Department of Law

Unitas in diversitate?

On Legal Cultures and the Europeanisation of Law

Jennifer Hendry

Thesis submitted for assessment with a view to obtaining the degree of
Doctor of Laws of the European University Institute

Florence, April 2009

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Abstract

This thesis argues for a sociologically observable equilibrium between the competing forces of legal unity and legal diversity within the European Union (EU) in order to conceptualise the contested process of the Europeanisation of law as a contingent, reciprocal one that has no endpoint in either uniformity or discontinuity. The main point of departure is the concept of legal culture, which provides for an institutionally-bounded and territorially-delimited jurisdiction with a unique socio-historical context. Member State legal cultures, within the overarching EU legal space, are conceptualised as a segmentary form of legal system-internal differentiation on the basis of territory, whereby communications originating in and pertaining to a particular Member State are conditioned in terms of the legal-cultural context of that Member State. This thesis argues that this "fragmentation" is a force of diversity within the Europeanisation process, which operates against a unifying force, understood here to be a similarly legal-system internal differentiation on the basis of areas of law and their related epistemic communities.

This thesis advances the argument that, instead of viewing the existence of legal diversity within the EU as being essentially problematic for the process of Europeanisation of law, legal diversity should be reconceptualised as a productive counterweight to any purported legal unity in the EU and re-entered into the process in order to maintain its openness. While the concept of legal unity provides the framework for the operation of the Europeanisation process, that of legal diversity within that framework provides the means by which the process remains open-ended and fully contingent. Legal unity, in turn, is positioned as a counterbalance to legal diversity in that it places restraints upon the diversifying forces of both nationalism and fragmentation within the EU, thus maintaining the overarching framework within which the process of Europeanisation can occur.

Legal "unity in diversity", conceptualised both as a precondition of the process of the Europeanisation of law and as a default aim, sits in stark contrast to the two main theoretical approaches to the Europeanisation of law, namely deracinated formalism and autochthonous culturalism. This thesis proposes a middle way that avoids the pitfalls of these two extreme schools of thought by operationalising the conundrum of unitas in diversitate in a way that both maintains the critical openness of the ongoing Europeanisation of law process, and facilitates a form of organically-evolving social validity for this process and the resultant legal structure of the EU.

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Introduction

The European "project" has often been described as a journey, an ongoing undertaking, a process. What is unclear, however, is what the endpoint of this process is, where this journey is taking us, or if there even *is* a destination at all.[1] In this regard there appears to be no consensus of opinion that builds on the original "peace, prosperity and supranationalism" triad of "ideals" of European integration first identified by Joseph Weiler[2]; moreover, while these no longer seem sufficient in and of themselves, there appears to be a lack of subsequent ideals common and compelling enough to revitalise those already in existence, let alone any that purport to be replacements. It is as if the Europe Union (EU), having taken the first few steps, now seems unsure as to what the next step constitutes.

In light of this apparent vacuum, one principle is pushing itself forward into the spotlight, namely that of unity in diversity, or to give it its Latin appellation, *unitas in diversitate*.[3] It has been asserted that, in post-war Europe and at the very beginning of the European integrative project, "supranationalism meant more than no nation state and one identity but the ability to have something like unity in difference"[4] and now, long after the bright-eyed unificatory impulses behind the mantra of "ever closer Union" have faded, this notion is once more coming to the fore.

Unsurprisingly, perhaps, this notion is not without its attendant difficulties, not least its infuriating inspecificity. The pre-Maastricht European Union had a concrete goal and a (comparatively) clear path in mind in terms of its pursuance of an integrationist agenda, namely the gradual growing-together of the European member (nation) states that would eventually culminate in their replacement by a European state conceived in line with the Westphalian model; since the essential discarding of this roadmap in favour of another,

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[1] See, among others, Z. Bańkowski & E. Christodoulidis, "The European Union as an Essentially Contested Project," in (1998) 4 *European Law Journal* 4, 341-354; C. Joerges, "Europeanization As Process: Tensions Between the Logic of Integration and the Logic of Codification" in (2005) 11 *European Public Law* 62-82, at 77; R. Ladrech, "Europeanization of Domestic Policies & Institutions: The Case of France" in (1994) 32 *Journal of Common Market Studies* 1 (March) 69-88 at 69; and J. Ziller, "L' européisation du droit : de l'Élargissement des champs du droit de l'Union européenne à une transformation des droits des États membres" in (2006) *EUI Working Paper (LAW)* 19

[2] J.H.H. Weiler, "Fin de Siècle Europe", in R. Dehousse, (ed) *Europe After Maastricht; An ever closer Union* (1994) 203-216. See also, for example, the speech by Leonard Orban, European Commissioner for Multilingualism; "Multilingualism - Essential for the Unity in Diversity of the EU", Debate at the College of Europe, 7 March 2008 on the topic of multilingualism, and A.M. Gates, *Promoting Unity, Preserving Diversity? Member State Institutions and European Integration* (2006, Lanham, MD: Lexington Books) on national parliaments.

[3] These two phrases, "unity in diversity" and *unitas in diversitate* will be the two utilised consistently throughout this undertaking, despite a raft of options. An oft-used alternative to the former in English is "united in diversity", but as this could also be taken to imply that our being different is the only thing we agree upon, and as such I consider it to be both inaccurate and confusing – "unity in diversity" expressed this way has a tradition in a number of modern languages and also reflects best the sentiment of the notion, which will be explained throughout this chapter. Similarly, the alternative Latin phrase *in varietate concordia* has also been rejected for being erroneous.

[4] See, among others, Bańkowski & Christodoulidis, (1998) "The European Union as an Essentially Contested Project", *supra* note 1 at 343; and B. Schäfer & Z. Bańkowski, "Emerging Legal Orders. Formalism and the Theory of Legal Integration" in (2003) 16 *Ratio Juris* 4, 486-505 at 486

far more amorphous one, however, whatever progress there has been has also been decidedly less linear.

Not that we should mourn the *de facto* discarding of the statist approach in the EU: on the contrary, the "turn" to governance in the EU during the 1990s that culminated in the adoption of the 2001 White Paper[5] can be cited as a timely recognition that the statist paradigm was on the wane, and that new structures and methods were required to react to and deal with what Michael Blecher calls "the failures of markets, states and laws and […] the consequent fragmentation, hybridisation and multi-level character of autonomous global norm production".[6] Nevertheless, along with this increased flexibility and manoeuvrability came a sense of vagueness about the contours of the very endeavour of integration in Europe or, rather, Europeanisation.

It is essential to interrogate what is connoted in the term Europeanisation in contrast to, predominantly, European *integration*, and those terms implicit in it, namely unification and convergence (also embedded in the model of "ever closer Union"), harmonisation and coordination. Indeed, it is vital that the terminology be clarified as early as possible in this investigation; such concepts as those mentioned above are often used interchangeably in the literature, thus contributing to the muddiness of these waters. This is so even if such ancillary terms as cooperation, colonisation, transference, transplantation and sharing, as well as questions of degrees, such as "differentiated integration" and "selective convergence", are left to one side.

The process of Europeanisation with which I am concerned is exclusively (insofar as that is possible) that of the law. The selection of the object and the term used to describe and demarcate the process are, therefore, wholly deliberate. The bulk of theoretical work undertaken on the broad topic of European *legal* integration, having started out applying the term "unification" to the process, has since tended to avoid it, the main reason for this rejection being that "unification" suggests a completed integration of legal features, cultures and systems. Similarly, the alternative term, "convergence", with its connotations of tending towards a common (end)point, is also one I view as being insufficient to explain fully the complexities inherent to these processes of legal integration within the EU. It has been suggested that "harmonisation" is the most accurate and useful term because it implies both a more active process through which some degree of unification is reached while also allowing for differences to exist;[7] nevertheless, in my view "harmonisation" still bears a subtext of there being an ultimate goal or destination, and so I have chosen the concept and term: "Europeanisation" of law.

Over the past ten years the term "Europeanisation" is one that has become increasingly fashionable,[8] and this explosion into the *Zeitgeist* is attributable not only to the pressing

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[5] Commission of the European Communities: COM (2001) 428 final: European Governance. A White Paper

[6] M. Blecher, "Mind The Gap" in M. Blecher & J. Hendry (eds), Special Issue on "Governance, Civil Society & Social Movements" (2008) 19 *Law & Critique* 3, 297-306 at 301

[7] M. Van Hoecke, "The Harmonisation of Private Law in Europe: Some Misunderstandings" in M. Van Hoecke & F. Ost (eds), *The Harmonisation of European Private Law* (2000: Oxford; Hart) at 2-3

[8] This, as Peter Mair pointed out, is not a groundbreaking remark: "To note this is to make a very banal observation, for by now almost every book or paper on the topic – including this one, of course – begins with a reference to how fashionable it has become to discuss Europeanisation". P. Mair '"he Europeanization Dimension", *Journal of European Public Policy* 11 (2 April 2004): 337-348. Nevertheless, the abundance of literature utilising the term – an Amazon search produces no fewer than 222 books with the term in their title – suggests a real need for (if not that specific term then) such a concept.

need for a fresh term that is free from baggage, but also to the lack of a viable alternative straddling the body of disciplines currently struggling to conceptualise "Europe". Its popularity, especially in political science circles, has meant that definitions now abound: for example, Harmsen & Wilson give an eight-point definition and Olsen suggests five variations, while Featherstone sticks to merely four,[9] and this has led to a situation of what Maarten Vink called "considerable conceptual contestation".[10]

Nevertheless, across this broad sweep of literature it is comparatively straightforward to pick out a core and practically *accepted* meaning of the term, which can be phrased thus: Europeanisation is an approach which, in contrast to that of European *integration* which "treats the process of integration as the end point of a causal process beginning with domestic and transnational social interests and ending with European outcomes,"[11] concerns itself with the effects and influences of Europe upon the Member States, or rather, with domestic change caused by and through the process of European integration. While this definition still acknowledges the "institutionalisation" aspect of the process in terms of the establishment of European Union-level institutions, it focuses on what has been referred to as the "penetration" dimension of Europeanisation, which encompasses the ingression of European rules into the ambit of the Member States.[12] This, however, is a definition that comes mainly from the discipline of political science – more specifically, that of comparative politics – and so, while being a useful starting point, should be treated with caution instead of being adopted without further examination.

For the purposes of this *legal study*, however, I need the term "Europeanisation" to work a little harder; by yoking it to law and thus concentrating specifically on the Europeanisation *of law*, I simultaneously narrow and broaden its application. Restricting it to a single function system (law) allows for a certain holistic approach to be adopted within these parameters; that is to say, the Europeanisation of law can be discussed on the meta-level as a juridified *process* of social learning,[13] one that is embodied by the tensions stemming from the unavoidable *interactions* between European and domestic (levels of) law. This process is one that can be characterised by *reciprocity*, by which I mean that the interactions that comprise it have effects at both levels; in this sense the process has "two-way causality".[14] Even more importantly, this reciprocal process should be understood as *lacking any endpoint*: this single detail is perhaps the most vital in distinguishing the Europeanisation of law from the other terms used to describe variations on the integration, convergence and harmonisation of law within the EU. Indeed, it is this lack of any single ultimate aim, of any sense of completion or *finalité*, that makes it the optimum term to utilise to conceptualise the contested and fragmented

[9] See R. Harmsen & T.M. Wilson, "Introduction: Approaches to Europeanization", *Yearbook of European Studies* 14: 13-26; K. Featherstone, "Introduction: In the Name of 'Europe", in K. Featherstone & C. M. Radaelli (eds) *The Politics of Europeanization*, (2003, Oxford: Oxford University Press); J-P. Olsen 'The Many Faces of Europeanization', (2001) *ARENA Working Papers* WP 02/2:24.

[10] M. Vink, "What is Europeanization? and Other Questions on a New Research Agenda", (2003) *European Political Science* 3(1): 63-74 at 63

[11] M. Green Cowles, J. Caporaso & T. Risse (eds) *Transforming Europe: Europeanization and Domestic Change* (2001: Ithaca: NY, Cornell UP), introduction at 12

[12] K. Featherstone & C. M. Radaelli (eds) *supra* note 9

[13] See C. Joerges, "Europeanization As Process" *supra* note 1

[14] T. Börzel, "Towards Convergence in Europe? Institutional Adaptation to Europeanization in Germany & Spain" in (1999) 37 *Journal of Common Market Studies* 4, 573-596 at 574

European project. A more developed discussion along these lines takes place in the next chapter,[15] but this definition should be borne in mind throughout.

Restricting the focus "only" to the law is justified by its integral and important role within the overall process of Europeanisation in the EU.[16] Indeed, of all the function systems[17] touched upon by the EU, it is certainly safe to say that law has, more than any other, established itself at the very heart of the endeavour.[18] From its early designation by the founding Treaties as the very bedrock of the Union to its role as the driving force behind European integration and constitutionalism, law has taken on the mantle of not only a tool for the furtherance of the European project but also that of being *an end in itself*, in terms of the EU taking the form and identity of a "Community of law". Indeed, its boisterous omnipresence through the doctrines of direct effect and primacy can now be said to have been augmented over the recent past by a creeping juridification, as law's tentacles have poked into all kinds of areas by means of regulation and new methods of governance such as, for example, the Open Method of Coordination (OMC).[19]

While the exalted position of the law within the EU cannot be in doubt, it could nevertheless, and perhaps also somewhat unkindly, be said that law could have done with getting its own house in order first. Much of its kudos within the Europeanisation process derives from its utilisation by other function systems, most notably politics and economics, as a *agent* of integration in Europe, namely as a tool being put to a specific (if undefined) purpose, but this has arguably been at the expense of its own *internal* coherence. This situation is not one that stems from mere oversight on the law's part; rather, the fragmentation within (some say inherent to) law in the EU can be seen as a result of the abovementioned interactions between the EU and its Member States and, indeed, among those same Member States.

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[15] See chapter 1 section 3

[16] Incidentally, while I am aware that many debates on Europeanisation concern the disputed contours and boundaries of the European Union *qua* Europe, for the purposes of this investigation Europeanisation will, in fact, represent "EU-isation". See M. Vink, *supra* note 10 at 69

[17] By "function system" I mean those systems that are distinguished from their environment (and thus any *other* function system) on the basis of their function. Examples could be given as the legal, political and economic systems. See N. Luhmann, *Law As A Social System* (2004: Oxford, OUP) at 71: "The meaning of the concept of function does not contain any normative or even teleological connotations. All that is involved is a point of view representing a limiting effect..."

[18] Law in the EU can be said to occupy a "special position" and also to have made "a special contribution to the [construction] of a new type of polity" which is in itself an entity *sui generis*; see N. Walker, "Legal Theory & The European Union: A 25th Anniversary Essay" in (2005) 25 *Oxford Journal of Legal Studies* 4, 581-601 at 598 & 595 respectively. However, a qualification to this point is that, despite the fact that legal supranationalism was *at the outset* much stronger than the then weaker political version, it appears that the law now shares the stage with politics to a much greater extent, and so its position within the EU is arguably less "special" than it once was.

[19] The OMC was introduced by the Lisbon Agenda of 2001 with the professed aim of facilitating the achievement of certain objectives by means of "soft law", an approach that was adopted as a result of the perceived failure of traditional, "hard" forms of law in the EU to operate adequately in the field of social policy-making. This point – that the OMC is an example of juridification within the EU – is contested, primarily due to its character as "soft law"; in this sense, can it actually be argued that the OMC is law as such? If not, then the argument should be articulated more in terms of *de*-juridification, whereby the OMC is an example of an *extra*-legal approach, one that is not intended to stabilise expectations but rather to facilitate learning. That said, an alternative argument is that the OMC is, in fact, an example – instead of de-juridification – of *de-differentiation* between the function systems of law and politics, the reasoning behind this approach being that, in light of the fact that its scope reaches beyond the competences of the EU and thus into areas that previously went unregulated, the OMC could thus be postulated as a method of regulation by stealth, flying below the radar by virtue of its non-legal disguise.

It is this unique, post-national character of the EU legal framework that gives rise to two distinct problems that condition these interactions, which can be listed as follows. Firstly, the problem of *interpretation*: not only does EU law have its own vocabulary, separate from those of the various Member State legal orders ("in European law, no language is the original language"[20]), but multi-lingualism also necessitates translation, which can give rise to variations in understanding. These "misunderstandings" can occur both at the level of the individual – a lawyer advising a client from their own legal "culture" on a matter of EU law, for example, or alternatively, a Dutch lawyer advising a Dutch client on a relevant point of law in Italy – or at the level of institutions; law enacted at EU level must be interpreted, applied and enforced by the Member States. Second, the problem of *culture*, which can be described as the *embeddedness* of law within its own Member State-specific context. This not only encompasses the fact that commonalities across national systems of legal education are limited or, as Sacha Prechal and Bert van Roermund describe them, "*in statu nascendi* or embryonic"[21], but also that all of the contextual considerations pertaining to law, such as social norms, socio-political constellations, historical developments and idiosyncrasies, and so on and so forth, give rise to a *legal culture* particular to that Member State.[22] In essence, it can be said that the problems caused by this multiplicity of legal cultures in existence within the EU and, even, the very existence of those diverse legal cultures, is an *unavoidable by-product of the very project of the Europeanisation of law*.

Leaving aside for the moment whether or not the EU itself can be conceptualised as having its own legal culture, simultaneously separate from and encompassing of those Member State legal cultures, it is clear that this contextual quality of law cannot be overlooked, especially in a multi-legal cultural setting or, rather, where a multiplicity of legal orders occupy (arguably) the same legal space. However, we should be careful not to fall into the trap of automatically designating this as a failing; after all, "is it so bad to be different"?[23] Instead, therefore, of demonising diversity and postulating it as a fundamental stumbling block for the Europeanisation of law, as I will show that competing approaches do, should not the possibility of an *operationalisation* of this so-called predicament be recognised here?

I will contend that, instead of viewing the existence of legal diversity within the EU as being essentially problematic for the process of Europeanisation, legal diversity should, first of all, be reconceptualised as a productive *counterweight* to any purported legal unity in the EU, and subsequently *re-entered into the process* in order to maintain its openness. While the concept of legal unity provides the framework for the operation of the Europeanisation process, that of legal diversity within that framework provides the means by which the process remains open-ended and fully contingent. Furthermore, and no less importantly, legal unity can in turn be conceptualised as a counterbalance to legal diversity in the sense that it places restraints upon the diversifying forces of both nationalism and fragmentation within the EU, thus maintaining the overarching framework within which the process of Europeanisation can occur. The resulting

[20] L. Mulders, quoted by S. Prechal & B. van Roermund (eds) *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (2008: Oxford, OUP), "Binding Unity in EU Legal Order: An Introduction", 1-20 at 6
[21] *Ibid*, at 5
[22] A discussion of the concept of legal culture and an attempt to provide a definition will take place in chapter 2.
[23] R. Cotterrell, "Is It So Bad To Be Different? Comparative Law and the Appreciation of Diversity" in E. Örücü & D. Nelken (eds) *Comparative Law: A Handbook* (2007: Oxford, Hart), 133-154 at 133. See also C. van Dam, "European Tort Law and the Many Cultures of Europe" in T. Wilhelmsson E. Paunio & A. Poholainen (eds) *Private Law & the Cultures of Europe* (2007, Kluwer Law International) 53-76

outcome of legal *unitas in diversitate* within the EU can be described as one of *double fragmentation* or, rather, of unity without uniformity and diversity without discontinuity. Legal "unity in diversity", understood here both as a precondition of the process of the Europeanisation of law and as a default aim, sits in stark contrast to the two main theoretical approaches to European legal integration – I use this term deliberately in this instance – which can be referred to as *formalist* and *culturalist*.

I gather these arguments under these interpretive headings to demonstrate their underlying links; I do not mean to suggest that these are identical but rather that certain similarities of approach and/or premise exist across them. It does not essentialise these arguments to group them under these subsuming paradigms but, rather it demonstrates the commonalities of these theoretical standpoints as regards the operationalisation of legal "unity in diversity" within the process of the Europeanisation of law within the EU.

I will first distil the distinctions I draw between the two camps into simple starting premises. First, those I include within the "formalist" faction tend to prioritise legal unity within the EU over considerations of legal diversity; they reify the legal, giving little or no credence to its contextual quality. These approaches also tend to be adopted by those working for the most part in the field of private law harmonisation,[24] who can be said to "equate Europeanisation with the substitution of national private law with European-wide applicable rules and principles" and who "pay little attention to the 'regulatory embeddedness of private law'."[25] These "formalist" approaches tend to view the Europeanisation of law as a move away from unnecessary national legal differences and towards a post-national, common European legal order.[26]

In the other corner, the "culturalist" camp – the smaller one – takes an opposing tack. The main proponent of this theoretical approach is Pierre Legrand,[27] who argues that, as a result of the contextual specificity of law, there exists in the EU a much deeper incommensurability of law than any "formalist" approach would admit to, with the conclusion that this is an insurmountable barrier to the Europeanisation of law (to be understood here in the sense of legal harmonisation), which should consequently be regarded as fatally flawed.[28] By viewing the law as being fundamentally embedded within its socio-cultural context, the "culturalist" approach can be said to privilege the acknowledgement of legal diversity *within* the EU over the possibility of there being an EU-level legal unity, to the extent of arguing that the latter is simply impossible, despite the existence of certain concrete achievements that would appear to prove them wrong.

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[24] By private law harmonisation in the EU I refer specifically to the work being done in the field of contract law, as well as the Draft Common Frame of Reference (DCFR).

[25] C. Joerges, *supra* note 1

[26] J.M. Smits, *The Making of European Private Law,* (2002, Antwerp, Oxford, New York: Intersentia) Epilogue at 271: "...there is the naive idea that the mere implementation of a European Civil Code will result in uniform law [..., which] takes insufficient account of the only limited importance of principles; they still leave too much room for interpretation to lead to unification in practice."

[27] While Legrand is the most vocal and thus best-known advocate for a contextualist, culturally-informed approach, many less-vehement others also flavour their arguments with similar considerations of the embeddedness of law within its own legal-cultural setting. That these concerns – which often come from the field of comparative law – tend to be more balanced than Legrand's should not prevent their being included in this camp.

[28] J.M. Smits, *supra* note 26 at 271: "…there is the absurd opinion that a European private law will always be contrary to the diversity of legal cultures in Europe […, which] unjustly denies that there is already a partly uniform private law in Europe. That is not only because rules of positive law are sometimes identical, but also because the rules are embedded in an already partly common legal culture."

I will be critical of both of these polarised approaches while also recognising that each of them makes valid claims to a certain degree. As regards the former, I will agree that there exists sufficient evidence of the unifying forces exerted by the process of Europeanisation of law in terms of institutions and practices at both the EU and Member State levels to support the "formalists" when they submit that Europeanisation of law *is* both taking place and being relied upon. In terms of the latter, I again recognise that both intra-EU legal diversity and legal-conceptual divergences stemming from differences in the socio-cultural context of Member State law(s) constitute, if not a barrier to the Europeanisation of law, then at least a substantial hurdle for it to overcome (if that indeed is its aim).

Instead, therefore, my approach will occupy the middle ground between the two camps. This, it should be stated, is not an extreme position to adopt: an increasingly number of both theoretical and substantive law scholars now lean towards what could be described as either a balanced, centrist or even moderate approach.[29] Indeed, one might wonder why, at the outset of the debate, scholarship gravitated towards its margins and took up such extreme positions but, read in light of the wider debates on Europeanisation, this is certainly ideologically motivated. Nevertheless, while the opposing legal tropes of deracinated formalism and autochthonous culturalism are undoubtedly powerful ones, each of them has flaws enough that undermine them as viable options in and of themselves; the moderate, middle way approach seems to be the most pragmatic.

I propose that the legal "unity in diversity" conundrum be conceptualised as less a situation of impasse and more one of achieving *equilibrium*. Indeed, was the balance to shift in favour of one side or another then the process would skew in the direction of that shift and effectively close the door on the alternative option; the Europeanisation of law process would lose the all-important *openness* and *reciprocity* that characterise it.

I claimed earlier that the very existence of legal *unitas in diversitate* within the contemporary European Union itself relies upon a situation of *double fragmentation* within law. By this I mean that fragmentation can be observed in terms of both function, understood here as *legal area*, and territory, understood here as *jurisdiction*. This fragmentation is internal to the original one, namely that of the system – in this case the legal system (*Rechtssystem*) – and its environment (*Umwelt*). The "third way" approach to conceptualising the Europeanisation of law process that I advocate here and throughout relies upon this double fragmentation (alternatively, *intertwined differentiation*) as a means by which to explain the very possibility of legal "unity in diversity" within the EU, arguing that the interaction and mutual reinforcement of these two fragmentations facilitates the maintenance of the *unitas in diversitate* balance. The use of heavily systems-theoretical terminology here is wholly deliberate, for the twofold reason that I draw on the main tenets of systems theory in order to explain and support this double fragmentation argument, while also positing a systems-theoretical approach as the optimum one by which to conceptualise legal-cultural *unitas in diversitate* within the EU.[30] The functional differentiation inherent to a systems-analysis facilitates a focus upon the *legal* system, on

[29] See, among others, H-W. Micklitz, "The Visible Hand of European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation" in (2008) *EUI Working Papers (LAW)* 14; M. Faure, "Towards A Maximal Harmonisation of Consumer Contract Law" in (2008) 15 *Maastricht Journal of European & Comparative Law* 4; and J.M. Smits, *supra* note 26

[30] Also, while the initial functional differentiation can be cited as one of system/environment *vis-à-vis* the law, an additional initial differentiation could be postulated here as well, namely that of territory on the basis of the distinction EU-internal/EU-external.

its environment and the communications relevant to *it*; however, even more than that, it is the emphasis of a systems theory approach on "understanding the world (as the horizon of possible descriptions) as expressed by means of a network of contingent decisions and labels that always have to be understood in context"[31] that makes it so fertile for the purposes of this investigation. In the fifth chapter of this thesis I explain how a systems-theoretical analysis avoids the pitfalls encountered by both of the extreme positions mentioned above, and argue for the existence of double fragmentation *within* the legal system (*Binnendifferenzierung*) on a *dual sectoral* basis that is subsequent to the original functional differentiation.

As is probably evident from this short introduction, the "Europeanisation" of law in the European Union is a process that encompasses so many different strands that it would be impossible to deal with them all in a single analysis and so much depends, therefore, on the basic constraints imposed upon it.

My concern is with this analysis rather than empirical investigation, but where I give examples, these are taken predominantly from the field of private law. The reasoning behind this selection is twofold: it relies on the particular quirks of private law while also evading those pitfalls presented by other, less historically-characterised or clearly demarcated legal fields. For example, I will not make specific reference to the running debate on constitutionalisation within the EU or with considerations of what is conventionally recognised as public law, with the chief motivating factor for this abstention being that constitutional and administrative law have strong links with the *political* system, which contributes to a blurring of the lines in terms of which function system is being discussed.[32] Moreover, and as I will argue in more depth later in chapter 5, the political system is much more obviously connected to a territorial space than the is economic system. Similarly, I will not discuss those other fields that can be characterised as non-embedded, in the sense that they are more contemporary and have been effectively embarked upon at the European level without first having been exposed to the (historical, cultural, *contextual*) operations of national legal cultures.[33]

Equally, although I am aware of the risk of falling into methodological nationalism[34] and nation state-centrism, I see it as essential to restrict this discussion to *national, EU Member State, legal cultures*. Against the allegation that my approach and methodology might "take it for granted that society is equated with national society",[35] I would argue three points. First, in light of the fact that I undertake to conceptualise not only the relationship between the *sui generic* EU legal order and those of its Member States but also the very process engendered by these ongoing interactions, I have avoided a methodology that assumes either the "nation" or "state" to be the natural form of society – as observed above, the days when a European "state" was touted as a practicable option are gone.

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[31] G. Bechmann & N. Stehr, "The Legacy of Niklas Luhmann" in (2002) 39 *Society* 2, 67-75 at 69

[32] In fact, the constitution of a state is recognised as being a "structural coupling" between the legal and political function systems.

[33] Environmental law could be cited as an example of this category of legal field.

[34] For definitions and discussions of this concept see, for example, M. Zürn, "Politik in der postnationalen Konstellation. Über das Elend des methodologischen Nationalismus" in C. Landfried (ed) *Politik in einer entgrenzten Welt. Beiträge zum 21. Kongreß der Deutschen Vereinigung für Politische Wissenschaft* (2001: Köln; Verlag Wissenschaft und Politik) at 181-204; A. Wimmer & N. Glick Schiller, "Methodological Nationalism and Beyond: Nation-Building, Migration & Social Sciences" in (2002) 2 *Global Networks* 4 301-334; and U. Beck & N. Sznaider, "Unpacking Cosmopolitanism for the Social Sciences: A Research Agenda" in (2006) 57 *The British Journal of Sociology* 1-23.

[35] *Ibid,* at 2

Second, I adopt the demarcated unit of the Member State as the prime concern when analysing the concept of legal culture for necessary brevity and because the inclusion of sub-national, regional, cross-national and transnational forms of legal order would alter, to a great extent, the main focus of this work, namely the interaction of legal orders occupying a common legal space. These units must be both territorially-delimited and institutionally bounded[36]; mere normative orders lacking in institutional articulation are insufficient for this purpose, as they eradicate any utility from the concept of legal culture. Third and finally, a core component of the unifying forces I identify as existing within the European Union legal field is that of cross-border, non-territorially-restricted *epistemic communities*.[37] These epistemic communities are both dynamic and non-embedded, and thus operate as the weft to the warp thread of Member State legal cultures. Consequently, and instead of falling into the trap of viewing everything through a statist lens, these three counterclaims demonstrate that this analysis is decidedly *non*-nationalist in its methodology.

Throughout this introduction repeated mention has been made of "legal culture". I define this concept and explain its choice in chapter 2. First, however, I will highlight exactly *why* this concept has such a central role for this analysis. I base this on my own definition of the concept, which I construct in light of the lack of a definitional consensus within the field and across the various disciplines that employ it.[38]

The term and concept "legal culture" are both characterised by contestation; however, it is not particularly controversial to state that the very application of the term embodies an epistemic shift from the "black-letter" law paradigm to a more contextually-informed, law-in-action one, and this is particularly evident in the field of comparative law where it has become "steadily apparent that comparatists cannot limit themselves to simply comparing rules".[39] This point is the foremost reason behind my use of the term; it not only brings to the fore the notion of law's embeddedness in its own socio-cultural context, but also forms the main justification for eschewing the terms "legal system", which has its own systems-theoretical baggage, or "legal order", which is widely conceived of as context-neutral. In a similar vein, and unlike those outworn classificatory terms such as "legal family", "legal tradition" and (albeit to a lesser extent) "legal *mentalité*", all of which have a *categorical* outcome either as their objective or effect, the concept of "legal culture" allows for a more-nuanced understanding of the units selected for study than simple identifications of commonality or difference can purport to provide.

Another factor that can be cited in support of the concept "legal culture" is its inherent flexibility, which can be exemplified in two particular ways. First, instead of simply being another way of denoting a category or demarcating a fixed unit, the concept of legal culture allows for processes of development, progress and evolution to be recognised *in relation to* the relevant unit of analysis. A "legal culture" need not be seen as a discrete entity in the sense of being closed-off or isolated from external forces; on the contrary, is constructed by and through an interplay of both internal and external forces, although

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[36] The importance of the institutional dimension of (Member State) legal culture will be explained in chapter 2

[37] See *supra* note 34 for Wimmer & Glick Schiller's discussion of transnational communities as being a shift away from the purely methodological to the *epistemic*.

[38] The most obvious disciplines in this regard are: cultural anthropology, legal sociology and comparative law.

[39] M. van Hoecke & M. Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" in (1998) 47 *International & Comparative Law Quarterly* 495-636 at 495

not necessarily in a linear and direct manner.[40] Secondly, and unlike the classificatory alternative terms, "legal culture" can be brought to bear on a number of various spatial units,[41] thus affording the opportunity for it to be applied to the *sui generic* unit of the European Union. This point is crucial; it permits an articulation of legal-cultural *unitas in diversitate* within (the legal space of) the EU.

This elasticity, however, comes at a price, namely one of somewhat questionable utility. It is not uncommon for such a concept to purport to do so much it runs the risk of stretching itself too thinly or being so widely employed that it loses any real efficacy or concrete purchase. Nevertheless, a balance has to be struck between its ambit and application, and this requires a restriction on what *type* of unit is eligible. Limiting the conceptual flexibility of "legal culture" in order to retain its utility is, I submit, a necessary evil.

I conclude this introduction with one final point. This investigation situates itself within an arena created by the intersection of the three titular strands: namely, *unitas in diversitate*, legal culture and the Europeanisation of law within the European Union, each of which is representative of one or more contested concepts and all of which relate substantially to the others. As such, there is a risk that these related and relational concepts become too closely-intertwined for analysis. To avoid this I reiterate definitional explanations throughout this investigation, recognising that this can appear duplicatory. This caveat applies similarly to the project's structure: for example, while each theoretical approach is considered separately, there are some components of this analysis that fit less neatly into these chapter breaks than I would like.[42] In such instances the prime consideration has always been clarity.

[40] This mirrors, to an extent, the situation of normative closure and cognitive openness intrinsic to the Luhmanian theory of autopoietic systems. Comparable terminological equivalents in this sense could be holism / evolutionary capacity.

[41] Although, and for the reasons given above, this analysis will restrict itself to those units that are institutionally-bounded. Similarly, while many proponents of the term/concept "legal culture", including the founding-father Lawrence Friedman, claim that it is also possible to apply it to *aggregates*, such as "global" or "homosexual" legal culture, I disagree and will confine this analysis to spatially-delimited units only. Chapter 2 will explain this resolution in more detail.

[42] For example, Pierre Legrand is quite clearly in the "culturalist" camp, what with his concept of legal *mentalité* and his strong support of a contextually-influenced understanding of law, but much of his *oeuvre* is pitted against the very notion of a European Civil Code and so there are frequent references to his work in the chapter of the thesis arguing against "formalist" approaches to the Europeanisation of law.

Chapter 1: **The Social Function of Law in the Europeanisation Process**

"Si c'était à refaire, je commençerais par la culture"
(If I were starting over, I would begin with culture)
- Jean Monnet[*]

The essence of the beautiful is unity in variety.
- Moses Mendelssohn[**]

1. *Unitas in diversitate* and the Importance of Considering Culture

The motto of the European Union, *unitas in diversitate*, is indisputably less instantly recognisable than the European flag, its famous twelve gold stars on a blue background being easily the most well-known symbol. Nevertheless, as the 'verbal logo' of the EU, and despite its removal from the now-defunct Constitutional Treaty and its successor the Lisbon Treaty,[43] the phrase "unity in diversity" can be said to articulate something very particular about the EU and its aims and principles, for example, its intention to "respect the national and regional diversity [of the Member States] and at the same time bring the common cultural heritage to the fore".[44]

This section contends that the EU's *overt* commitment to the notion of "unity in diversity" is one that exists only at the level of this abstract sound bite, and which falls far short in terms of both concept and application. The root of the problem lies with the fact that the constituent ideas of the phrase are, in their purest articulations, *fundamentally irreconcilable each with the other*. Take, first of all, the concept of "unity"[45]. It conveys a sense of oneness, singularity and uniformity, of something cohesive, whole and complete. There is also a sense of rigidity implicit in the concept, of continuity without distraction or deviation; indeed, one could even say that unity "appears to be secured at the expense of plasticity and experimentation with new concepts".[46] Clearly it is in direct opposition to that of "diversity"[47], which suggests difference, multiplicity and separateness;[48] in fact,

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[*] This statement is most often attributed to Jean Monnet, although this is in dispute, with others claiming it to have come from Denis de Rougemont. See page 16 fn 56 of this chapter for elaboration.
[**] Moses Mendelssohn, *Briefe über die Empfindungen* (1755)

[43] Arguably this removal owes more to the implicit notions of state-building suggested by having a motto in itself rather than any especial content.
[44] Treaty of European Union, Title XII, Article 151(1)
[45] Definition taken from Merriam Webster's English Dictionary, 2002, 10th ed., at 1288-9 as: 1a· the quality or state of not being multiple: oneness; b(i). a definite amount taken as one or for which one is made to stand in calculation; (ii) identity element; 2a. a condition of harmony: accord; b. continuity without deviation or change (as in purpose or action); 3a. the quality or state of being made one: unification; b. a combination or ordering of parts in a literary or artistic production that constitutes a whole or promotes an undivided total effect; *also*; the resulting singleness of effect or symmetry and consistency of style or character; 4. a totality of related parts: an entity that is a complex or systematic whole; [...]
[46] E. Christodoulidis & R. Dukes, "On The Unity of European Labour Law" in S. Prechal & B. van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (2008: Oxford, OUP), 397-421 at 398
[47] Definition taken from Webster's, *ibid*, at 339 as: 1. the condition of being diverse: variety; 2. an instance of being diverse. 'Diverse' is in turn defined as: 1. differing from one another: unlike; 2. composed of distinct or unlike elements or qualities.
[48] Obviously these definitions are somewhat one-dimensional, but this lack of subtlety appears to be a by-product of the very utilisation of such catchphrases.

this recognition of variety can result in the repeated drawing of distinctions until any and all commonality has been eroded. The coincidence of the two concepts thus necessitates a compromise of sorts, with one taking the limelight and the other fading into the background, but this uneven see-saw is far removed from the equilibrium implied by the motto. One possible conclusion here, in light of the fact that the concepts appear to be mutually contradictory and despite the slogan's recurrent use, is simply that one of the two either does not exist or has not been achieved. This of course begs the question: if one is lacking in the EU framework, which is it?

Taken at face value, the obvious existence of diversity within its boundaries would appear to suggest that, in spite of the name, there is no actual unity in the European Union; the construction of *Festung Europa* has not been at the expense of heterogeneity within its walls. Then again, and from the opposite perspective, those walls are fixed, both legally- and politically recognised, and confer certain advantages to those within them as opposed to those outwith – can this not be seen as a form of unity? It is in this last point that the answer suggests itself, as the notion of a form of unity suggests either unity *at a level* or unity *to a degree*. "*Partial* unity", therefore, is the notion that that *neither* unity nor diversity has been achieved or, rather, that each has only been achieved *to some extent*. It is only in allowing for the two to co-exist that any sort of balance can be attained.

Partial or qualified unity, it should be noted, can be cognised in two ways: it can be limited either in terms of degree or in terms of ambit. By this I mean simply that "unity" can be qualified in its scope regarding, first of all, the degree to which is has been achieved overall and, secondly, in relation to a specific section or sector of the whole.[49] Obviously the sectors for this are not Member States themselves but are specific areas of policy, law or economics that span both the Member States and the EU. These two axes provide a framework for a somewhat limited and fragmented conception of unity. On the other hand, however, partial diversity is much more difficult to outline, mainly due to the fact that the concept of diversity is less concrete to begin with – for example, it is much harder to quantify. The term itself is an unappealing one, positioning itself as it does against a notion of complete diversity, which is the endpoint of the fragmentation mentioned above. The threshold of difference is far less burdensome to attain than that of similarity: something can always be discovered that can be relied upon as the basis of a distinction, however insignificant or inconsequential that something may be. Instead of 'partial diversity', a better term would perhaps be either "affiliated" or "associated" diversity; however, as any of the cumbersome combinations that could be dreamt up are infinitely poorer than their effective synonym, *qualified unity*, that is the term that I will use. Indeed, as mentioned above, it is the unity that is questioned and never the diversity.

The optimum way of cognising the concept of "unity in diversity" with regard to law in the EU, therefore, is as an expression of *unity without uniformity and diversity without discontinuity*. Unity in diversity means more than the creation of a singularity that absorbs and homogenises all existing variety; rather, it describes the balance between creating a European legal order *while at the same time* also accommodating and not overpowering the Member State legal orders within it. This more fragmented conception of co-existing

[49] A simplistic comparison is that of depth and width; the question of degree deals with the extent to which the whole entity is affected, and so how *deep* it is, while that of width relates to how *much* of the entity is affected in terms of the sectors that make it up.

legal orders within the EU can be referred to as either a Community[50] or a *diversity* approach.

So where does culture and, for that matter, law and legal culture, fit in here? Culture is well noted for being a slippery concept – indeed, it is reputed to be one of the most complex words in the English language[51] – and so attempting to pin it down to mean anything specific is a torturous endeavour. Its richness as a concept has been its own downfall as an analytical tool, for its very malleability has been that which has blunted its edge. As Terry Eagleton says:

> If culture was once too rarefied a notion, it now has the flabbiness of a term which leaves out too little. But at the same time it has grown overspecialised, obediently reflecting the fragmentation of modern life rather than, as with a more classical concept of culture, seeking to repair it.[52]

Nevertheless, while it could be said that its complexity reflects its importance, it would appear that this is an endeavour worth undertaking. I submit that there are two particular ways in which to cognise culture in terms of the legal integration in the EU, which can be referred to as (i) culture as grounds for unity and (ii) culture as grounds for diversity. This dual nature of culture in relation to the Europeanisation of law within the EU sees it as being either a driving force behind legal integration or a spanner in the works of the whole process; in essence, as *either* a positive *or* a negative factor. To duplicate the structure of Dehousse and Weiler's famous statement,[53] culture can be described as being both a justification for and a barrier to European (legal) integration.

a) Culture as Grounds for Unity

It was only in the late 1980s and 1990s and in terms of the debates on integration that the question of culture entered the collective EU regulatory and bureaucratic psyche, and led to the express recognition of (what I will call) the "unity-in-diversity" paradigm. However, it was not until the 1992 Treaty of Maastricht (TEU), which established the EU itself, that culture and cultural considerations were even expressly included in terms of EU-wide policy – the original Treaty of Rome neither provided for a Community cultural policy nor empowered Community institutions to interfere with cultural affairs. Prior to the TEU, the absence of an explicit competence in terms of culture did little to hamper the appearance of cultural issues at the European level, but this situation placed the Community in somewhat of a quandary regarding whether to involve themselves or not. Tending as it did to eschew a *laissez-faire* approach, Community intrusions into the cultural field thus became both more frequent and significant – a strategy which resulted in rumblings of discontent being heard across the Member States, who had unanimously agreed that cultural policy should remain a wholly national matter. Considering the lines between the economic sector and the cultural sector were increasingly blurred by the functioning of the Common Market, however, it is difficult to see how the Community could have avoided influencing national cultural policies even if they had attempted to;

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[50] J.H.H. Weiler, "The Transformation of Europe" in J.H.H. Weiler (ed) *The Constitution of Europe: 'Do The New Clothes Have An Emperor' And Other Essays on European Integration*, (1999: Cambridge, CUP) 10-101 at 91

[51] T. Eagleton, *The Idea of Culture* ((2000: Oxford, Blackwell) at 1

[52] *ibid*, at 37

[53] "Law is both the object & agent of integration". See R. Dehousse & J.H.H. Weiler, "The Legal Dimension" in W. Wallace (ed) *The Dynamics of European Integration* (1990: London & New York; Pinter) 242-60 at 243

however, and this notwithstanding, ever-increasing Member State concerns over whether or not the Community was following a stealth unitary policy on cultural issues were central to achieving the subsequent clarification of roles undertaken by the Treaty of Maastricht.

Title XII of the TEU was dedicated entirely to culture, with Article 151(1)[54] providing that: "the Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore". Although this was not the first time the notion of emphasising the common aspects of culture across Europe while simultaneously maintaining state or even sub-state diversity had been suggested in Community documents – for example, both the 1973 Declaration on European Identity and the 1982 Commission communication on "Stronger Community Action in the Cultural Sector" speak in similar language[55] – this Article did, however, represent the first time that culture became a specific policy field for the European Union in terms of being enshrined in a founding Treaty.

This "unity in diversity" paradigm introduced under Article 151 does not create such a delicate balance between the two as might have at first been supposed, however. While reference is made in the fifth recital of the Treaty's Preamble to a desire to "deepen the solidarity between their peoples while respecting their history, their culture and traditions", the only mention of a "common" cultural aspect is in paragraph 1 of the Article, as quoted above; all the other provisions are for the preservation and promotion of *national* cultural diversity. Indeed, instead of viewing Article 151 as forming the basis for a common cultural policy at the level of the EU, it could in fact be seen as having entirely the opposite effect, that of hindering or limiting EU involvement in the field of culture.

What here, then, can be said to give rise to an argument for "culture as grounds for unity"? Indeed, and despite Jean Monnet's supposed regret of "if I could do it all again I'd have started with culture"[56], considerations of culture in the pre-TEU Community had never really been treated as having any great importance in their own right, which makes one wonder as to the motivations behind this apparent change of heart. While a policy of non-interference in cultural matters was always going to be difficult for the Community to sustain, the change made in 1992 can in fact be seen as a much more tactical one than a simple clarification of competence.

Put simply, the TEU's inclusion of culture within the *explicit* Community competences, on the one hand, gave a far greater mandate for Community involvement in areas falling predominantly within the ambit of the Member States while, on the other, only required concession in the form of mere promises to "respect", "encourage" and "support" cultural diversity.[57] The paragraph providing for this involvement is Art 151(4) EC, the

[54] Formerly Article 128(1), Title IX, TEU

[55] See the Declaration on European Identity, 12 Bull. EC (1973) 118, at 2502, which not only mentions that "the rich variety of national cultures' should be maintained, but also refers to both the "common heritage" of the Member States and "the degree of unity so far achieved within the Community".

[56] This quotation is often given as being Jean Monnet's, but there are claims that it comes, in fact, from Denis de Rougemont (1906-1985), the Swiss philosopher who was a leading figure in the battle for European cultural unity.

[57] This is evident in the wording of, particularly, paragraph 2 of the Article, which states that: "Action by the Community shall be aimed at *encouraging cooperation* between Member States and, if necessary, *supporting and supplementing* their action…" Emphasis added.

cross-sectional or policy-linking clause as it is known,[58] which states that "the Community shall take cultural aspects into account in its action *under other provisions of this Treaty*, in particular in order to respect and promote the diversity of its cultures".[59] This has the effect of extending Community cultural policy *beyond* the ambit of this single Treaty Article and into its general practice, while also providing grounds for the pursuance of the Community's own cultural agenda *in spite of* the commitment to respect national and regional diversity as established by the Article. This still begs the question, however, as to why culture and the control of cultural issues suddenly became so important around this time.

It has been alleged that this concern with culture around the time of the Maastricht Treaty was both intentional and politically motivated, and that these motivations had their roots in the recognised lack of popular legitimacy for Europe and its institutions.[60] This move to galvanise the cultural bases of Europe can be attributed to the perceived "cultural deficit"[61] in the EU, which existed alongside the famous "democratic deficit" and in tandem to which became damaging to any claims of legitimacy. In essence, culture came to be regarded as the legitimising factor *for* the legitimising factor of the process, namely the *demos*, which in turn would serve to give a much-needed popular legitimacy to the EU integration project.

The provisions relating to culture in the Treaty of Maastricht can be read, therefore, as a deliberate attempt not only to include culture within the scope of the Union's powers, but also to harness culture as an integrative force. It is this *instrumental* usage of cultural policy for the construction of a European common culture with which the people(s) of Europe could or should identify that gives rise to the notion of culture as a ground for unity. Consequently, what in Article 151 EC *initially* looks like measures designed to reject a homogenising approach to culture and place an emphasis on maintaining diversity have, in fact, their roots in a much more strategic and ultimately unitary-minded approach. The powerful symbolism of giving culture its own space within the Treaty and enriching a formerly arid politico-economic landscape is, therefore and from this perspective, undermined by what can be regarded as a somewhat clandestine attempt to solve the infamous legitimacy problem at the heart of the European integration process by recourse to culture.

As for the more specific consideration of the Europeanisation of *law*, as opposed to simply European integration as a whole, it is the cross-sectional clause of Article 151(4) that provides for the furthering of the Community agenda in terms of cultural policy across other sectors, incorporating both areas of Community policy under Article 3 EC *as well as* those that fall outwith the ambit of that Article. As observed by Psychogiopoulou, "action" under this clause may be perceived as "encompassing all three stages of manifestation of Community law. It may relate to the stage of policy designation and subsequent implementation by the European institutions, but can also extend to the interpretation of Community law by the European Court of Justice".[62]

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[58] E. Psychogiopoulou, "The Cultural Mainstreaming Clause of Article 151(4) EC: Protection and Promotion of Cultural Diversity or Hidden Cultural Agenda?" in (2006) 12 *European Law Journal* 5, 575–592 at 576

[59] Emphasis added.

[60] C. Shore, "*In uno plures* (?) EU Cultural Policy and the Governance of Europe" in (2006) *Cultural Analysis* 5, 7-26 at 11-12.

[61] *Ibid.* The alleged cultural deficit will be discussed later in more detail.

[62] E. Psychogiopoulou, *supra* note 58, at 584

The consequences of this situation will be investigated more intensively later in this chapter; similarly, a more in-depth analysis of the intentions behind and possibility of creating a common European culture based on a common European identity will be undertaken in the section titled "Towards a Common European Culture". For now, however, the focus will switch to the second interpretation of culture, namely that of culture as grounds for diversity.

b) Culture as (Two) Grounds for Diversity

As mentioned above, the inclusion of the cultural field within the ambit of explicit Community competence via the Treaty of Maastricht came complete with apparent commitments to the safeguarding, maintenance and promulgation of the cultural diversity within and across the Member States of Europe. However, while these promises to uphold Member State diversity can easily be construed as posing obstacles to the process of European integration, it should also be acknowledged that these barriers do not simply stem from the preservation of diversity *per se*, but are also caused by problems of *understanding* inherent to situations of diversity. Two separate approaches can be identified within this "diversity" paradigm, therefore: one which bears a remarkable similarity to the formerly discussed instrumentalist "unity" paradigm, albeit with substantially different conclusions, and one which takes a more all-encompassing view of law-in-culture and, for that matter, culture-in-law.

i. An Instrumentalist Approach

The formerly-introduced description of culture as a justification for and barrier to European integration is, therefore, less clear-cut than it may have first appeared; it is the particular conception of culture utilised within this formulation that allows for this duality. This (what I will call) "instrumentalist" conception of culture relies upon an understanding of culture as a means by which to implement certain plans, and thus essentially reduces it to a policy tool.[63] Examples of cultural considerations being reduced to this status abound in EU documents, such as, for example, the Commission statement that, "[a]lthough its goal is to *develop* a feeling of belonging to a shared culture, the EU is also keen to *preserve* the specific aspects of Europe's many cultures, e.g. minority languages".[64]

Does it not seem strange, therefore, that the very thing causing the fundamental problem is the nature of the instrument being utilised to achieve both ends simultaneously, namely the notion of *unitas in diversitate*? The confusion as to what the aim of the integration process actually is can be traced directly back to this fundamental conflict: with the two being apparently mutually contradictory, for how can both a European people be achieved while the peoples of Europe are maintained, and vice-versa? The difficulty can be seen, therefore, as being in the *agenda* itself, and not in the instrument.

It is the "blank-canvas" nature of this particular instrumentalist conception of culture that allows it to be harnessed for a variety of agendas; one could say, therefore, that the significance lies less with the instrument itself than with the agenda, namely the aims of

[63] Examples of cultural considerations being reduced to this status abound in Community documents, such as, for example, the Commission statement that, "[a]lthough its goal is to *develop* a feeling of belonging to a shared culture, the EU is also keen to *preserve* the specific aspects of Europe's many cultures, e.g. minority languages". See, CEC (Commission), 2002, 5. Emphasis added

[64] *ibid*

the process. The fact that these aims – *either* achieving unity *or* maintaining diversity – are at odds with each other has, in this case, little to do with the tool chosen to accomplish or further them. On these grounds, therefore, the "culture as grounds for diversity" paradigm can be utilised more successfully if culture itself is reconceptualised, especially in terms of the law.

Instead, therefore, of maintaining the original dichotomy of culture, it appears that the split should actually be situated elsewhere, namely between two different conceptions of culture, *both of which* can be relied upon as being grounds for diversity. The first, instrumentalist conception takes, as noted above, much the same tack as the "unity" approach, but the second will rather rely upon a more embedded notion of culture as *context*.

ii. A Contextual Approach

This progression away from the original dichotomy presented at the outset of this chapter is to draw attention to the fact that, for the purposes of this project, the focus is *not* on EU cultural policy. Rather, I use the concept of "culture" here in a very particular way: considering that a flexible definition of culture undermines its explanatory usefulness, I would like to use the admittedly more abstract but, I believe, more practical construction of culture as *context*, which in this case can be construed specifically as the context of the Member State. A *contextual* conception of culture is one which understands culture as being *both* a basis for *and* a result of a variety of historical processes, legal decisions, political situations, economic fluctuations, general social interactions, and so on and so forth; in effect, all of those sectors, without exception, that contribute to the 'whole' of the Member State. In this sense, the law can be seen as a distinct sector within a Member State culture, one that is informed and constructed by and through the whole culture to which it is related. Each EU Member State has its own distinct legal order, the uniqueness of which can be seen as resulting from the interaction of many factors and phenomena, both internal and external to the Member State, such as: the legal tradition to which it belongs, be it either civil or common law; the religious and moral pressures exerted upon it from society; political choices, market forces, and so on and so forth. A Member State's legal order is constantly affected by changes in its social context, its *environment*, and thus undertakes a continuous process of adaptation in order to reflect that context; it is in this sense that a Member State's legal order can be referred to as a "legal culture".[65]

To clarify: the distinction being drawn here is between the understanding of culture as something the law deals with or regulates, and that of holistic context. While former takes an instrumentalist and objective view of both the law and culture, the latter sees the combination of cultural considerations as constructing and informing the law, creating a distinct legal order or "legal culture" that is embedded in the very fabric of the Member State. Instead of being mere tools of policy, therefore, law and culture can be seen as inter-related, interdependent and mutually informing.

[65] 'The concept of culture is [...] a heuristic device for suggesting how individual decision-making is conditioned by the language of normative discussion, the set of historical reference points, the range of solutions proposed in the past, the institutional norms taken for granted, given a particular context of repeated social interaction.' See J. Webber, "Culture, Legal Culture and Legal Reasoning: A Comment on Nelken" in (2004) 29 *Australian Journal of Legal Philosophy*, 25-36 at 32.

This final dichotomy between the two conceptualisations of culture outlines some striking differences: while the former – that culture can be instrumentalised as either a catalyst for or a brake upon the integration process in Europe – looks predominantly to cultural policy, the latter takes a more all-encompassing view of the concept of culture itself. Indeed, the "diversity" paradigm is the only one accommodated by this contextualist approach,[66] which looks to the cultural underpinnings of the law in the EU and its Member State, considering the two factors as being inextricably linked.

The law, in this sense, can be seen as a distinct sector within a Member State (culture), but one that is informed and constructed by and through the *culture* of that Member State; for example, the legal order in, say, Italy, is different from that of Germany, of the UK, of France, and so on and so forth. In the EU there are currently 27 Member States, each with their own distinct legal order,[67] and the uniqueness of each national, Member State legal order can be seen as resulting from the interaction of many factors and phenomena, both internal and external to the Member State, such as: the legal tradition to which it belongs, be it either civil or common law; the religious and moral pressures exerted upon it from society; political choices, market forces, and so on and so forth. Although not as open or reflexive as the social, the legal order of a Member State is constantly affected by changes in its social context, its own environment, and it thus undertakes a continuous process of adaptation in order to reflect that context.[68] It is in this sense that we can refer to a Member State's legal order as a "legal culture". I will deal with this conception of legal culture in depth in my next chapter but, for the moment it should be noted that, when discussing the legal culture of a Member State, it should be cognised in its entirety, and I mean this on two counts. Firstly, and following Jeremy Webber, it is futile to attempt to separate a legal culture from the phenomena that exist within it in order to utilise it to interpret those phenomena, because it is always-already a product of their interaction; this simply results in tautology.[69] Secondly, both for the purposes of this paper and to avoid an essentialist conception of legal culture, the term will only be used in reference to *national, Member State* legal orders.[70]

To be clear on this point, the recognition of a contextual basis for the law of a Member State is somewhat different to asserting that the Member States are in themselves culturally diverse, but the leap from one conclusion to the next is in fact not so great; after all, the Maastricht Treaty already outlined the agreement with the peoples of the Member States that the Community would "respect their history, their culture and traditions" – what is the law if not an expression of these? Nevertheless, it should be made clear here that the discrepancy here is between what I am asserting – namely, that the legal order of a Member State is different from any other because of its culturally-derived and specific context – and the understanding of culture as something that the law *deals with* or regulates. While latter takes an instrumentalist and objective view of both the

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[66] This conclusion quietly points a finger at the predominantly formalist approach adopted by the drafters of the proposed Civil Code and the Draft Common Frame of Reference. See the next chapter for more on this argument.

[67] The distinct legal order in Scotland could be cited as another, 28th legal order within the EU, but the focus for now will remain with the Member States.

[68] This notion that what occurs is a continual process of reciprocal adaptation will be discussed in more detail in chapter 6. For more on this see D. Augenstein & J. Hendry, "The 'Fertile Dilemma of Law': Legal Integration and Legal Cultures in the European Union", (2009) *Tilburg Institute of Comparative & Transnational Law (TICOM) Working Papers* No. 2009/06

[69] J. Webber, *supra* note 65 at 28

[70] For a detailed argument justifying this usage, see both the introduction and chapter 3 on legal culture, specifically the section on "Reductively Pluralist Approaches".

law and culture, the former sees the combination of cultural considerations as constructing and informing the law, creating a distinct legal order or "culture" that is embedded in the very fabric of the Member State. Instead of being mere tools of policy, therefore, law and culture can be seen as inter-related, interdependent and mutually informing.

It is important not to overlook this uniqueness, this contextual character, of each of the Member State legal orders[71] because this is what appends the complication of understanding to that of interaction. The existence of a multiplicity of legal orders at the supranational level means that interaction is unavoidable, especially in terms of a process of legal integration, but there is nothing that guarantees the *quality* of that interaction. By this I mean, the extent to which the information being conveyed is being received and/or understood, and what effect the necessary interpretation of this information has. At the crux of this consideration, therefore lie the dual notions of observation and interpretation, both of which will be discussed in greater depth later in this thesis. At the moment, however, it suffices to say that different observers result in different interpretations, because the viewpoint necessarily constitutes what is being viewed. As observers are always-already located within a specific culture, their interpretation and thus understanding of any information is inevitably coloured by that perspective. The underlying questions at the heart of this investigation are, firstly, whether or not any misunderstandings of the meaning of law or legal practices within the European Union on behalf of the "observing" and interacting Member States are detrimental (or defeating) to the project of European legal integration and to the overall legal coherence of the European Union, and secondly, whether they can be accommodated or even ignored.

c) A New Dichotomy, a Non-Synthesising Conclusion, and a Selection

The differences between the two interpretations of culture outlined above are striking, mainly as a result of the different conceptions of the term culture that have been relied upon at the basis of each. While the former, the argument that culture can be instrumentalised as either a catalyst for or a brake upon the integration process in Europe, looks predominantly to cultural policy, the latter takes a more all-encompassing view of the concept of culture.

What I have identified as an instrumentalist approach to culture, in terms of it being grounds for both unity *and* diversity and meaning that it can be used to support or further either end, is very different to the more contextual conception of culture as grounds for diversity, which looks to the cultural underpinnings of law and sees the two factors are being inextricably linked. The pliability of culture as an instrument should probably not be all that surprising – it has, after all, been heavily criticised for being everything to everybody – however, my interest is less in this conception of culture, which concerns itself with questions of justification, and more in the other, which takes questions of understanding as its focus.

However, this is not to say that this project will adopt a wholly pessimistic view – while the commonalities across Member State legal cultures should not be exaggerated, neither should the differences: national culture, and thus national legal-culture, has both evolved and been created, which means that while it is indigenous and organic to a degree, it is

[71] This accusation is one that I level at "formalist" approaches to the Europeanisation of law, and will be discussed in chapter 4.

also subject to influence from and alteration through strong forces from its social environment, *which is both external and internal to its national borders*. Its reflexivity should be cognised as being somewhat limited, however, because there is no guaranteed, linear corollary between events in the social and results in the legal, although there are definitely influences from one on the other. It is as Lawrence Friedman says, that:

> [S]ociological or technological changes do not, of course, automatically alter the legal system in any way. Pure social forces are too 'raw' to operate directly on the legal system. But they do so indirectly. They change the legal culture. Events, inventions, and new situations lead to differences in the way people think, in what they want and expect; and these changes in turn change in the pattern of demands on the legal system.[72]

I would, however, add an additional component to this process, which is that the legal, in turn, has its own influence upon events in the social, and it is from this possibility of mutual disturbance that the process takes its circularity. For a legal culture should be considered as exactly that, as an ongoing process of constant evolution, instead of as a closed, fixed, complete entity. Indeed, it is from this notion of a circular process that the project of the Europeanisation of law should take its impetus – while the Member State legal orders have a certain character due to their contexts, the "semi-permeability" of each legal culture provides for the possibility of change occurring across and within them.[73]

2. From the National to the Supranational

This section addresses the question of "levels" within the post-national constellation of the European Union, and the conceptual difficulties posed by multiple legal orders occupying the same legal space. Theoretical approaches that base themselves upon concepts, structures and institutions in existence at the level of the nation-state cease to be fit for purpose when the supranational level of the European Union is added to the mix. In order, therefore, to avoid the "uncritical transfer" and application of nation state-based thinking to the supranational level, in this section I will "unpack" the very concept of the nation-state with the view to exemplifying this initial, identity-based differentiation.

a) The 'Nation-state'

The 'nation-state' is the coincidence of both nation and state[74]; while a nation is a cultural and ethnic construct, the modern state is a political and geopolitical entity with explicit territorially defined borders and jurisdiction. Indeed, one of the defining features of the state is that its territorial dimension delimits its exclusive jurisdiction. Four main

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[72] L. Friedman, "The Place of Legal Culture in the Sociology of Law" in M. Freeman (ed), *Law & Sociology: Current Legal Issues, Vol.8* (2006: Oxford, OUP), Chapter 11, 185-199 at 189. It should be noted here that Friedman uses the term "legal system" interchangeably with what I have been calling a "legal order".

[73] This is not, of course, such an astute observation that it forms the basis of my argument – it can simply be stated: legal orders and legal cultures can evolve. A much more interesting and disputed area to focus upon, however, regards which *form* this evolution can take, and to what extent it can be controlled. These questions will be investigated in more detail in the later chapter of this thesis on *memory*.

[74] While there is much than can be said about this coincidence and the symbiotic relationship between nations and states, as well as examples of disjunction of the two, this thesis will proceed from the assumption that they are, in terms of a discussion of the EU and its Member States, conterminous.

characteristics are recognised as being essential to the concept of a state, which are that it is: territorial, legitimate, independent, and has a recognised government.[75] This means that, in order to be considered a state, they would have to: i) claim control over a specific geographic domain, ii) assert that such control by the governing authority is rightfully theirs, iii) claim that there is no interference from others in the exercise of this control, and, finally, iv) demand that that each of these claims is acknowledged by other states.

While a state is both politically and territorially defined, a nation, on the other hand, is less easily delimited, and is often used synonymously with terms such as ethnic group, tribe, race or even country, leading to a lack of clarity about its specific meaning. Despite the obvious commonality among all of these "equivalent" terms clearly being a heavy reliance on *identity*, each has an additional meaning: tribe tends to mean an aggregate of people united by either ties of descent from a common ancestor or adherence to certain customs and traditions, while race suggests a more hereditary or genetically-based similarities or traits, as does ethnic group. Indeed, when the term "nation" entered the English language in the late thirteenth century, it initially referred to those who were blood-related, but evolved over time to take territory and not race as its common denominator.[76]

Michael Hardt and Antonio Negri cite two operations as driving the construction of the modern concept of "people" in relation to that of 'nation' in Europe in the 18th and 19th centuries. They argue that a conception of a "homogeneous national identity" fundamentally depends, first of all, upon the construction of an absolute racial difference, through which they can distinguish themselves from their Other and, secondly, upon the "eclipse of internal differences through the representation of the whole population by a hegemonic group, race, or class".[77] The salient point here is this combination of the drawing of a main distinction that creates an inside and an outside, and the subsequent glossing-over of minor differences on the inside, is what constructs a "people"; as Hardt and Negri put it, "[t]he people … tends toward identity and homogeneity internally while posing its difference from and excluding what remains outside it".[78] Nation emerges from this (exaggerated) internal homogeneity when a single general interest is selected by the dominant and/or majority group, thus serving to generate social order and unity within itself.

For the sake of clarity, however, I will utilise the definition of "nation" as "a uniquely sovereign people readily distinguishable from other uniquely defined sovereign peoples who are bound together by a sense of solidarity, common culture, language, religion, and geographical location".[79] Although there are obvious pitfalls in assuming that linguistic practices and religious beliefs are as express and distinct as this quotation suggests, their inclusion as factors is important. Similarly, while too great a level of coherence or homogeneity should not be assumed as existing within the nation, it is reasonable to proceed on the premise of substantial commonalities among the people of that nation. As a result, national identity is of utmost importance to the construction of nation-states, because *nationalism is the founding basis of differentiation*: "we" are different from "them" because "we" are _____ (insert as required) and "they" are not. Therefore, while the actual similarities may be exaggerated, the people of a nation see themselves as a group in

[75] N. MacCormick, *Institutions of Law: An Essay In Legal Theory* ((2007: Oxford, OUP) at 39-40
[76] G.W.White, *Nation, State & Territory,* Vol. 1 (2004, Lanham & Oxford: Rowman & Littlefield) at 34-5
[77] M. Hardt & A. Negri, *Empire* (2000, London & Mass., Harvard UP) at 103-104
[78] *Ibid*, at 103
[79] N. Davies, *Europe: A History* (1996, Oxford & New York: OUP) at 7-8

contradistinction to other groups of people(s), based upon their sharing of a common culture. As Eagleton says:

> People who belong to the same place, profession or generation do not thereby form a culture; they do so only when they begin to share speech-habits, folklore, ways of proceeding, frames of value, a collective self-image. It would be odd to see 3 people as forming a culture but not 300 or 3 million. … It covers those aspects of it which embody a distinctive way of seeing the world but not necessarily a unique way of seeing.[80]

Nationalist ideology takes as its basic tenet the idea that a nation has its own culture, different from any other, and that this culture is expressed through traditions, rituals, symbols, such as flags and emblems, and the arts; namely, by means of cultural *signifiers*. Due to its inclusion and articulation through the very construct of 'nation', the cultural is basically an assumed given within the nation-state: it brings contextual specificity to the generally defined concept of 'state'.[81]

The Peace Treaties of Westphalia, signed at Münster and Osnabrück in 1648, have become synonymous with the emergence of the modern nation-state, with the modern state system often being referred to as 'Westphalian'. The result of the religiously-motivated Thirty Years' War (1618-48)[82], these treaties authorised the territorial division of Europe into "states", introduced the legal concept of secure borders, and recognised both the principle of state sovereignty and the principle of non-intervention in the territorial space of another state.[83] These two main changes can also be described, following Hirst, as the principles of exclusion and mutual recognition.[84] Although it is unlikely that the Treaties are in fact the actual seismic turning point they have often been taken to be (as this would downplay the subtlety of any incremental social change occurring around this time), they are commonly recognised as marking a shift in the way states were cognised.[85] The main differences between the medieval state and the modern *nation-state* are differences of power and culture, with the formerly permeable boundaries of culture becoming impermeable, and the formerly impermeable ruler/ruled power balance making way for the more permeable governing/governed system.[86] This is reflected in the MacCormick criteria of a (constitutional) state (*Rechtsstaat*) as listed above: together the territory occupied and the people occupying it are the embodiment of the national, while the governing of that territory, its authority and the recognition of that by others, are what mark it as a nation-state. Europe in the early modern period, plagued as it was by religious conflicts, had a distinct need for peace and stability, and the Westphalian settlement helped to introduce both of these. Additional aims underlying

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[80] T. Eagleton, *The Idea of Culture* (2000, Oxford: Blackwell) at 37

[81] "Nationhood, especially as conceived by the nationalists of the early-nineteenth-century Europe, was explicitly cultural'. See M. Herzfeld, *Cultural Intimacy: Social Poetics in the Nation-State* (2005, New York: Routledge) 2nd ed., at 75

[82] The "great separation" between religion and politics in Europe, essentially pre- and post Hobbes, is of interest in terms of functional differentiation, and will be discussed in chapter 5 in relation to Europe's unique trajectory and current position. For more on this see M. Lilla, *The Stillborn God* (2007, New York: Knopf)

[83] W.C. Opello Jr & S.J. Rosow, *The Nation-State & Global Order* (1999, Boulder & London: Lynne Rienner Publishers) at 70-1

[84] P. Hirst, *War and Power in the 21st Century*, (2001, Cambridge: Polity Press) at 55-57

[85] M. Burgess & H. Vollaard (eds), *State Territoriality & European Integration* (2006, London & New York: Routledge) at 275

[86] G.W. White, *Nation, State & Territory,* Vol. 1, *supra* note 76 at 128. This switch from ruled to governed can also be phrased as the switch from subject to citizen, or from being passive to becoming active.

the move to statehood were security, sovereignty and prosperity for all those within their clearly delimited, fixed borders, and these are aims still retained by today's nation-states. However, these aims are professed in terms of the shared culture of the national group within the territory of the state, meaning that national identity and a Them-Us comprehension is of utmost importance to the process of nation creation.

A Them-Us paradigm has always existed within the nation-state construction, based on the recognition of a "distinction" and the erection of a boundary on that basis.. The people within the nation thus understood themselves as being different from those on the outside, the Other(s). However, with the move to supranationalism in Europe, embodied by the European Union, what appears to have occurred is a change from the outright rejection of the Other related to a national identity to a *recognition of a similarity* of sorts. Indeed, it is this alleged commonality that is at the basis of the notion of a common European culture. While the exact nature of this similarity is unclear, the very fact that the EU exists would suggest that such a sentiment was in existence from the outset of the European project.

This brings to the fore two specific considerations. Firstly, who was it that felt such a sentiment, and what are the causes and results of this relaxing of the Them-Us concept within Europe to the extent that there could have been participation in such a scheme? Secondly, an important question to be considered here is: what is Europe? Can we equate Europe with the European Union, or should the two be kept distinct? Indeed, and considering that the first consideration stems from how identity is perceived, how then should this be seen in light of this distinction, being as it is largely political and not cultural? Similarly, and in terms of the European Union, one could enquire as to what forces and impetuses have driven it from its early and rather humble beginnings as a western European trade body to a supranational and intergovernmental entity *sui generis* comprising 27 Member States, from Ireland in the northwest to Cyprus in the southeast? These questions drag us right back to the beginning, so to speak, to the very genesis of the European project and to the reasons and aims behind it.

b) From Nation State to Member State: From Difference to Similarity?

Going right back to the 1950s, to the 1951 Schuman Declaration and the 1951 Treaty of Paris that created the European Coal and Steel Community, it is clear that, despite their overarching economic content (and thus their aim of achieving prosperity), much of the intention behind the establishment of economic interdependency in Europe was to prevent a conflict to the extent of those Europe had experienced in the earlier part of the 20th century. More specifically, the linking of the powerhouse economies of France and Germany was perceived as being the optimal method for the eradication of their "age-old opposition".[87] As the preamble to the 1951 ECSC Treaty asserts, the aims were:

> to substitute for age-old rivalries the merging of essential interests; to create, by establishing a European Economic Community, the basis for a broader and deeper community among peoples long divided by bloody conflict; and to lay the foundations for institutions which will give direction to a destiny henceforth shared.[88]

[87] Schuman Declaration of May 9, 1950, reprinted in *Bulletin of the European Communities* 13 (1980) 14, 15. "The gathering of the nations of Europe requires the elimination of the age-old opposition of France and the Federal Republic of Germany."

[88] European Commission, 1983, 15; quoted from the Preamble to the Treaty of Paris, 1951.

In comparison to the Westphalian Peace Treaties of the 17th century, therefore, the recourse was *not* to a nationalist-type structure, which can now be judged as one of unmitigated failure in terms of being a peace-keeping strategy, but to a structure *above* that of the nation-state, one that was intended to deal with the excesses of the very construct of the nation-state and the continued maximisation of national interest at the expense of every other consideration.[89] In fact, as Joseph Weiler explains, the European Community was intended to be "an antidote to the negative features of the state and statal intercourse; its establishment in 1951 was seen as the beginning of a process that would bring about their elimination".[90] This can also be seen from the quotation given above: despite its economic beginnings as a Common Market and a simple association of sovereign states, the European Community was effectively always seen by its founding fathers as establishing a basis for "broader and deeper" political union. There is also the clear suggestion in the ECSC Treaty that these "bloody conflicts" had created schisms in the natural wholeness of Europe and that, subsequent to that division, "the natural bonds that somehow defined Europe as a single entity were to be re-established".[91]

To answer the first of the questions posed in the previous section, then, it can be said that it was the founding fathers of the Community who first recognised a similarity among the peoples of Europe that allowed for the creation of, firstly, the EEC, then the EC and subsequently, the EU. Whether or not there was actually anything *to* recognise at this point, however, is another story; one could argue that by virtue of its very coming-into-being the EEC introduces an additional boundary, within which there *is* a similarity but *only* by virtue of its existence. Nevertheless, with their accession to the Community, and now the Union, Member States included themselves within this boundary, and as such could be considered as 'European'. Europe, then, could be cognised in terms of varying degrees of Otherness, losing as it does the homogenising effect of the nation-state's hegemonic group.[92] To phrase this more clearly, one could say that the people of a Member State, say France, now think of themselves as *less dissimilar* to the Germans, the people of another Member State, than they do to a non-member-state people like, for example, the Russians, simply as a result of this EU/non-EU boundary.

Of course, this construction meanders along very nicely until one reaches the boundary of the EU *without* leaving the continent of Europe, where there does appear to be a spanner in the works. Despite the peripheral boundaries of the European continent itself being somewhat nebulous,[93] there can really be no argument about whether or not a nation-state such as Switzerland is European or not, situated as it is in the very centre of the continent.[94] The above example of the EU/non-EU boundary would certainly not apply to France's perception of Switzerland as being non-European, and this would

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[89] J.H.H. Weiler, "The Transformation of Europe", *supra* note 50 at 91

[90] *Ibid*, at 91

[91] A. Williams, *EU Human Rights Policies: A Study in Irony* (2004, Oxford: OUP) at 164

[92] Indeed, even this has come under pressure by the forces of supranationalism, in terms of sub-state and regional assertions of identity, although I will stick specifically to the nation and European for the moment, and avoid the sub-state, sub-altern or local.

[93] The Council of Europe and the European Court of Human Rights both have a different scope / jurisdiction to that of the European Union. On a lighter note, UEFA and the Eurovision Song Contest organisers are examples of two bodies who have broader and less-discriminate understandings of which nation states are European than the European Union does, including as they do for their competitions such comparatively far-flung countries as Russia, Georgia, Turkey and even Israel.

[94] The other three European Free Trade Agreement (EFTA) states of Norway, Iceland, and Liechtenstein are similar examples.

suggest, therefore, that a "common" European culture, were it to exist, would be more territorially based than politically constructed. Following from this, then the move from there being a ethnically or racially-defined Other at the national level to the construction of the non-European Other at the European level can be seen as a mere repetition instead of a change; the territorial-definition of non-European as opposed to non-European *Union* is, in fact, based predominantly on a perceived ethno-racial similarity among the peoples of Europe.

This observation has little to do with the nation-state and its interaction with the European Union, however, as this takes place in a more politico-legal rather than cultural space; the obvious difference between the European continent and the EU is that the latter is *constructed* instead of being territorially (albeit somewhat loosely) fixed. The above point on territory notwithstanding, it is political, legal and economic forces that create the EU and thus give it its meaning. Its boundaries, as mentioned above, were established by the 1951 Treaty and have been expanded upon only by means of each of the subsequent Treaties, which have both political and legal character.[95]

The result of this politico-legal boundary, however, alongside the promotion of a common culture within it, is not so different from the ethno-racial one noted above, for it tacitly constructs an *imagined*, non-European Union Other. As the similarities within the boundaries are emphasised in contradistinction to the differences outwith, these boundaries are strengthened, in both a real and a symbolic sense. This *Festung Europa* approach has been criticised by many who allege that the EU is simply geared towards replicating the statist model on a larger scale; as Weiler phrases it:

> Nationality as referent for interpersonal relations and the human alienating effect of *us* and *them* are brought back again, simply transferred from their previous intra-Community context to a new inter-Community one. We have made little progress if the *us* becomes European (instead of German or French or British) and the *them* becomes those outside the Community or those inside who do not enjoy the privileges of citizenship.[96]

This would have been an obvious consequence of following the unitary vision for Europe, which saw the development of Europe occurring by means of incremental change and cumulative effects, starting with simple economic interdependency through the common market but culminating in full political Union. An essentially neo-functionalist approach to the integration project, prevalent during the 1960s and 70s, worked from the assumption that integration processes in one sector would "spillover" into other sectors, specifically the political one, where they would influence and drive similar developments.[97] However, despite the fact that this vision was ultimately rejected in favour of a Community-based vision of the European project, the Community approach may, arguably, have the exact same consequence, however unintentional this may be. I say arguably, for the existence of a common cultural underpinning for Europe is exactly what is in doubt.

c) Towards a Common European Culture?

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[95] A nation-state is both the subject and object of a Treaty, as both regulator and regulated. As the pedigree source of the law in this situation, they bind themselves by means of their own authority. Despite being a legal instrument, a Treaty also has a political underpinning.

[96] Weiler "The Transformation of Europe", *supra* note 50 at 95

[97] E. Haas, *The Uniting of Europe* (1958, Oxford: OUP). This vision has also been referred to as the "Monnet Method".

Thinking about a "common" European culture and its highly debated existence or achievability introduces the consideration of why this is, in fact, something desirable. As we have seen from the earlier discussion of the Westphalian nation-state, a common culture under the Them-Us paradigm was a huge factor in the nation-state coming into being – should we, then, glean a unitary integrationist impulse from those promoting a common culture across the EU? What form does – or should – this common culture take?

It is practical here to take the concept of national identity as a starting point. It can be said that national feeling is created and sustained by means of recourse to the symbols and artefacts of the nation-state, as well as through the reiteration of past triumphs. Indeed, it is interesting to note the influence of intellectuals in this process of nation-creating based on a shared identity or culture; historically, within the more interactive system of the modern nation-state compared to the medieval state, intellectuals naturally had more of an influence than they had previously enjoyed and were heavily involved in the process of nation-creating by disseminating tales and images of past and present glories, often with the effect of masking existing difficulties. The importance of this class of intellectuals for the construction and maintenance of the nation-state during the 18th century, and their insistence on nationalism as a virtue in itself, can actually be seen in close parallel with the influence of the contemporary European intellectual "elite" on what is to constitute an "official" common European culture.[98]

As Cris Shore points out, restrictions on what is considered to be "common" European culture to such "high culture" as opera, classical music and grand architecture point not only to a "bourgeois intelligentsia" comprehension of a European common culture, but also to an uncomfortably stuffy, white, Graeco-Roman, Judeo-Christian version[99] that glosses over the multi-ethnic and pluri-religious character of contemporary Europe. This accusation, at the EU level, echoes the reasoning of Hardt and Negri, who claim that a bourgeois hegemony exists at the level of the nation state. They also state that, in terms of constructing a national identity:

> [t]here is a territory embedded with cultural meanings, a shared history, a linguistic community; but moreover there is the consolidation of a class victory, a stable market, the potential for economic expansion, and new spaces to invest and civilise.[100]

Following the definition given above, the EU does, in fact, meet some of Hardt and Negri's criteria for laying claim to the possession of a specific identity. It can be considered, for example, as being a stable market in much the same way as a national one, and there is undoubted potential for economic expansion, whether this is simply in terms of enlargement, which also provides new spaces to be "invested" in, or in terms of the coordination of a huge economic area empowered by a strong single currency. However, while the territory of the EU can be described as being "embedded with

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[98] To an extent this European "elite" could be considered as something of a precursor to the contemporary notion of an "epistemic community", see A. Vauchez, "Embedded Law.Political Sociology of the European Community of Law: Elements of a New research Agenda" in (2007) *EUI Working Papers (RSCAS)* 23. This will be discussed in greater depth in chapter 5.

[99] C. Shore, "*In uno plures*(?) EU Cultural Policy and the Governance of Europe" in *Cultural Analysis* 5, 7-26 at 19

[100] M. Hardt and A. Negri, *supra* note 77 at 105

cultural meanings", these are not necessarily the same across all of the Member States; also, the "shared history" of Europe is perhaps not the ideal foundation for its future. As for a linguistic community, unless the rise of the English language as the disputed but dominant *lingua franca* for European commerce and academia is included, there is no homogeneity of speech across the region. Thus, notwithstanding whether or not these criteria establish a threshold that the EU *should* be aiming to meet, it is clear that the ones with which it *does* comply appear to be the economic ones, once again leaving the cultural considerations out in the cold.

Are these allegations of a bourgeois dominance well founded, then? Whether they are or not, they do raise some pertinent questions in terms of the EU in terms of regarding what the basis for the creation of an equivalent-to-national EU identity or culture could be. What would the notion of a shared or common European culture be based upon or articulated through if not such "high" cultural objects or expressions? Renaissance architecture, impressionist painting, the philosophy of the ancient Greeks – can they be rightfully considered as the property of all Europeans at the expense of everyone outwith the borders? What is it about these specific things that are supposed to unite us in all our diversity? And what about more lowbrow ones, such as European football, the Eurovision Song Contest or budget airline travel? Are they any less pertinent to a construction of a contemporary European common culture than the works of Plato, Wagner, Picasso and Monet? What is there on which we could base the claim that a common culture exists within the EU if not upon these things, and why, indeed, has a common European culture become an overriding aim?

Shore suggests that the motivation behind constructing a common European culture is less a sentimental than a political one. He alleges that, regardless of the insistence of supporters of the EU that the "unity in diversity" approach points to a European identity based on "the compatibility of contrasting identities,"[101] the impetus for the promotion of a common European culture and identity came from the perceived democratic deficit in the EU. Shore argues that, contrary to the expectations and predictions of the founding fathers and traditional, neo-functionalist theories of integration, the peoples of Europe have not embraced European institutions and ideals, thus depriving it of any popular loyalty.[102] The realisation of this state-of-affairs and its subsequent addressing through the introduction of EU cultural policy by the 1992 Treaty of Maastricht, as mentioned earlier in this chapter, can be seen as an attempt to promote a common European culture and heritage based upon "certain "core values" and in the shared legacy of "classical civilisation".[103] The obvious question here is, to what end? The answer rests in this lack of popular loyalty for the European project, which could also be seen as a lack of popular consent and, thus, of *legitimacy*. As Andrew Moravcsik explains,

> [A]n organisation of continental scope…appear[s] rather distant from the individual European citizen. As a multinational body, moreover, it lacks the grounding in a common history, culture, discourse and symbolism on which most individual polities can draw.[104]

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[101] M. Pantel, "Unity-in-Diversity. Cultural Policy and EU Legitimacy" in T. Banchoff and M. Smith, (eds) *Legitimacy and the European Union* (1999, Routledge: London) 46-65 at 46

[102] C. Shore, *supra* note 60 at 10-11

[103] *Ibid*, at 13

[104] A. Moravcsik, "'In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union" in (2002) 40 *Journal of Common Market Studies* 4, 603-24 at 604

I would argue that this lack of a recognisable European public, society or body politic, coupled with existence of a gap between the institutions and the people(s) they claim to represent, can be cognised in two ways, in terms of both political will and identity. It is only the latter that I intend to discuss here.[105]

As mentioned above,[106] it has been argued that in the European Union there exists a "cultural deficit", which has also been described as a lack of "cultural legitimation"[107] and which can also be phrased as the lack of a cultural underpinning at the supranational, European level. In light of this, the promotion of a common European culture becomes more recognisably important, but its ineffectiveness thus far also becomes much more obvious. In contrast to the democratic deficit, which is obviously a more political consideration, the "cultural deficit" concerns questions of identity, and thus the lack of a readily-identifiable and recognisable common European identity, at least from the perspective of the pan-EU Joe/Giuseppe/Josef Public, means that claims that the EU already has a common culture are disputable at best.

In this sense, and while this "cultural deficit" can be indicated as regards the lack of a (socio-political) legitimising factor for the European project, we should nevertheless be cautious about not simply swallowing this sound bite wholesale. Indeed, in terms of *identity*, the argument could be the reverse; namely, that there is, in face, a cultural *surplus* in contemporary Europe. Whichever option is selected in this instance depends very much on the perspective adopted: in terms of a "common" European culture it would appear to be safe to say that there exists a deficit, but one should hasten to add that this deficit is *only* one of *commonality* – there is no lack of culturally-informed identity claims within the territory of the European Union. On the contrary, these exist in abundance and range from the sub-national (or regional) to the cross-jurisdictional,[108] hence the use of the term "surplus", which also encapsulates the non-exclusive character of such identity claims.[109]

While it could be submitted that the terms "cultural deficit" and "cultural surplus" merely frame the same situation from differing perspectives, I would argue that it is by means of the distinction between the two that the problem here is elucidated. While the former rues the weak cultural underpinning of the EU, the latter boasts of the strong, vibrant, copious cultural foundations of Member States and regions within the EU; there does not exist here the equilibrium of *unitas in diversitate*, because the diversity in this instance is much more powerful than the unity. By comparison with the strong, clear lines of national and regional cultural identity claims, the EU equivalent seems indistinct, pale and wan, but the real irony of this situation is that it is one of the few within this debate where the existence of unity in diversity is *not* problematic. Consider the

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[105] By political will I mean to imply the "heresy of national legitimation" and similar parasitic forms of political legitimacy. For an in-depth discussion of these see the conflicting arguments in, for example, P. Allott, "Epilogue: Europe and the Dream of Reason", in J.H.H. Weiler & M. Wind (eds), *European Constitutionalism beyond the State* (2003, CUP: Cambridge) 202-225 at 220; and A. Moravcsik (2002) *ibid.*

[106] See C. Shore, *supra* note 60

[107] B. De Witte, "Cultural Legitimation. Back to the Language Question", in S. Garcia (ed) *European Identity and the Search for Legitimacy* (1993: Pinter/Royal Institute of International Affairs, London) 154-171

[108] An example of a sub-national identity (claim) could be Flemish within Belgium, while an example of cross-jurisdictional identity could be given as the cultural region of the Basque Country (Basque: Euskal Herria, Spanish: País Vasco, French: Pays Basque). Note that this cultural region should be distinguished from the autonomous region of the Basque Country in northern Spain (Basque: Euskal Autonomia Erkidegoa, Spanish: Comunidad Autónoma del País Vasco).

[109] See chapter 2 for a discussion of multiple, non-exclusive, identity claims.

equivalent situation as regards legal "unity in diversity" within the EU, for example: right away we encounter difficulties with co-existence of laws within the same legal space, applicability at various levels, questions of jurisdictions, and so on and so forth. The character of law necessitates a clear ranking hierarchy of applicability and thus struggles with multiplicity, *but identity claims do not*. They can co-exist in situations of multiplicity – indeed, even to the extent of coping in situations of incompatibility – and it is this elasticity that would allow for an overarching European (Union) identity to exist in conjunction with those regional and national ones already formed. Instead of either a cultural deficit or surplus, therefore, one could point to the presence of a gap between what the EU requires the man on the street to feel about a European identity, and what that same man does, in fact, feel.

d) Law as an Agent of Integration: Juridification in the EU

To turn now to the other question posed above: what, if anything, could a common European identity or culture be based upon? What can be cognised as the "unifying and distinguishing concept"[110] at the heart of the European project? One possible option could be that of the European law. Ezra Suleiman has stated that:

> It is in the area of law that European states have made some of the most critical concessions of sovereignty and people are only now becoming aware of this. The political implications are incredible, because Europe seems bound to shift slowly from the project of an elite to more of a grass-roots thing.[111]

A quick glance at this library's[112] collection of case law from the European Court of Justice, the Court of First Instance and the Court of Human Rights is sufficient to confirm that the increase in the case traffic to both Luxembourg and Strasbourg has been exponential – to give a rough indication, while the European Court Reports from the years 1954-56 inclusive were contained within a single volume, by 1959 a single volume covered a single year, and two volumes were required soon after for each year from 1965 until 1979, which itself ran to three. Even that looks pitiful next to 1987's tally of six, but the inclusion of the Court of First Instance Reports in 1990 serve to boost the number of volumes required to house all the reports into double figures, with 1998 even managing a then-record of 16 tomes before being blown out of the water by 2002's hefty 25 volume showing.

While the growth in the size and ambit of the EU itself, via the ongoing accession of states and its ever-increasing geographical scope, can be cited as a factor in this inexorable rise of European court jurisprudence, it is in the reach and relevance of all aspects of European law that the real reasons can be found. Long perceived as being overly bureaucratic, impersonal and concerned with minutiae,[113] there is now arguably a

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[110] A. Williams, *supra* note 91 at 162

[111] This quote from Ezra Suleiman is taken from an article by Roger Cohen, "A European Identity: Nation-State Losing Ground" published in the *New York Times*, January 14, 2000. Retrieved 24/04/07 from http://www.globalpolicy.org/nations/citizen/eurcit.htm

[112] That of the European University Institute, Florence.

[113] A good example of this is the infamous "Brussels only wants straight bananas" sound bite peddled by UK Euro sceptics. While the Commissioners were clearly less keen on bendy bananas than they were on straight ones, as can be seen from Commission Regulation (EC) 2257/94, which provides that bananas must be "free from malformation or abnormal curvature", bendy ones have never been banned; rather they have been classified in terms of shape defects. However, seeing as no attempt is made to define what "abnormal curvature" in the case of bananas actually is, this appears somewhat futile.

palpable shift in the way that European law is being considered by European citizens, especially in terms of its relevance *to them*, mainly due to the ongoing process of juridification within the European Union.

The term "juridification" sees its foremost normative articulation and content in the "twin ideals of the rule of law and legally assured human rights",[114] although there are many overlapping and ancillary definitions. Although they concede that the term lacks a workable blanket definition, Lars Blicher and Anders Molander argue that there are, in fact, five possible "dimensions" of juridification, these being: constitutive juridification, juridification as law's expansion and differentiation, as increased conflict solving with reference to law, as increased judicial power, and as legal framing.[115] However, as it is both onerous and unnecessary for the purposes of this paper to mediate over each of these in turn, mention here will only be made of the second and the final dimensions.

The juridification process sees both the proliferation of written, formal law[116] relating to areas that were previously unregulated or untouched by the law as well as an increase in specificity regarding what these laws relate to. Jürgen Habermas refers to these two axes of juridification as being the *expansion* and the *densification* of (positive) law, because the term includes both:

> an expansion of legal provisions into the hitherto unregulated areas of social life and an increase in the density of law [, through which] process, general formulas, characteristic of the Rule of Law ideal, are broken down into particularised regulation.[117]

These axes have also been described in terms of horizontal and vertical differentiation,[118] whereby the former connotes the splitting of one original law into two or more in order to accommodate complexity, and the latter refers to the situation where the law is made more specific in order to maintain subtlety and to distinguish among similar cases. In essence, therefore, the law comes to penetrate and involve itself – to "colonise", as it were – within and across the entire public sphere. This can be seen nowhere more clearly than in the fifth and final dimension given above, that of law as "framing", which can be summarised as the increased tendency of people to think of themselves and others in terms of *legal* relationships and as being within a common legal order. In other words, this is the perception of individuals within the public sphere that they belong specifically to a "community of *legal* subjects with equal *legal* rights and duties", and where "individual and social well being is though of in terms of *legally*-based provisions" instead of social, private or political conditions.[119]

This burgeoning tendency is evident within the EU by virtue of the aforementioned increase in traffic to the European Courts; in essence, the Courts are coming closer to the ordinary European citizen, who is more than ever before of the opinion that these are forums within which their legal rights can be upheld. This, in turn, has an effect upon

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[114] L.C. Blichner & A. Molander, "What Is Juridification?" (2005) ARENA Working Paper 14 (March), Oslo: Centre for European Studies, at 4; see www.arena.uio.no

[115] *Ibid,* at 1

[116] J. Habermas, *The Theory of Communicative Action*, Vol.2, (1987: Boston, Beacon Press) at 357-9. "Juridification [*Verechtlichung*] refers quite generally to the tendency toward an increase in formal (or positive) law that can be observed in modern society".

[117] E. Christodoulidis, *Law & Reflexive Politics* (1998, Dodrecht: Kluwer) at 22; see also Habermas, *ibid*

[118] Blichner & Molander, *supra* note 114, at 14

[119] *Ibid* at 24. Emphasis added

the juridification "framing" process itself because European citizens have the means not only of having recourse to the European level but also of forcing their Member States to recognise these legal rights, which serves to tighten all the linkages among the simultaneously national *and* European citizen,[120] the Member State legal order, and the EU legal order. As Karen Alter outlines, "with individual litigants raising cases and national courts sending these cases to the ECJ, states are less able to exploit legal lacunae and interpret their way out of compliance with European law".[121] In this sense, the ongoing juridification process within the EU allows its own legal order to "define for itself the realm of its application, selectively bringing it into existence".[122]

However, this is all perhaps jumping the gun a little, for, despite the arguments given above, it is disputable whether such a "community of legal subjects" exists within the current European Union, even though legal provisions have been made both for citizenship and the EU's status as a legal order. A far more plausible conclusion would be that, in the absence of such a "community", it is actually the *aim* of the EU to engender one, and to utilise the law as an agent of such an endeavour, as *the* "unifying and distinguishing concept". The questions that present themselves here are: firstly, why is the law considered as being the means through which such a community could be achieved and, secondly, if the community of legal subjects requires a common European identity at its foundation, what could this foundation be?

The juridifying capacity of human rights discourse should here be brought into consideration, for human rights can be considered in two ways: for a start, it is arguably the field of human rights that is of most relevance to the European citizen, but what should also be considered is that human rights have, since the very beginning of the European project, been an essential element within the promoted form of European identity: indeed, there has been a deliberate inclusion of human rights in the identity promulgated by the Community, almost from its very inception. Inherent to the notion of a "unifying and distinguishing" concept is that it has both an internal and an external character, and it is on the basis of this bifurcation that Andrew Williams approaches his critique: he argues that human rights discourse has been instrumentalised for the purposes of the integration process by means of two separate attitudes towards identity. As Williams puts it, "internally, human rights developed in conjunction with a narrative that sought to construct an identity *with* the Community. Externally, the narrative was concerned with the identity *of* the Community".[123]

In essence, human rights discourse was harnessed as a beacon around which Community feeling could coalesce, while also being situated so as to provide an undeniably positive moral basis for the European project. The fact that any shared and common heritage in Europe embedded in the respect for human rights is, quite simply, mythical has not seemed to hamper the waves of enthusiasm that rise up to perpetuate it, in both Commission declarations and Court Judgements alike.[124] Even back when it was taking

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[120] One problem to be considered here is that, under this conception of juridification as legal framing, there could be no possibility of a dual or joint *legal* identity; the concept of a citizen would be able to accommodate both, but it is questionable whether a "legal" subject could be subject to more than one legal order or regime. This, however, is a question for another day.

[121] K.J. Alter, "The European Union's Legal System and Domestic Policy: Spillover or Backlash?" in (2000) 54 *International Organisation* 3, at 2000, para 492

[122] Christodoulidis, *supra* note 117, at 97

[123] A. Williams, *supra* note 91 at 179

[124] The 1973 Declaration of European Identity saw the "determination" of the nine Member States, as they were then, to "defend the principles of representative democracy, of the rule of law, of social justice —

its first, tottering steps, the European project was being cognised as more than a material, economic undertaking; the underlying political ambitions saw both human rights and the rule of law as playing fundamental roles in bringing about (or rather rediscovering, as the Commission would have it) a popular European identity, through which the Community could take both legitimacy and character.

As the discussion of juridification above shows, this reliance on the law is nothing unusual in modern day society, although it is questionable whether this is a positive development. Paul Campos comes up with the witty "jurismania"[125] as a term for what he sees as an affliction of society, while Peter Goodrich goes as far as to refer to this reliance as the "modern addiction to legal form", stating that "it represents both a normalisation and a confinement or depoliticisation of social relationships, a colonisation of everyday life that brings the malaise of law into ever-further aspects of cultural life".[126] The colonisation of the EU social sphere by EU law has extended certain rights and duties to European citizens and, as a result, changed the very nature and reasoning of public discourse within its borders.[127] This utilisation of a rights discourse (among others) can be seen not only as an attempt to attenuate existing links between the national citizen and the Member State and replace them with a "feeling of belonging to a *Gemeinschaft* with a common destiny, common beliefs and common values"[128], as explained above, but, more than that and as can be seen from the increase in the Court jurisprudence, it exhibits a penetration of the social by the legal, the legal being a mechanism functioning in order to perpetuate itself.

The calamity here for the European Union is twofold. First, there is, quite simply, a paucity of alternatives that could be instrumentalised within the European integration process the way the law has been, while the second problem is that even the law, as this supposedly grand integrative mechanism, has its own problems in terms of integration, even in the comparatively small realm of cultural considerations. Integration through law (ITL) utilises the law as a tool for its purpose, as a means of achieving an end, but this approach overlooks the "law is … an object … of integration" component of Weiler and Dehousse's observation.[129] It is my argument that it is the Europeanisation of law *itself* that is conceptually problematic, and that this is the result of the necessity for law to be considered in terms of its socio-cultural context, namely the context of the Member State within which it is embedded.

3. The Europeanisation of Law within the EU

a) Legal Order(s): From Singularity to Multiplicity

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which is the ultimate goal of economic progress — and of respect for human rights" because "all of these are fundamental elements of the European Identity". Similarly, in the well-known case of *Van Gend en Loos*, the ECJ stated that "Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become a part of their national heritage". See Case 26/62 [1963] ECR 1, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, at 12

[125] P. Campos, *Jurismania: The Madness of American Law* (1998, New York: OUP)

[126] P. Goodrich, "Law Induced Anxiety: Legists, Anti-Lawyers and the Boredom of Legality", Review Article in (2000) 9 *Social Legal Studies* 1, 143-163 at 148

[127] Habermas, *supra* note 116 at 357

[128] E.A. Marias, "Mechanisms of Protection of Union Citizens' Rights", in A. Rosas and E. Antola (eds.) *A Citizens' Europe: In Search of a New Order*, (1995, London: Sage) at 208

[129] R. Dehousse & J.H.H. Weiler, *supra* note 53 at 243

When the jump is made from the national to the supranational level, cultural considerations force themselves into being acknowledged by means of casting undisputed processes and general "givens" at the (comparatively) unitary nation-state level in a new light. As I argued in the preceding chapter, the cultural or *contextual* is included in the very essence of the nation-state, and thus while the national can be seen as having a strong cultural foundation, the EU cultural basis, as has been demonstrated, is weak. The main point that I want to make here is that this state of affairs is not one that is questioned to any great degree when the analysis of law is undertaken at the *level* of the state: no-one queries the existence of a cultural or contextual aspect to the law because the analysis is only concerned with the law as it exists within those boundaries, within that specific legal order. To phrase it in another way, there is a cultural *underpinning* to the nation-state that conditions and affects it, and which is reflected in its legal order.[130] Due to the lack – purely at nation-state level[131] – of a comparative component to the analysis, the contextual is often taken for granted, with approaches and principles particular to that nation-state being cited as *the only way* of dealing with a specific legal situation or problem. Barring the undertaking of classical comparative analysis in this regard, it is only when the jump is made to the supranational level that the previously hidden legal-cultural considerations come to the fore; indeed, it is in terms of the debates on legal integration and the Europeanisation or harmonisation of law within the EU that they force themselves into the limelight. It is in this switch from unity to plurality, from singularity to multiplicity, from one legal order to many that the legal-cultural becomes an object not only of relevance but also of significance to legal sociology, and through which the conundrum of legal *unitas in diversitate* is introduced.

So what does this "jump" actually entail? Now that we have the supranational entity that is the EU, what happens to the nation-states that are members of this Union? Are they subsumed within a monolithic structure? Emasculated by unavoidable compromises, concessions and restrictions on their claims to sovereignty? Suffice to say that, contrary to many assertions that the emergence of the supranational level would terminally undermine the existence of the nation-state, it appears to be more robust and adaptable than expected. Despite being under pressure not only from the outside, in terms of the supra- and transnational forces such as globalisation and governance, but also from within with the assertion of sub-state, regional identities, the nation-state has endured and, contrary to any sweeping claims that we are now post-state or post-Westphalian, seems to be holding its place in the world order, albeit in a more interdependent, less splendidly isolated way than in its early post-war heyday.[132]

What is it, then, about this concept of nation-state, combining as it does nationhood and statehood, that appears to be so resilient? A willingness to alter its own form through pressure from the external and internal forces can be cited as a factor; the nation-state appears to have adopted the capacity to adapt, as can be seen in the reactions to assertions of sub-state regional cultures such as those that have manifest themselves in situations of, for example, both devolution and federalism. By changing the very definition of the "modern state", therefore, contemporary nation-states have

[130] This assertion is not to suggest that this is a phenomenon restricted solely to the nation-state, merely that it can be said to occur at this level. The next chapter will deal with this question in greater depth.
[131] In line with the above note, an obvious omission here is the existence of sub-state legal plurality and thus comparative endeavours undertaken on intra-legal order pluralism.
[132] N. Rollings & M. Kipping, "Private Transnational Governance in the Heyday of the Nation-State: the Council of European Industrial Federations (CEIF)" in 61 *Economic History Review* 2 (2008) 409–431

reconstituted themselves as something decidedly not Westphalian.[133] Also, and perhaps more interestingly, the dissolution of large and complex nations, such as the USSR and Yugoslavia, has resulted in the former component regions asserting themselves as nation-states, suggesting that the concept is, firstly, more malleable and, secondly, not as antediluvian as some have claimed.

Although a number of factors could be cited as contributing to this situation, culture can certainly be put high up any list – its importance as a unifying force has already been discussed in depth. Indeed, it is the perceived lack of a common European culture that leads to what could be called *deracinated law* at the supranational level – in comparison to the culturally-informed and contextual legal orders at the state level, the EU legal order has no such socio-cultural underpinning. That said, the EU neither purports to be nor (at least, any longer) aims to become a state comparable to its members, and so arguably has no real need for a cultural foundation upon which to establish its legal order. What, then, is the importance of including the legal-contextual within an analysis of the European project?

This chapter will argue that it is the indeterminacy inherent to the process of Europeanisation of law that forces considerations of legal *unitas in diversitate* to the fore. In light of the demise of the unificatory drive that operated under the banner of "ever closer Union", the difficult concept of "unity in diversity" has come to occupy the vacancy, with the result that not only the process but also the endpoint have been cast into doubt. Indeed, in the sense that it concerns the existence and maintenance of a multiplicity of legal orders in existence within one legal space, legal "unity in diversity" can be understood as being *both* a precondition for the process of the Europeanisation of law *and* its default aim. The Europeanisation of law, with law as an *object* of integration within the EU, is thus an important area of analysis; however, leaving the legal aspect to one side for the moment, the disputed and multi-faceted concept of "Europeanisation" itself should first of all come under some scrutiny.

b) What is Europeanisation?

Part of the confusion relating to the "fuzzy concept"[134] of "Europeanisation"[135] is the different approaches to it across different disciplines, as it is contested in terms of both its focus and its ambit. It is not a term that is restricted purely to an analysis of law, but rather has its main articulation in the field of political science, specifically that of comparative politics. There are numerous definitions in existence – after all, Europeanisation is still contested – and it has even been suggested that this "considerable

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133 M. Burgess & H. Vollaard, *supra* note 85, at 275

134 M. Jachtenfuchs. & B. Kohler-Koch, "Governance and Institutional Development" in A. Wiener & T. Diez (eds) *European Integration Theory* (2004, Oxford: OUP)

135 J.P. Olsen, "The Many Faces of Europeanization" in (2002) 40 *Journal of Common Market Studies* 5, 921-52. Olsen's chosen spelling, like that of many other scholars, is "Europeanization" with a "z", but I have opted to use the British "s" form. Call it a cultural influence (although I am aware that this standpoint is not supported by the OED, who argue that: "[T]he suffix..., whatever the element to which it is added, is in its origin the Gr[eek] *-ιζειν*, L[atin] *-izare*; and, as the pronunciation is also with *z*, there is no reason why in English the special French spelling in *-iser* should be followed in opposition to that which is at once etymological and phonetic.") Both appear to be acceptable, however; see for example C. Joerges, "Europeanization as Process: Tensions Between the Logic of Integration and the Logic of Codification" in (2005) 11 *European Public Law* 62-82; and F. Snyder, *The Europeanisation of Law* (2000, Oxford: Hart). Also, an online search of amazon.co.uk in early February 2009 showed some 117 titles using the "z" form and another 105 preferring the "s" form. For the sake of consistency in the main text I will change all "z"spellings to the "s" form, while staying true to the given title in my referencing.

conceptual contestation"[136] may in fact be more trouble than it is worth.[137] Nevertheless, far from an abandonment of this concept, there has actually been an tenfold increase in the literature over the past decade,[138] with much of it attempting to bring some coherence to this "disorderly field"[139] and delimit the term on the grounds of its utility for particular disciplines.

Johan Olsen distinguishes between five different usages of the term "Europeanisation" in order to delimit the separate phenomena that it refers to, these five being: (i) changes in external boundaries, (ii) developing institutions at the European level, (iii) central penetration of national systems of governance, (iv) exporting forms of political organisation, and finally (v) a political unification project.[140] For the purposes of this thesis, the third and fifth usages are the most pertinent as they relate most obviously to the "unity in diversity" conundrum; while the latter concerns itself with the possibility of Europe becoming "a more unified … political entity' and looks at "territorial space, centre-building [and] domestic adaptation", the former relates to:

> [t]he need to work out a balance between unity and diversity, central co-ordination and local autonomy. Europeanisation, then, implies adapting national and sub-national systems of governance to a European political centre and European-wide norms.[141]

To phrase it simply, "Europeanisation" in this sense means those changes at the domestic level that have been engendered by European integration.[142] This application, which takes as its predominant focus the changes in domestic institutions caused by the evolution and increased reach of the European-level institutions and identities, has been described as the most common use of the term "Europeanisation".[143]

While the majority of early studies undertaken in this specific field were empirical and related to the effects of European level action upon policies and conduct at the domestic level, there have more recently been those that take as their focus the *implementation* at the domestic level of European policies, undertakings that have undoubtedly enriched the study of European integration.[144] Claudio Radaelli, who draws on Ladrech's definition of Europeanisation as a process, gives a more all-encompassing definition than Olsen does, arguing that the term refers to:

> [P]rocesses of (a) construction (b) diffusion and (c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the making of EU decisions and then incorporated in the

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136 M. Vink, "What is Europeanization? and Other Questions on a New Research Agenda", (2003) *European Political Science* 3(1): 63-74 at 63

137 Olsen, supra note 135

138 See the introduction to this investigation, and also P. Mair, "The Europeanisation Dimension" in (2004) 11 *Journal of European Public Policy* 2, 337-348 at 337-8

139 Olsen, *supra* note 135 at 922

140 Olsen, *ibid* at 923-4

141 *ibid,* at 923-4

142 M. Vink, *supra* note 136 at 63

143 Olsen*, supra* note 135 at 932

144 C.M. Radaelli, "Whither Europeanization? Concept Stretching and Substantive Change" in (2000) 4 *European Integration Online Papers (EIoP)* 8, http://eiop.or.at/eiop/texte/2000-008a.htm, at 3-4 pdf.doc

> logic of domestic discourse, identities, political structures and public policies.[145]

While this definition has been recognised as being too wide to serve as a clear definition of the term, its strength is that it includes within the concept a recognition of the importance of the underlying structures and identities of the Member States[146] instead of restricting its focus purely to political and policy reactions. Indeed, despite the breadth of his definition, Radaelli also endeavours to delimit the term "Europeanisation" and distinguish it from those suggested synonyms of convergence, harmonisation and integration. Convergence, first of all, cannot be equated with "Europeanisation" because, he argues, it is the *consequence* of a process instead of being a process in itself. Another consequence of the process of Europeanisation could just as equally be divergence – there is nothing to suggest that the outcome of the process is predetermined.[147] On the other hand, harmonisation, Radaelli argues, while also being a process, is one that results in a different consequence from that of Europeanisation – the harmonisation process produces a "level playing field", while the Europeanisation process has no specificity in its outcome, and can also give rise to divergence and distortions.[148]

Both of Radaelli's reasons given above aid my own analysis, as terminology denoting 'merging' is antagonistic to the notion of 'unity in diversity'. Indeed, one of the attractive features of the concept is that is refers to a process without conditioning the outcome of that process. Similarly important is the recognition of separate structures and identities at the level of the Member State within the definition of Europeanisation – thus far, we are in complete agreement. However, Radaelli's third delimitation, that of integration from Europeanisation, is somewhat problematic; as Radaelli constructs it, while Europeanisation could not exist without European integration, it cannot be equated with integration because the latter concept:

> belongs to the ontological stage of research, that is, the understanding of a process in which countries pool sovereignty, whereas [European-isation] is post-ontological, being concerned with what happens once EU institutions are in place and produce their effects.[149]

To reiterate, the strength of the concept of Europeanisation, despite its breadth, is that its post-ontological character brings more to the debate than classical theories of integration do on their own. By these I mean those on European integration, intergovernmentalism[150] and neo-functionalism[151]; while these simply focus upon both formal and functional relationships at the EU level and adopt a "top-down" approach,

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[145] *Ibid* at 4

[146] Here it should be noted that the concept of "Europeanisation" need not only refer to *Member State*s but can also be applied to non-Member States such as Switzerland, Norway, and aspirant members in Central and Eastern Europe; see, for example, A. Mach, S. Häusermann & Y. Papadopoulos (eds), "Economic Regulatory Reforms in Switzerland: Adjustment without European Integration or How Rigidities Become Flexible" in (2002) 10 *Journal of European Public Policy* 2, 302-319; and H. Grabbe "How Does Europeanization Affect CEE Governance?: Conditionality, Diffusion & Difference" in (2001) 8 *Journal of European Public Policy* 6, 1013-1031.
However, for the purposes of this thesis, the analysis will be restricted to Member States only.

[147] C.M. Radaelli, *supra* note 144, at 6

[148] *Ibid*, at 7

[149] Radaelli, *supra* note 144, at 6 pdf.doc. It should be noted here that Radaelli is talking about, specifically, *political* integration.

[150] A. Moravcsik, (1993) and (1998)

[151] E.B. Haas, The Uniting of Europe (1958, Stanford: Stanford UP)

Europeanisation brings the national, domestic level into the mix,[152] and seeks to problematise the interaction between the levels in a more reflexive, circular way.

c) Law as an Object of Europeanisation

For the purposes of a law-focussed investigation, the political science concerns of politics and policy-making fall away (to a certain degree), allowing us to concentrate on law as an *object* of the Europeanisation process. This, is should be noted, is not conceptually comparable with European *legal* integration, although these terms are often conflated; rather, the study of the Europeanisation of law can be said to concern itself not only with the "principal legal effects of European integration"[153] but also with the ongoing *process* in itself, the way that actions at the European level can affect and influence, albeit possibly not deliberately,[154] reactions at the level of the Member States.

Raedelli argues (albeit in terms of policy) that this conflation of process and consequence under the term "Europeanisation" is problematic, but this would only become a stumbling-block were the process not an *interactive* one: the term "Europeanisation of law" can be used to refer to both the *process* itself and the results generated by it, which – be they either intentional or unforeseen – are automatically retained within the operations of the process and relied upon in a reciprocal process of adaptation. The Europeanisation of law can be conceptualised and discussed on the meta-level as "a process juridified by principles and procedures which organise the interact[ion] between political actors and courts at different levels of governance, as a *Recht-fertigungs-Recht* (Wiethöltner), as a law of law-making (Michelmann)",[155] in addition to being a term that can be used to describe the actual results of the process, in the sense of law being "Europeanised". The process of Europeanisation can thus be conceptualised as one of social learning, a *reciprocal* process that embodies the interactions between the domestic and European levels of law. The shared causal agency that characterises the process of Europeanisation of law also serves to bring considerations of legal *unitas in diversitate* to the fore.

As such, this investigation deliberately utilises the term and concept of "Europeanisation [of law]" in order to avoid the inclusion of an eventual endpoint to the process; it is this lack of any single ultimate aim, of any sense of completion or *finalité*, that makes it the optimum term to utilise in conceptualising the contested and fragmented European project. Indeed, it is predominantly on the basis of this reasoning that the term "Europeanisation of law" is favoured over that of "legal integration", which, despite insistence that it is a neutral term and while clearly being a more dispassionate term than both harmonisation and convergence, still has inherent and unavoidable connotations of amalgamation.[156] Similarly, it is on these grounds that I would reject Hugh Collins' claim that the Europeanisation of law concerns "the establishment of important, albeit limited, supranational competences, the disintegration of private law institutions from their

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152 S.S. Andersen, "The Mosaic of Europeanization" in (2004) ARENA working papers, 04/11

153 F. Snyder, *The Europeanisation of Law* (2000, Oxford: Hart) at 4

154 This is an important point and will be dealt with in more depth later in this chapter.

155 C. Joerges, "Europeanization As Process", *supra* note 135 at 77

156 Whether the terms "convergence", "harmonisation", "integration" or "Europeanisation" are used, it should be noted that these are more than mere semantic considerations: the terminology utilised is vital in ascertaining exactly what is intended by each suggestion or analysis. See the introduction for a discussion of the selection and rejection of specific terminology.

inherited institutional environment, [and] the disintegration of national legal orders",[157] because this conceptualisation limits the ambit of the concept of Europeanisation to a straightforward top-down approach; approaching the Europeanisation of law wholly from a "'top-down rather than bottom-up perspective'… fail[s] to recognise th[is] more complex, two-way causality of European integration".[158] The main characteristics to be borne in mind as regards the Europeanisation of law are that is is: an ongoing (no *finalité*), reciprocal (between the domestic and European levels of law), contingent process of adaptation.

This study of the Europeanisation of law concerns, fundamentally, the tension stemming from the situation of legal *unitas in diversitate* within the EU; considerations of law-in-context cannot simply be ignored in this situation, the reason being that it is the context that *informs* the interpretations and understandings of law within a Member State. This contextual quality of law can be articulated and explained in terms of Member State "legal culture", which will be the focus of the next chapter of this investigation.

[157] H. Collins, "European Private Law and the Cultural Identity of States" in (1995) 3 *European Review of Private Law* 353-365, quoted in C. Joerges, "European Challenges To Private Law" in (1998) 18 *Legal Studies* 146-66 at 152

[158] Vink, *supra* note 142, at 7 pdf.doc; for the reasoning behind this quotation, see T. Börzel, "Towards Convergence in Europe? Institutional Adaptation to Europeanization in Germany & Spain" in (1999) 37 *Journal of Common Market Studies* 4, 573-596 at 574

Chapter 2: **Wherefore Legal Culture(?)**

[Culture] is one of the worst notions ever invented.
- Niklas Luhmann[*]

Taken out of context I must seem so strange.
- Ani DiFranco[**]

1. Legal Culture: Competing Definitions

There has already been frequent mention of the term and concept of "legal culture" throughout the introduction and preceding chapter but, as yet, there has been little or no attempt to provide a definition. This chapter shall aim to address this, and also to clarify exactly what is meant by the specific utilisation of the term "legal culture" instead of the more immediately obvious options of, for example, "legal order" or "legal system". The latter is certainly a more straightforward undertaking than the former: to put it succinctly, the term "legal system" is too widely associated with systems-theoretical approaches to be anything other than confusing when employed within an investigation (such as this) that relies heavily on operations of differentiation, both functional and otherwise; whereas "legal order", in all its detachment, fails to convey an understanding of the law in *context* and rather restricts its application to what is commonly known as "black-letter law" or, alternatively, law-in-books.

It is this epistemic shift from a purely formalist conception of law to a more nuanced law-in-context one that the deliberate use of the term legal culture is meant to indicate;[159] however, this is not the only reason. The inherent flexibility of the concept of legal culture is also important here: its malleability in terms of both the unit it is applied to and the evolutionary capacity of that unit is a vital facet and one that serves to make it the optimum concept to employ with regard to the contested process of Europeanisation of law. That is not to say that is becomes a catch-all term; on the contrary, and as this investigation will exhibit, legal culture is conceptually strengthened by limitations upon its applicability. Nevertheless, it can be stated that the elasticity of the concept makes it a more useful element within the contingent process of Europeanisation of law than any of the alternatives due to the fact that it provides for an understanding of how law actually functions within a given society.[160]

Before, however, an attempt is made to delimit and define legal culture, however, and prior to any discussion of its *legal* aspect, some attention should be paid to the other variable within the term, namely that of culture, and to its attendant themes of identity – both individual and collective (or communal) – sameness and difference.

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[*] N. Luhmann, *Die Kunst der Gesellschaft* (1995, Frankfurt/Main: Suhrkamp)
[**] A. DiFranco, "Fire Door", *Living in Clip* (1997)

[159] Those more other alternatives, namely "legal consciousness", "legal ideology", "legal tradition", "legal *mentalité*" and "legal episteme", to name but a few, will be discussed throughout section 3 of this chapter.
[160] A. Watson, "Legal Culture v. Legal Tradition" in M. Van Hoecke (ed) *Epistemology and Methodology of Comparative Law* (2004, Oxford: Hart) 1-6 at 4

2. Culture, Identity, Difference

a) On Culture

This section is not intended to reiterate statements made in the previous chapter, which investigated the propensity of culture to be harnessed as a tool for the furtherance of political and ideological objectives within the framework of the recent and contemporary EU. While these observations are important to the overall analysis, their focus on the instrumentalist utilisation of cultural specifics for policy purposes meant that the concept of culture escaped without critique; this section will endeavour to clarify some of the main themes inherent to this concept.

There is no shortage of definitions of "culture", although it could be said that a definitive one is lacking. The difficulty with the concept is not so much that it is indefinable, but more with actually relying on or utilising it as an analytical tool. While "culture" can, in essence, be reduced to "that which is socially rather than genetically transmitted"[161], this definition provides very little actual purchase. The catch-22 here appears to be that supplementing it with additional information also serves to undermine it, giving rise to numerous and conflicting interpretations. A good example of this can be seen in the definition of culture given recently by Pierre Legrand:

> "Culture" refers to a horizon of intelligibility within which a constellation of (often unexplicitable) world-defining dispositions allowing for responses to situations and for the effectuation of discriminations manifest themselves.[162]

This definition explicitly draws attention to other concepts inherent to that of culture; namely, the processes of perception, interpretation, and selection, as well as considerations of identity and, therefore, similarity and difference. As was already discussed in chapter one, the recognition of sameness and/or difference is essential to identity construction, which in turn is intrinsic to the creation and maintenance of a culture based upon shared understandings, values and practices within it, and counterposed against perceived differences that exist outwith.

b) On Identity

Identity is both the basis for and the result of all of these processes operating within culture, while in fact also taking the form of an ongoing process itself: continuously self-referential and continually reaffirmed or renegotiated on the basis of external information being inserted into that process. In that it is the foundation of these processes, it can be said that identity is never a blank canvas at the outset, but is constructed in the social by the social. This basis then influences the ongoing processes of perception and interpretation of and selection from the social, processes which continually refine identity. This conceptualisation could arguably be placed in direct opposition to Aulis Aarnio's assertion that a necessary condition of identity is permanence, that "if everything is in constant motion, there are no fixed points on which experiences of

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[161] A. O'Hear, "Culture," in E. Craig (ed.), *Routledge Encyclopedia of Philosophy* (1998, London: Routledge). Retrieved May 12, 2005, from http://www.rep.routledge.com/article/S016SECT1

[162] P. Legrand, "Antivonbar", in (2006) 1 *Journal of Comparative Law* 1, 13-40 at 17

identity could be formed,"[163] but I would submit that this ongoing process is also one that operates around a core, one that is both stabilised and adapted by these operations. In addition, certain components of identity could be postulated as having a degree of permanence: gender, for example, or race or nationality.

It is vital that identity be conceptualised as being both a conglomeration of separate components and as an ongoing process of continual affirmation or rejection of these components in light of new information. Take, for instance, the notion of nationality. For many of us – I daresay the majority – our nationality is something we consider to be part of our identity: most of us are born into a certain nationality and few of us ever change it. Within nationality, however, there are internal distinctions that any individual can make that have a bearing on their own identity, be these distinctions based on ethnicity, regionality, dual-nationality, long- or short-term residence, languages spoken, religion, general practices, or any number of similar influences. The result of this is that, while a person is able to identify themselves as a national of a country, something we initially have no control over, this nationality is only ever a component of that person's actual identity, because "influence is not the same thing as complete determination".[164] Individual identity, therefore, can be posed as a question of relational self-comprehension, which not only asks "who am I?" but also situates this inquiry relative to considerations of "who" or "what am I *not*?".[165] By implication, those distinctions are recognitions of difference, quite simply because "establishing the self as self requires distinguishing it from something else".[166]

An individual's identity is, of course, different from *communal* identity or, rather, the identity of a "community"[167], whatever basis it is constructed upon: because communities can have any particular shared feature as their basis, an individual can be a "member" of any number of communities and thus of the culture(s) that these represent. However fragmented or conflicting an individual's identity may be, it is necessarily a *unity*, whereas community identity is, to all intents and purposes, both selected and constructed: effectively, "the identity…of any culture is thus aspectival rather than essential".[168]

Community identity, by its very nature, is dependent on linkages among individuals who recognise that they have something in common with other individuals; in effect, individuals who "'identify" with each other on the basis of some perceived similarity. An individual can be involved in many communities, which in turn can overlap, interlock or even be at variance, based upon that individual's specific identity, although it should be stated that the commonality of community in no way excludes other differences among those who share it. Nevertheless, participation in a community, which occurs, as stated above, through the processes of perception, interpretation and selection, means that the identities of the individual and of the communities within which they participate become interwoven.

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[163] A. Aarnio, "Who Are We? On Social, Cultural & Legal Identity" in T. Gizbert-Studnicki & J. Stelmach (eds) *Law & Legal Cultures in the 21st Century: Diversity & Unity – Plenary Lectures* (2007, Warszawa: Oficyna) 133-147 at 135

[164] A. Sen, *Identity & Violence: The Illusion of Destiny* (2006, New York, London: W.W.Norton) at 35

[165] More simply put: "without some others there is no identity". See M. Van Hoecke, "European Legal Cultures in a Context of Globalisation" in T. Gizbert-Studnicki & J. Stelmach (eds) *Law & Legal Cultures in the 21st Century: Diversity & Unity – Plenary Lectures* (2007, Warszawa: Oficyna) 81-100 at 82

[166] Z. Bańkowski & E. Christodoulidis, "The European Union as an Essentially Contested Project" (1998) 4 *European Law Journal* 4, 341-354 at 352

[167] For the sake of clarity, I deliberately use the term "community" instead of "culture" here.

[168] J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, (1995, Cambridge: CUP) at 10

In his work on identity, Amartya Sen uses the terms "category" and "membership group"[169] in the sense that I use "community". He draws attention to what he sees as being two distinct issues of identity: firstly, the inherent *plurality* of identity, and secondly, the need to establish a relative hierarchy or *precedence* among these oft-competing categories and groups for the purpose of choosing between them when actual conflicts arise. Giving precedence to being a member of one specific category or group over another is heavily context-dependent; a particular social situation will determine what choice is finally made, and such selections can be either explicit or implicit, be influenced by external factors, and are not subject to any requirement of consistency. The particular social context dictates which identity *within* the plurality is given precedence: for example, German nationality would be important at a national football match, while Catholic identity would be important in church.[170]

These pluralistic notions of identity can also be described as "hybrid", "inclusive", "non-exclusive", and "reflexive" or, as Zenon Bańkowski calls it in relation to the European Union, "non-rivalistic" identity[171]. In terms of the European Union, Bańkowski argues against a rigid vertical model of identity in favour of a more regional, dynamic approach. This approach provides for an assertion of difference at a local level while also allowing for subsequent inclusion of that which is "different" based upon a mutual commonality. For example: in order to recognise myself as being Scottish I am able to assert my Scottishness in contradistinction to my non-Englishness. However, as those two identities are at the same time both European; this implies an element of Englishness *within* my own identity as a Scottish European, which *cannot* be excluded. Any exclusion is precluded on the basis that the part to be excluded has already been incorporated, but the distinction still exists. In this way, identity itself can also be cognized as being like "interlocking normative spheres": overlapping and interpenetrating, multi-layered and non-hierarchical. Bańkowski's counter example is that of a Russian doll[172], where a small component part exists within a larger part, which is in turn within an even larger part in a hierarchical construction. This brings to mind the old school game where you wrote your address in your books as being: Burns Road, Greenock, Inverclyde, Scotland, United Kingdom, Europe, The World, The Universe, and so on: however entertaining it may be, it is this strictly vertical conception of identity that, Bańkowski argues, should be jettisoned in favour of a more horizontal, nuanced one.

This counter-example does provide some food for thought, however. A regional approach, namely one that does not use a Member- or nation State as its basis, forces the question: at which point is a line drawn? Basically, how far along can this argument be taken and, if it can be taken further, what does it tell us? Merely that commonly-held identity is fundamentally reducible to being individual identity: not exactly a striking observation given that this, as explained above, is always the starting point. Similarly, to stretch the given example in the opposite direction, what use is this horizontal, interlocking approach to identity for those that do not have their "European-ness" in common? In this sense, also, is European identity cognised as being linked to European Union membership? Does someone defining themselves as French European, for

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169 A. Sen, (2006) *supra* note 164 at 19

170 This is not to suggest that this prioritisation of identity claims is a straightforward one, but this is not an immediately important observation for this analysis.

171 Z. Bańkowski, *Living Lawfully* (2001, Boston: Kluwer), Chapter 10; see also, Bańkowski & Christodoulidis, (1998) *supra* note 166

172 Z. Bańkowski, *ibid*, at 201

example, by necessity have to exclude the Swiss because Switzerland is not an EU Member State? Similarly (but also to avoid the hot potato of discussing where Europe's boundaries are), another way of posing this question could be: is there a collective identity when there is no institution-based structure in place, be that institutional structure sub-state (for example, federal), national or supranational? To extend this thinking to a non-EU example, is there the possibility of a Japanese person identifying themselves as also south-east Asian, an additional layer of identity that would include within it South Korean identity? It appears that this construction encounters problems based on both the aspectival and fluid nature of identity that Bańkowski himself recognises as being positive aspects. That the concept of identity is inherently subjective and prone to alteration makes it, in the same way as that of culture, unwieldy as an analytical tool.

An additional consideration is, simply, the fact that assertions of difference undermine unity, but the recognition of difference is fundamental to identity. In discussions of identity, the notions of "effecting discriminations", making distinctions, distinguishing between standpoints or situations, and recognising difference all make frequent appearance. This is because, as has been outlined above, it is upon clusters of distinctions that identity is founded, assembled and refined, while the linkages that arise through recognition of similarities are only possible by virtue of a prior distinction having been made. Ultimately, inclusion is always-already precluded by the distinction that constitutes identity, and so "inclusive identity" is necessarily a misnomer.

c) Community Identity and Culture

As mentioned above, for many commentators culture is too wide and fluid a term to be considered as a utilitarian concept. Its constantly shifting contours and components make it nigh on impossible to define other than in its inspecificity: as Sarah Merry states, "culture is marked by hybridity and creolization rather than uniformity and consistency".[173] As such, the indication of component identities within a given culture is arguably of more conceptual utility than yet another discussion of the indefinability of culture itself; this section will focus on the non-exclusivity of identity within such contextually-conditioned communal constellations as can be loosely equated with cultures.

The communal or community identities that arise as a result of this recognition of differences and commonalities have often been referred to as "cultures". For the sake of clarity I have deliberately not used the term 'culture', as I think it distracts from the base definition given above; namely, that which is socially constructed. While this definition is solid, the fact that the term is used in two different ways, as both subject and object, can be confusing.[174] While the subject "culture" is, simply, a given social context, the object "culture" is similar to that of "community identity" or Sen's "membership group" and is a descriptive category. This latter, as-object usage of 'culture' would apply to an observable category of *identity*, such as German or Catholic, but *not* to a mere classification category, such as unemployed or Gemini.

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[173] S.E. Merry, "Human Rights Law and the Demonization of Culture (And Anthropology Along The Way" in (2003) 26 *Polar: Political & Legal Anthropology Review* 1, 55 at 69

[174] Alternative phrasing of this distinction could be "method" and "object", as the "as-subject usage" is simply a method of interpretation and analysis that includes social / contextual considerations. See D. Nelken, "Rethinking Legal Culture' in M. Freeman, (ed) *Law & Sociology: Current Legal Issues,* Vol.8, Chpt 12, 200-224 (2006, Oxford: OUP) at 205

By classification categories I mean those that, for all their distinctiveness, do not generate an identity *as such* because they lack the necessary social significance.[175] An unemployed person, or someone with the starsign Gemini, as stated above, are good examples of a clearly-defined but basically socially irrelevant categories. Like the examples given, these classifications are often of temporary duration or arbitrary construction and, unless specific social conditions arise under which they gain "contingent social significance"[176], they are not a source of identity. A discussion of how and when social significance arises will feature in the section on legal pluralism later this chapter. Before that, however, I want to pay a little more attention to this as-object usage, because I think there exists within it another distinction: namely, that the term "culture" is used in terms of *both* location *and* social-meaning. By this I mean that "a culture" can relate to a national, sub-national or regional identity, such as German, Bavarian and from Munich, to give an example (*i.e.* spatial), or it can relate to a socially-relevant situation (*i.e.* societal), within which there is an additional distinction. These socially significant components can be distinguished into the *ethnic*, such as a religion, race, tribe, class, and so on and so forth, and the *attitudinal*, such as opinions, ideas, practices and traditions.

It is due to the fact that this as-object usage can relate simultaneously to both the spatial and the social, thus resulting in a double-meaning, that James Tully can assert that "…cultures are not internally homogeneous"[177]: a pluralist approach to identity means that, in whichever sense the term is used, the other sense *cannot* be avoided or excluded. For instance, take the spatial "culture" of Scotland, which can be clearly defined in spatial terms but lacks any real homogeneity in the societal sense: there are multiple religions (plus denominations within those religions), various and mixed races, and even linguistic variations. Conversely, the societal "culture" of, for instance Catholicism, has no specific spatial relation but is rather one that spans the globe in a *network* form. The gap within which this distinction seems to play out is that created through the limitations of the classic state-based approach and the flexibility of the postmodern pluralist approach: in effect, the former is clearly insufficient but the latter loses its footing by allowing so many identity categories to construct culture. This (some may say) bold assertion is particularly relevant to considerations of law and thus will be dealt with in more depth later in chapter 3, specifically in relation to what I term "reductively pluralist" approaches.

The as-subject usage of "culture", on the other hand, appears at first to be much less complex: the subject "culture" can be described as being a particular social context: because meaning is attributed by the social, it gives concepts like borders and boundaries, races and religions, history and politics their context. Culture thus represents a shifting position, in that its meaning is different dependent on the context it is placed in.[178] It is the first order setting for the second order discussion of "culture" as object, and it will be discussed later in this chapter. However and in the meantime, the focus shall turn to "legal culture", which, as an expression in its own right, has suffered greatly due to the problems created by a conflation or muddling of the various different meanings cited above.

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[175] A. Sen, (2006) *supra* note 164

[176] A. Sen, *ibid*

[177] J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995, Cambridge: Cambridge University Press) at 10

[178] D. Baecker, "The Meaning of Culture" in (1997) 51 *Thesis Eleven* 37-51 at 44

3. 'Legal Culture'

In light of the discussion of the term "culture" in the previous section, the claim that "legal culture" is also difficult to define is a relatively safe and easy one to make. Indeed, it could be said that it is, in fact, an even more awkward concept to pin down because of the two variables; namely, the legal *and* the cultural. Certainly, even a tentative foray into the wealth of literature on the subject of legal culture is sufficient in establishing that the term "legal culture" means a variety of different things to different people, many of whom seek to employ it in a particular way.

That this is the case is not a new observation: indeed, the term itself has been heavily criticised, so much so that Lawrence Friedman recently stated that "[i]f those of us who talk about legal culture had a chance to rewind the tape … we might have chosen a different set of words".[179] Nevertheless, as David Nelken points out, that there are so many competing usages is evidence that there is a need for such a term,[180] although arguably the need is, in fact, for a number of clearly defined and separate terms. Indeed, a plethora of idioms, synonyms and alternatives have been utilised: "legal ideology", "legal tradition", "legal *episteme*" and "legal consciousness", to name but a few, but these have suffered from much the same confusion over usage as their antecedent.

As the cross-disciplinary character has often been cited as being a main contributing factor to this confusion, there have been calls for separate terms to be employed in discrete disciplines. However, with disciplines overlapping almost as much as the cultures being discussed, it appears that cultural anthropology, legal sociology, legal theory and comparative law, to name but a few, have to share their claims to both the term and the concepts behind it for the moment. That said, even when restricting the analysis to legal sociological and socio-legal approaches, which see legal culture as "the sum total of conditions that impinge upon the law's development and application",[181] there is little consensus in how the concept should be employed. This section shall aim to review some of the main definitions given for the term, the problems inherent to them, and the rare common ground that has been found.

What, then, can we consider to be a "legal culture" or, rather: what constitutes a "legal culture"?[182] Lawrence Friedman has been concerned with this question since 1975, which saw the publication of his book *The Legal System: A Social Science Perspective*, and it was he who coined the term. He describes legal culture as an "element of social attitude and value" and as referring to "those parts of general culture – customs, opinions, ways of doing and thinking – that bend social forces toward or away from the law and in particular ways".[183] This primarily idea-based formulation of legal culture is complemented by a behavioural aspect: "legal cultures are bodies of custom organically related to the culture as a whole".[184]

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[179] L.M. Friedman, "The Place of Legal Culture in the Sociology of Law" in Freeman, M. (ed) *Law & Sociology: Current Legal Issues, Vol.8* (2006, Oxford: OUP) Chpt 11, 185-199 at 189

[180] D. Nelken, "Rethinking Legal Culture' in M. Freeman, *Law & Sociology: Current Legal Issues, Vol.8*, (2006, Oxford: OUP) Chpt 12, 200-224 at 200

[181] V. Gessner, A. Hoeland & C. Varga, *European Legal Cultures* (1995, Dartmouth: Aldershot) at xvii

[182] Legal sociological definitions of "legal culture" abound: instead of attempting to cover all of them, this section will take selection of the most popular definitions and use those to outline the difficulties in putting the concept to use.

[183] L.M. Friedman, *The Legal System: A Social Science Perspective* (1975, New York: Russell Sage Foundation) 15

[184] L.M. Friedman, *ibid*, 194

The definition of legal culture that Friedman gives in his later work appears to jettison the behavioural formulation in favour of a purely ideas-based one, and to this he has remained constant. He built on the definition given above in his subsequent book, *The Republic of Choice*, stating that "legal culture refers…to ideas, attitudes, expectations and opinions about the law, held by people in some given society"[185] and he has maintained that definition throughout his work on the topic over the past 30 or so years: even as recently as January 2006 he identified legal culture as referring to "what people think about law, lawyers and the legal order; it means ideas, attitudes, opinions, and expectations with regard to the legal system".[186]

However, despite his own dedication to this definition, Friedman's use of the concept has on occasions not only been confusing but also contentious. This is not only because of the definition's own vagueness – it seems to focus on the circumstances under which a legal culture could be said to exist and on the effects that a legal culture could have upon a legal system – but also because the reader is usually uncertain as to what the definition applies. For instance, his initial view of legal culture appears to be a nation state-centric one, although this is somewhat vague: despite announcing that each nation has a distinctive legal culture,[187] he also states that each country or *society* has its own legal culture and, while there may be similarities, no two are identical.[188] Friedman does not explicitly clarify this position in his later work either: while there are frequent references to the legal system of a country, the terms "region" and "society" are also used repeatedly.[189] In fact, he has claimed that *every group* can have its own legal culture, without providing any elucidation of what he means by "group". The only conclusion to be drawn from these points is that *his* conception of legal culture is not one that does relate specifically to a polity with its very own legal institutions, personnel and processes, from which would follow the conclusion that he would not consider a legal culture as being necessarily tied to a nation state and, if anything, takes an *intrinsically pluralist approach*. Friedman also completely denies the existence of any autonomy of law,[190] rejecting even partial legal autonomy.

In keeping with this purely ideational formulation, Friedman draws an additional distinction between external and internal legal culture: while the "external legal culture is the legal culture of the general population, the internal legal culture is the legal culture of those members of society who perform specialized tasks".[191] This idea of legal specialists follows Savigny's classic conception of lawyers as interpreters of culture: indeed, Friedman considers only those societies that have legal specialists as possessing an *internal* legal culture. In light of this distinction, Roger Cotterrell has observed that the law "gains a peculiarly unassailable strength from being both arcane, esoteric knowledge and the assumed collective experience of the community (here meaning the nation, realm or people)".[192] This understanding of internal legal culture could be equated to that of a legal *epistemic community*, which denotes a constellation or network of knowledge-based experts. Within an epistemic community, these experts, usually professionals, have "recognised

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[185] L.M. Friedman, *The Republic of Choice: Law, Authority & Culture*, (1990, Cambridge, MA: Harvard UP) 213; see also at 4.
[186] L.M. Friedman, (2006) at 189; see also L.M. Friedman, *The Legal System: A Social Science Perspective* (1975, New York: Russell Sage Foundation) at 15-16.
[187] Friedman, (2006) *ibid*, at 209
[188] Friedman, (2006) *ibid*, at 199
[189] Friedman, (1990) *supra* note 185
[190] Friedman, (1990) *ibid*, at 3-4; see also Friedman (2006) at 186
[191] Friedman, (1975) *The Legal System: A Social Science Perspective*, at 223
[192] R. Cotterrell, "Law In Culture", (2004) 17 *Ratio Juris* 1, 1-14 at 7

expertise and competence in a particular domain and an authoritative claim to … knowledge within that domain"[193] – the domain in this sense being that of the law, although it could also be subject to subsequent internal differentiation into separate legal fields, such as labour law, commercial law, constitutional law and so on, each of which would be equipped with their own epistemic communities. After all:

> Is it really so counterintuitive to assume that, for example, environmental lawyers of different legal systems share more of a common frame of reference than they do with their compatriots who specialise in commercial law? That German and French defence lawyers have more in common with each other than prosecutors in their own culture?[194]

Indeed, and following from my earlier criticism of Friedman's somewhat vague definition of the *unit* of legal culture, it is arguable that these legal epistemic communities exist *outwith* the spatial parameters of their own legal order and in fact *transcend* territorial boundaries in order to make connections based on commonalities pertaining to a specific legal field.[195] But this is getting ahead of myself; this argument will be revisited in chapter 5 of this investigation.

Roger Cotterrell, unlike Friedman, has throughout his career discussed the concept of "legal culture" in a number of ways and has also opted to use various alternative descriptive terms, the first of which was "legal ideology". Although similar to Friedman's initial (ideational and behavioural) conception of 'legal culture' in that it can be described as "an overlay of currents of ideas, beliefs, values and attitudes embedded in, expressed through and shaped by practice," Cotterrell also viewed legal ideology as being "tied in a relatively specific way to legal doctrine".[196] His argument, along the same lines as Friedman's "internal legal culture", is that the ideas of legal professionals, be they lawyers, jurists or academics, delimit a topic area that can be examined empirically. As such, "legal ideology" is a more accurate term; however, as was mentioned above, these alternative monikers encounter their own share of problems and this one is no exception, mainly because it "requires us to justify our privileged position in describing other people's ideas".[197] This use of "legal ideology" instead of "legal culture" also draws attention away from "the permeability of law to social demands", which is more Friedman's interest, and focuses it upon the way in which "rules and values of law resist modification and thrive on inconsistencies".[198]

That said, Cotterrell's focus has always been more on the law-culture association than on a specific discussion of "legal culture" as such, and he has since moved away from the idea of legal ideology to considering the question of culture in terms of community. He states that: "what is encompassed by the vague idea of culture is actually the content of different types of social relations of community and the networks (combinations) in which they

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[193] P.M. Haas, "Introduction: Epistemic Communities and International Policy Coordination" in (1992) 46 *International Organization* 1 on *Knowledge, Power & International Policy Coordination*, 1-35 at 3

[194] B. Schäfer & Z. Bańkowski, "Mistaken Identities: The Integrative Force of Private Law" in M. van Hoecke & F. Ost (eds) *The Harmonisation of European Private Law (European Academy of Legal Theory Series)* (2000, Oxford: Hart)

[195] This is an important point and should be borne in mind throughout this analysis.

[196] Cotterrell (1997) "The Concept of Legal Culture", 21

[197] Nelken, (2006) "Rethinking Legal Culture' 209

[198] See D. Nelken, "Defining and Using the Concept of Legal Culture" in E. Örücü & D. Nelken (eds) *Comparative Law: A Handbook* (2007, Oxford & Portland, Oregon: Hart)

exist."[199] He also argues that the concept of "culture" itself is too imprecise to be of any *actual* use, and that a Weberian ideal-type construction of community is the "most powerful concept available to legal theory to help unravel the complexities of the law-culture relation."[200] Listing the four 'pure' types of community as being instrumental community, traditional community, community of belief and affective community, he relates them back to Weber's four pure types of social action: traditional, affective, purpose-rational and value-rational, claiming that this formulation facilitates linkages of law to "different kinds of need and problems associated with different kinds of social relationships".[201] This standpoint appears to be a substantial and welcome progression from his earlier ideas, especially considering that, in constructing the notion of "legal ideology", he had managed to give an equally unclear alternative to the vague concept of legal culture. In addition, his use of "community" and the idea of these communities combining in networks also provides a basis for consideration of legal cultures as existing within and alongside nation state legal orders, for "each type of community is not necessarily to be identified with any particular empirically identifiable social institutions".[202] This will be discussed in more detail in chapter 5 as regards *epistemic communities*.

The third main voice in this arena is David Nelken and, for him, "legal culture" is concerned with how "aspects of law are themselves embedded in larger frameworks of social structure and culture which constitute and reveal the place of law in society",[203] He also sees legal culture as a means of "describing relatively stable patterns of legally oriented social behaviour and attitudes"[204] and as a means of both avoiding and superseding the "tired categories" that are central features of comparative law, such as "legal families".[205] Nelken argues that understandings of legal culture should not just be restricted to the unit of the nation state, but that it should also be sought at both micro and macro levels, such as sub-state, regional, transnational, as well as in vertical constructions that are specifically discipline- or topic-related.[206] That said, he also seems to believe that the reports of the demise of the nation state as an analytical concept are exaggerated, that it is one "level" among many possible levels of legal culture.[207]

However, in trying to construct a definition of 'legal culture', Nelken yet again draws attention to the problems inherent to the meaningful utilisation of the concept. The main criticism faced by the concept of legal culture is that, because it "tends to be applied both to elements within a society and to whole societies composed of those elements, it easily ends up as an explanation of itself."[208] Those elements that contribute to legal culture he has identified as:

> [ranging] from facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms

[199] Cotterrell (2004) "Law In Culture", 1
[200] *Ibid* at 13
[201] R. Cotterrell, "Is There A Logic of Legal Transplants?" in D. Nelken & J. Feest (eds) *Adapting Legal Cultures* (2001, Oxford, Portland: Hart) at 82
[202] *Ibid*, 89
[203] D. Nelken, "Comparative Sociology of Law" in R. Banakar & M. Travers (eds) *An Introduction to Law & Social Theory* (2002, Oxford: Hart) 333
[204] Nelken, (2006) "Rethinking Legal Culture", *supra* note 180 at 204
[205] D. Nelken, "Using the Concept of Legal Culture" in (2004) 29 *Australian Journal of Legal Philosophy* 1-24 at 3
[206] *Ibid*
[207] *Ibid*
[208] Nelken (2006) "Rethinking Legal Culture", *supra* note 180 at 201

> of behaviour such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities.[209]

Indeed this, one of his own most recent definitions, probably sums up best the difficulty of actually *utilising* the concept; this almost certainly does not come as a surprise to those familiar with the spider's web that is definitions of "culture" itself. The ambiguities and conflicts that have been outlined in relation to each author discussed above are evidence of a lack of consensus in not only what a shared definition of "legal culture" would constitute, but also in terms of *what* the concept should be used for. That said, all of these authors at least make an attempt to define the concept – there are many who rely on the notion of "legal culture" without defining it, and thus contributing to the confusion surrounding it.

However, the main culprit for much of the perplexity about "legal culture" is, notably and somewhat ironically, the founding father himself, Lawrence Friedman. In addition to his definition[210] being somewhat weak, he has neglected to relate it to a specific *unit* of legal culture in the social sense: according to Friedman, entities that may have their own legal culture range from individuals[211] to groups of people, such as doctors, for example, to whole societies. While this no doubt stems from his denial of any autonomy of law[212], it must also be attributed to his own definition of the term: if "legal culture" can be constructed as being what people think about the legal system, then this is undeniably reducible to what *a single person* thinks about the legal system. Although this functions in terms of the as-object usage of *culture* given above, I would contest this undermining of the legal and the conflation of the cultural and the legally-cultural. By removing all institutionally-normative content from the law and thus designating that it simply reacts to social forces, Friedman's legal system is too "open".

The second major criticism of Friedman is his frequent employment of the term legal culture in relation to variables *as well as* to the aggregates of such variables,[213] for although Friedman "sees legal culture as a *cause* of 'legal dynamics', he also uses it to describe the *results* of such causes".[214] The causes of legal dynamics are those definition-dependent variables discussed above and so a "result" could effectively mean anything that stems from, for example, a commonly-held belief or attitude, a practice, or even a society, such as *Latin* legal culture[215], *global* legal culture[216] and *modern* legal culture[217]. His use of, for example, the term "modern legal culture" or, rather, the "legal culture of modernity"[218] to refer to western liberal attitudes and beliefs, such as gender, race equality and human rights, is so broad as to be well-nigh useless.

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[209] Nelken, (2004) 'Using the Concept of Legal Culture", *supra* note 205; see also *supra* note 180 at 204

[210] "Legal culture is what people think about law, lawyers and the legal order; it means ideas, attitudes, opinions, and expectations with regard to the legal system". Friedman, 2006, 189

[211] In light of this, how Friedman can claim, as noted above, that "internal legal culture is the legal culture of those members of society who perform specialized tasks" is completely beyond me.

[212] Friedman, 1990, 3-4; see also 2006, 186

[213] D. Nelken, "Rethinking Legal Culture", *supra* note 180 at 203. Emphasis in the original.

[214] *ibid*

[215] L.M. Friedman, *Legal Culture in the Age of Globalization : Latin America and Latin Europe* (2003, Stanford: Stanford University Press)

[216] L.M. Friedman, *The Horizontal Society*, (1999, New Haven, Connecticut: Yale University Press)

[217] L.M. Friedman, "Is There A Modern Legal Culture?" in (1994) 7 *Ratio Juris* 2: 117-31; see also (2006) at 196

[218] *Ibid* at 120

Cotterrell has pointed to the same stretching of the concept as being problematic, arguing that this "highly flexible" view of legal culture undermines its worth as a theoretical concept for the purposes of legal comparative sociology.[219] Put simply, the difficulties inherent to utilising this view of legal culture stem from the indeterminacy of both of the concepts "culture" and "legal culture": while wide, all-encompassing, heavily pluralistic definitions of "legal culture" are beautifully post-modern, they are analytically worthless for any concentrated legally-sociological undertaking because they lack any applicable rigour. As Jeremy Webber states, legal culture is in danger of being simply

> a superficially attractive but ultimately obfuscating concept, insisting upon interdependency but then cloaking that interdependency under the rubric of a single concept, doing nothing to tease out the specific relations of cause and effect within any social field.[220]

Webber's approach to the problem of conceptualising and defining legal culture is the final one that I want to pay attention to in this section, for he is one of the few scholars to not only recognise and highlight the tautology behind the interpretative approach to legal cultural explanations – that what is being explained is always-already included in the cultural itself – but also to attempt to provide a solution. In contrast to those approaches that treat culture as a "discrete explanatory variable" in order to ascertain what effect it has upon a particular situation or outcome, Webber explains interpretative approaches as ones which see these variables are elements of a complete whole, and aim to investigate the interrelations and interdependencies of these variables within the totality.[221]

Let me take Nelken's case of delay in Italian courts, also used by Webber, as the example.[222] In outlining the causes of delay Nelken places the blame squarely at the feet of Italian culture and thus the Italian legal culture, but then argues that additional causes for delay can be found in an interpretation of societal factors that have an influence upon the Italian legal system, whether directly or indirectly. This is as if to say that, while those things that comprise the legal culture are culturally based and thus contextual, by means of an analysis of the *context*, an insight into both the culture and legal culture. Webber asks the question here: "if the notion of culture already incorporates all the other influences that shape a legal system, doesn't it already contain the variables against which it is, ostensibly, being compared?"[223] The reasoning here appears to have gone full circle. Stretching the concept of legal culture undermines its applicability, while an interpretative approach finds itself interpreting that which has been constituted in the light of its very constitution. Webber argues that this tautology can be avoided if culture is treated simply as an image of the whole without there necessarily being a attempt to "extract a causal relationship between "culture" and the phenomena it purports to portray".[224] In essence, he argues for the *re-designation* of "culture" as social context by claiming that it is more of a "heuristic device" and less an analytical method.[225]

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[219] R. Cotterrell, "The Concept of Legal Culture" in D. Nelken (ed) *Comparing Legal Cultures* ((1997, Dartmouth: Aldershot)

[220] J. Webber, "Culture, Legal Culture and Legal Reasoning: A Comment on Nelken", in (2004) 29 *Australian Journal of Legal Philosophy* 25-36 at 28

[221] *Ibid* at 27

[222] D. Nelken, "Using the Concept of Legal Culture" in (2004) 29 *Australian Journal of Legal Philosophy* 1-24 *supra* note 205

[223] Webber, *supra* note 220 at 28

[224] *Ibid* at 28

[225] *Ibid* at 32: "The concept of culture is not so much a way of identifying highly specified and tightly bounded units of analysis, then, as a heuristic device for suggesting how individual decision-making is

The viability of this conceptualisation, among others, will be addressed in the next chapter. This chapter will focus, first of all, on the difficulties inherent to utilising contextually-informed conceptions of law in general analysis, and then turn its attention to those applications of legal-cultural concepts to the process of the Europeanisation of law.

conditioned by the language of normative discussion, the set of historical reference points, the range of solutions proposed in the past, the institutional norms taken for granted, given a particular context of repeated social interaction".

Chapter 3: **Against Culturally Reductivist Approaches to the Europeanisation of Law**

For what use are empty laws without traditions to animate them?
Horace, Odes, 3.24.36-7

It will seem strange, no doubt, that a thesis arguing the importance and inherence of culture to a legal order contains a chapter whose title starts with "Against Culturally Reductivist Approaches"[226], but this is not as contradictory as it may initially appear. By "culturally reductivist approaches" I mean those which claim that the law is fundamentally reducible to culture and as such privilege the cultural over the legal. The basic argument of these approaches is that, because law is inherently culturally specific, there exists in the European Union a much deeper incommensurability of law than any formalist would allow for[227], and that this is an insurmountable barrier to further the Europeanisation of law, even to the extent of denying that any real steps within this process have actually been taken.

Within this argument I have identified two main threads to be criticised in this chapter, these being: 1) reductively pluralist approaches, and 2) legal *mentalité*-based approaches. That these two threads criss-cross and overlap is not in dispute, especially as both have intrinsically reductivist tendencies; however, analysing them separately will, I believe, make the conclusions clearer. An additional distinction between these threads is that approaches under the former generally take a fragmented view of the notion of culture, while under the latter the approaches are more singular. This chapter will focus specifically on the meanings ascribed to the term "legal culture"[228] and on the relationship between law and culture. The first section will continue the discussion of the concept of legal culture embarked upon in the preceding chapter, while the second will critique perhaps the most intransigent approach to the Europeanisation of law, that of legal *mentalité*. I should note here that the first set of approaches, those I term "reductively pluralist" do not deal overtly with the process of the Europeanisation of law but rather provide an additional articulation of legal culture. As such, my critique deals with them *as if they were* involved in this debate, and argues against their main standpoint – that of a non-state-centric, pluralistic conception of law – *in terms of* the difficulties it poses for the Europeanisation of law process. The second set of approaches, within which the Legrandian perspective on legal *mentalité* is predominant, are more obviously set out in opposition to the very process of the Europeanisation of law and, as such, as subject to a more straightforward critique of their premises. The aim here is to elucidate the flaws within these arguments as they themselves stand; the more critical and valid points that they submit will feature within my arguments against "formalist" approaches to the Europeanisation of law in the subsequent chapter.[229]

Following these two sections of analysis, I aim to elaborate on the specifics raised in the previous sections by means of two case studies, which will focus upon, firstly, how a

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[226] An alternative was to term these approaches "purely culturalist" but, as they comprise a spectrum, this seemed problematic.
[227] These arguments will be outlined and criticised in the next chapter, entitled "Against Formalist Approaches".
[228] See the previous chapter "Wherefore Legal Culture(?)" for an analysis of the concept itself
[229] See chapter 4 section 3 for an application of Pierre Legrand's arguments *contra* "formalist" approaches to the Europeanisation of law.

particular legal *feature* can influence a legal culture and, secondly, the ways in which a particular legal *mentalité* within a legal culture conditions its functioning. In the final section I will then explain my own conception of legal culture as context, and argue that, while the culturally reductivist approaches are fundamentally flawed, there is a place for a contextually informed conception of law (and therefore legal culture) within the debate of the Europeanisation of law within the European Union (EU).

Study of the law-culture relation, as has been discussed above, is therefore a hugely varied and contested field where the connections between law and culture are often constructed and explained in many varied and conflicting ways, with:

> law sometimes appearing to be dependent on culture, sometimes dominating and controlling it; sometimes ignoring it, sometimes promoting or protecting it; sometimes expressing it, sometimes being expressed by it.[230]

It is of vital importance, however, that the duality of this relation be maintained, and that it be one of interaction and not of absorption, one side of the other. In light of this assertion, the explanation of legal culture that Jeremy Webber advances is particularly useful to my own analysis, especially in the next section, where I will argue against those reductivist approaches that diminish law into culture instead of aiming to achieve a balance between the law and its social context.

1. Reductively Pluralist Approaches

There are two grounds for a discussion of legal pluralism[231] in relation to the main argument regarding the Europeanisation of law within the constellation of the European Union and its Member States, and these are: firstly, the lack of a fixed spatial unit for a "legal culture", and, secondly, the absence of a definition of law and thus what is, in effect, being "Europeanised". A common thread running through the previous chapter is that many, if not all, of the authors discussed have a proclivity to sympathise with pluralist constructions, and with the notion of legal pluralism more specifically: Clifford Geertz is paradigmatic as he muses on the fact that "we should not be satisfied with a starting point based on "national legal cultures" in a world which has become 'a gradual spectrum of mixed up differences".[232] That this is the case is neither in doubt nor surprising, considering the plural nature of the concept of culture: the societal (*i.e.* identity-based, ethnic, epistemic and attitudinal**)** and spatial constructions given above suggest one type of plurality, while within the spatial there is also the added complication of which unit should be employed. The notion of a multiplicity of simultaneously existing cultures is what Tully calls 'interculturality'[233], by which he means that cultures overlap geographically, are interdependent in form and identity, and are involved in complex processes of interaction. In essence, his claim is that there is no fixed spatial unit for culture.

As has already been discussed in some depth, a concept of "culture" that is stretched to the extent of being nothing more than a floating signifier is of no analytical use whatsoever: by allowing "culture" to avoid denoting anything in particular is to render the concept empty.

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[230] R. Cotterrell, 2004, "Law In Culture", *17 Ratio Juris* 1 (March) 1-14 at 6

[231] For now Gunther Teubner's systems-theoretical approach to legal pluralism is specifically not included within (what) I call the general approach; systems-theory approaches will be considered in chapter 5.

[232] C. Geertz, *The Anthropologist as Author* (1989, Cambridge: Polity Press) 147

[233] J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995, Cambridge: CUP) 11

My complaint here is not with *plurality* as such: indeed, it is not my intention to, however, as Nelken puts it: "[presuppose] too high a degree of coherence within a culture, or [exaggerate] its separateness from other cultures or from global trends".[234] Rather, and more specifically, my disagreement is with the way that this usage of culture is absorbed within that of legal culture, which as a result (in the hands of certain authors) loses its *legally* normative content. Perhaps this is jumping the gun rather – a discussion of legal pluralism may serve to clarify this assertion.

Legal pluralism is the term used to cover a number of different perspectives on what actually constitutes *law*, and steps away from the notion that the state law is the only law. Indeed, this "false" ideology of legal centralism, which can be defined as the notion that "law is and should be the law of the state, uniform for all persons, exclusive of other law and administered by a single set of state institutions",[235] is what fundamentally unites all legal pluralists. It should be noted here that any use of the term legal pluralism is in its sociological sense: in effect, in reference to "a factual situation of multiple sources of binding rules"[236], and not its legal sense, which denotes and describes a positive law situation where different rules are provided for different groups within a population. In terms of legal sociology, legal pluralism is characterised not by "interculturality', as Tully puts it, but rather by "internormativity"[237] and "interlegality"[238], the notion that different forms of law exist in a constellation of interaction, interpenetration and interlinkage.

Within its basic argument, namely that "for any social field…behaviour pursuant to more than one legal order occurs",[239] legal pluralism can effectively be split into three types, the first being the acknowledgment of different legal orders *within* the unit of the nation state; secondly, the "open-ended concept of law that does not necessarily depend on state recognition for its validity"[240]; and finally, the coexistence of distinct but genuinely normative legal orders, such as the European Union and its Member States. The first "type", the sub-state construction, bears the additional description of "weak"[241] legal pluralism due to its fundamentally statist viewpoint, and effectively follows the legal definition of the term. On the other hand, "strong" legal pluralism focuses on the three major legal spaces of local, national and transnational, and the idea that: "the different forms of law create different legal objects upon the same social subjects".[242] It is the second, "open-ended" type of strong legal pluralism that will be discussed in this section.

In the same way that conceptions of legal culture tend towards the inclusion of legal pluralism, legal pluralism frequently relies upon cultural considerations as a basis for distinctions that it draws. For example, in what is possibly the most all-embracing formulation of legal pluralism on offer, Boaventura de Sousa Santos' definition sees him deconstructing society into six categories of social relations: domestic law, production law,

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234 D. Nelken, "Discloing/Invoking Legal Culture: An Introduction", (1995) 4 *Social & Legal Studies* 4, 435-452 at 444

235 J. Griffiths, "What Is Legal Pluralism?" (1986) 24 *Journal of Legal Pluralism* 1, 38

236 *Ibid,* at 60

237 G.W. Anderson, *Constitutional Rights After Globalization* (2005, Oxford & Portland: Hart) at 53

238 "Our legal life is constituted by an intersection of different legal orders, that is, by interlegality." B de Sousa Santos, (1987) "Law: A Map of Misreading" in 14 *Journal of Law and Society* 3 (1987)

239 Griffiths, (1986) *supra* note 235 at 2

240 A. Griffiths, "Legal Pluralism" in R. Banakar & M. Travers (eds) *An Introduction to Law and Social Theory* (2002, Oxford: Hart) 289-310 at 289

241 The weak/strong distinction within legal pluralism was made by John Griffiths, *supra* note 235 at 8

242 B. de Sousa Santos, *Towards A New Legal Common Sense* (2002, Cambridge: CUP) at 463

exchange law, community law, territorial or state law, and lastly, systemic law.[243] While the latter two can arguably both also take culture as their founding distinction, community law is the category with the most obvious cultural source. Indeed, Santos describes the diverse "community law" as something that:

> …may be invoked either by hegemonic or oppressed groups, may legitimise and strengthen imperial aggressive identities or, on the contrary, subaltern defensive identities, may arise out of fixed, unbridgeable asymmetries of power or regulate social fields in which such asymmetries are almost non-existent or merely situational.[244]

However, these broad and wide-ranging definitions are, in fact, representative of the inherent weakness of Santos' theory of legal pluralism, and have been criticised by, among others, Brian Tamanaha. The above definition comes in for specific criticism for lacking any *actual* meaning: on closer inspection it is in fact difficult to see what would be included by it, and what would not.[245] The concept of "interlegality",[246] therefore, encounters the problem of what to include, and so the question then becomes: if we enlarge our perspective regarding what constitutes law, where then should the line be drawn? It is as Sarah Merry said:

> Why is it so difficult to find a word for non-state law? It is clearly difficult to define and circumscribe these forms of ordering. Where do we stop speaking of law and find ourselves simply describing social life? Is it useful to call these forms of ordering law? In writing about legal pluralism, I find that once legal centrism has been vanquished, calling all forms of ordering that are not state law by the term law confounds the analysis.[247]

This problematic inability of legal pluralism to distinguish between legal and social norms leads us speedily to the next major hurdle for the theory, namely that, while it is straightforward enough to define the social, there is no agreed-upon definition of what constitutes the legal. In this regard, the difficulty is not so much with the existence of other normative orders alongside that of the state, but more with their claim to be *law*. The lack of consensus as to *what law is* is at the heart of this problem: until this situation is resolved legal pluralism will not have a solid foundation.[248] In essence, the difficulty for pluralist conceptions of law is that, having undertaken a successful search for culture "in the fragmented subsystems which make up modern society rather than [restricting it to]…the idea of national cultures",[249] the answer to the question of what constitutes the legal aspect appears simply to have been presumed and relied upon without proper exploration. Since the central thesis of legal pluralism is the denial that state law is the only law, that non-state forms can *also* be considered to be law, and that law is manifest in all forms of social control, there is nothing then to halt that slide.

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[243] See Santos (2002) *Towards A New Legal Common Sense, ibid* at 384-395, for a comprehensive account of what he means by these categorizations.
[244] *Ibid* at 434
[245] See B.Z. Tamanaha, "A Non-Essentialist Version of Legal Pluralism," (2000) 27 *Journal of Law & Society* 2, 296-321 at 303-4
[246] Santos, "Law: A Map of Misreading" (1987) *supra* note 238: "our legal life is constituted by an intersection of different legal orders, that is, by interlegality
[247] S.E. Merry, "Legal Pluralism," (1988) 22 *Law & Society Review* 869, 878-879
[248] Tamanaha, (2000) "A Non-Essentialist Version of Legal Pluralism," *supra* note 245 at 297
[249] Nelken, "Beyond the Metaphor of Legal Transplants?", *supra* note 234 at 284

The obvious problem this causes for any discussion of legal integration in the European Union is that it is, quite simply, unclear what the focus rests upon. A discussion of the Europeanisation of law within the EU is, fundamentally, reliant on there being a clear conception of *what the law is*: in the absence of that the exercise becomes merely empty rhetoric, a story without a subject. *What*, precisely, is being integrated? It is, as Tamanaha has said,

> legal pluralists are left with a definition that the legal includes the non-legal, while [being] unable to prove a certain standard by which we are to identify the distinctively legal (now in the broader legal pluralist sense) from the truly non-legal (those normative orders even legal pluralists would not want to call law)".[250]

Similarly, an equivalent difficulty arises when the question is inverted and what is asked, instead of which level or type of law is being Europeanised, is: what spatial unit is being used? In a sense, as the question is framed and informed by the very notion of the process of Europeanisation of law, it restricts any answer to the national, sub-national, or regional (in the cross-border sense). Nevertheless, as "interlegality" means that a number of legal orders can arguably have a bearing upon a given situation, it is unclear which of these "levels" would take precedence.

These problems are two sides of the same coin. Despite the fact that the Westphalian hangover is one that the EU is trying to break free from, the statist legacy can be said to be so deeply intertwined with our conception of law that attempting any separation of the two becomes hugely problematic. The absence of an adequate definition of what is meant by the term "law" once its state-law character is lost is exacerbated by the difficulty of identifying what constitutes a legal order when that concept is stretched to include non-state law.

Comparative law, more than any other discipline (or methodology), tends to take the nation state as the necessary unit of comparison and analysis. Many comparativists, in their work on the topic, have stuck to this statist approach in order to compare legal cultures as diverse as Turkey and Japan, for example, and even the work that has been done with a more European focus appears to have a nation state-centric slant to it; considerations tend to be of Italian or German or French "legal cultures". Of course, comparative law *requires* that there be a bounded or, at least, readily-identifiable unit so that the subjects of the comparison are clearly delineated, although whether that unit is necessarily a nation state depends on the type of comparative analysis being carried out.[251] However, comparative law also tends to utilise the term "legal cultures" when "legal orders" or "legal systems" would suffice: when the objects of comparison are two different state legal orders then the accentuation of the cultural aspect of law appears to be unnecessary. While "legal culture", as we have seen from the discussion above, *can* refer to a national legal system, it can also refer to a variety of other "legal" constellations. And this is the crux of the matter – if those legally-sociological definitions of legal culture, like Friedman's, that insist upon or emphasize legal plurality are relied upon, then its usefulness as an analytical tool is eroded,

[250] B.Z. Tamanaha, "The Folly of the 'Social-Scientific' Concept of Legal Pluralism" in (1993) *20 Journal of Law & Society 2*, 193-4

[251] See J. Hendry, "Contemporary Comparative Law: Between Theory And Practice" - Review of Esin Örücü & David Nelken's Comparative Law: A Handbook" in (2008) 9 *German Law Journal* 12, 2253-2262 at 2260-62

all because of the inability of the concept of legal culture to restrict itself to a specific cultural unit.[252]

This disagreement about "units" is evident in the literature on legal cultures, with the problematic always being identified as the same thing: the conundrum of unity in diversity inherent to the concept of legal culture and its effect upon the concept's explanatory utility. Nelken and Cotterrell have both highlighted this problem, but approach it differently: in his article on court delay in Italy, Nelken insists that unity can exist despite state-internal diversity,[253] while it's Cotterrell's assertion is that

> although such a variety of levels of super- and sub national units could in theory provide a rich terrain for inquiry, we must nonetheless reject the idea that legal culture can be reflected in "diversity and levels" whilst also having a "unity".[254]

So what, then, is the pull of the nation state as a unit, even for those fully-paid up and card-carrying supporters of cultural analysis? Is it simply that the statist baggage is difficult to jettison? That the ease of using the nation state as a "classificatory and reference concept"[255] makes the comfort zone of methodological nationalism a difficult one to exit from?[256] Or does the attraction of the state unit have more to do with the difficulties inherent to the alternatives?

Jeremy Webber[257] puts forward the most convincing explanation of this situation in terms of the notion of "institutions", by which he means those formalised structures and relations created by repeated social interaction. These institutions are not only a result of social interaction but also serve to focus it in specific loci and structures. Webber argues that, as a result, these institutions both produce and influence the character of those social practices that have a certain "density". The consequence of this is that:

> Institutional boundaries are therefore often used as rough approximations for cultural boundaries. Institutions, by structuring interaction, tend to generate cultures moulded to their contours. It is no accident, then, that Nelken ultimately fastens on the level of the state as his primary (though far from exclusive) level of analysis".[258]

The example that Webber is referring to here is Nelken's interpretative approach to the case of delay in Italian courts, as mentioned in the previous chapter. In this article Nelken states that, while all the regions of Italy have a varying severity of problems with delay, they

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[252] I should probably make it clear that I do not necessarily consider Cotterrell and Nelken's approaches to be reductivist or pure cultural approaches. Friedman's analysis is hugely reductivist, and Legrand could be tarred with the same brush, but the former two are engaged in a struggle with the difficulties of the law-culture relation. While both Nelken and Cotterrell follow the pluralist line to an extent, neither of them explicitly denies the autonomy of law in the way that Friedman does.

[253] D. Nelken, "Using the Concept of Legal Culture" in (2004) 29 *Australian Journal of Legal Philosophy* 1-24

[254] R. Cotterrell, cited by D. Nelken in (2006) 211; see also R. Cotterrell, "The Concept of Legal Culture" in D. Nelken (ed) *Comparing Legal Cultures*, (1997, Dartmouth: Aldershot) 16-17

[255] C. Joerges, "The Science of Private Law and the Nation State" in F. Snyder (ed.) *The Europeanisation of Law: The Legal Effects of European Integration*, (2000, Oxford & Portland: Hart) 47-82 at 49

[256] See the explanation given in the introduction as to why this investigation is not guilty of methodological nationalism.

[257] J. Webber, "Culture, Legal Culture and Legal Reasoning: A Comment on Nelken", in (2004) 29 *Australian Journal of Legal Philosophy* 25-36

[258] *Ibid* at 33

all have it *to some extent*, which gives Italy a high preponderance of court delays in comparison to other European Union Member States. The conclusion he draws from this data is that the Italian *legal culture* is more homogenous than many other aspects of national culture, and that this is a result of common rules and procedures, as well as aspects of institutional practice, being in place throughout the country. In effect, then, what has caused the homogeneity of the legal culture here is the existence of the institutions Webber describes. It is those "formalised structures" that channel social practice (in this case is the Italian legal culture) and accordingly have a standardising effect upon the legal culture that they frame and support. Normativity is engendered by and through these institutions because of the density of social practices that adhere to them. I would argue, therefore, that the inherent value of the nation state unit is the fact that its institutions provide a *institutionally normative framework* that allows for legally-cultural considerations to be identified.

Webber notes that Nelken uses the state level as the major but not exclusive level of analysis, which begs the question: what other levels can be used? As institutions are not only to be found in the possession of the nation state, there is still the possibility of a sub- or supranational analysis: however, the *institutions* are that which structures the given level as a unit of legal culture, so this construction necessarily places a restriction on the legally pluralist conceptions of legal culture by forcing them to adhere to a more normative structure. Therefore, a regional court district could arguably constitute a legal culture, for example, as could a federal state, but it is the overarching and homogenising influence of the state institutions that causes the state concept to be dominant as the spatial unit of legal culture. While the sub-national level appears to fit this model, the specifically *cross-border* regional construction seems to fall at this hurdle, while question marks over the supranational construction remain. Following this argument, it would seem obvious that the EU and its institutions would fall into the category of having had a "legal culture moulded to its contours" – nevertheless, I would argue that the mere *existence* of institutions is not on its own sufficient to constitute a legal culture in this sense and that the *social practices* that comprise and are comprised by these institutions are *also* necessary for the spatial unit of the EU to be called a legal culture.[259] In effect, these social practices would be linked to what I have called the *attitudinal* component of culture. I would also argue that this approach, as a result of this maintenance of normative content, *cannot* be deemed to be a culturally reductivist one, for the reason that it confines the concept of legal culture in strictures that would be unacceptable to Friedman and possibly even Nelken and Cotterrell, all of whom understand legal culture as a much more fragmented concept.

2. Legal *Mentalité*-based Approaches

In contrast to reductively pluralist approaches discussed above, what I have chosen to call "legal *mentalité*-based approaches" do not consider culture to be so aimless and disjointed but rather "tend to assume [the] monolithic character of culture, rather than recognising the fragmented, complex, shifting nature of cultural phenomena".[260] A legal culture in the latter sense is viewed as being much more of a unit than the "intercultural" construction of the hardcore pluralists. There are similarities, however: both sets of approaches have (varying degrees of) leanings towards legal pluralism, for example, and both essentially reduce law to culture, but the distinction I have made here is a more disciplinary-based one: the reductively-pluralist approaches are, in the main, legally-sociological, while the

[259] The possibility of considering the EU as a "legal culture" in its own right will be explored in chapter 6.
[260] R. Cotterrell, "Law In Culture" in (2003) 17 *Ratio Juris* 1 1-14 at 8

latter legal *mentalité* approaches situate themselves more in comparative law and comparative legal studies.[261]

The focus in this section will rest primarily upon the work of one scholar – Pierre Legrand[262] – who, with his non-convergence thesis, was the first outspoken opponent of the notion of a codified *ius Europeaum* on the basis that it runs roughshod over the cultural aspects innate to the law. He uses "convergence" in the literal sense of "the process of coming together or the state of having come together toward a common point",[263] arguing that this notion of there being an endpoint *necessarily* denotes an eventual unity. I emphasise this very deliberate use of the term "convergence" here because Legrand maintains a distinction between this term and that of European legal integration (which he also calls the "Europeanisation" of law[264]), which he acknowledges does not have complete legal unification within the EU at its eventual target. Therefore, while Legrand disputes any possibility of the *convergence* of European legal systems, he does not actually deny that legal integration in Europe is happening; nevertheless, he does claim, "it is not happening as it should".[265]

Much of Legrand's work rails against the fundamental flaws of the disciplines of comparative law and comparative legal studies, that is to say, their failure to recognise the "plurijurality" of the European Union. By the employment of the term "plurijurality" Legrand refers, simply, to the existence of two distinct legal traditions within the European Union that find themselves having to interact: the civil law and the common law,[266] monikers he has also described as being:

> labels [that] purport to convey…the historical fact that in some countries Roman law was received and in others not, which is to say that in some countries Roman scholarship had the force of law and in others not.[267]

While he maintains that this distinction is in essence nothing more than an explicative device utilised by comparatists,[268] Legrand argues that, because their differences outweigh their similarities, these legal traditions can be identified as being "discrete epistemological formations"[269] or, rather, different ways of thinking about the law. His term for this is *legal mentalité* – simply, the distinct cognitive structure and epistemological foundation of the law,[270] to its societal expression and role, and to what such knowledge entails and implies. This is main thrust of Legrand's thesis, that the two major legal traditions of civil and

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261 Not that this is a clear-cut distinction either; see J. Hendry, *supra* note 251 at 2260-61

262 Simply placing Legrand within the ambit of comparative law or comparative legal studies would be unlikely to please him, however; he rather styles himself a "comparatist", that is, one who deals in and values alterity and diversity, a term which is then stretched to include being a "comparatist-at-law". See P. Legrand, "On the Unbearable Localness of the Law" in (2002) *European Review of Private Law* 1, 61-76 at 62 and 76; also, P. Legrand, *Fragments on Law-As-Culture* (1999, Deventer: W.E.J. Tjeenk Willink)

263 See website http://dictionary.reference.com/search?q=convergence, viewed 16/17/2006

264 P. Legrand, "Public Law, Europeanisation and Convergence" in P. Beaumont, C. Lyons & N. Walker (eds) *Convergence & Divergence in European Public Law* (2002, Oxford: Hart)

265 P. Legrand, (2002) "On the Unbearable Localness of the Law" *supra* note 262

266 P. Legrand, "Against A European Civil Code" in (1997) 60 *Modern Law Review* 1, 46-63. It should be noted here, for reasons that will become clear later in this section, that I am following Legrand in treating the Scandinavian Member States as being of the "civil law" tradition and thus *mentalité*.

267 Legrand, "On the Unbearable Localness of the Law" *supra* note 262 at 74

268 *Ibid* at 72

269 Legrand (1997) "Against A European Civil Code" *supra* note 266 at 48

270 P. Legrand, "European Legal Systems Are Not Converging" in (1996) 45 *International & Comparative Law Quarterly* (January) 52-81 at 52

common law have very different and irreducible *mentalités* which influence the way it is understood within those legal cultures that pertain to whichever tradition.[271] Furthermore, while following a particular tradition and thus having a specific *mentalité*, legal cultures can differ among themselves and situate themselves along a spectrum constructed by variances in the base tradition. This would account, for example, for variations in continental civil law jurisdictions such as Germany and France or, in the same vein, for common law jurisdictions such as England. Indeed, Legrand even argues that there exist differences among legal cultures *within* the same jurisdiction,[272] and thus for the existence of para- or sub-*mentalités*.[273]

The inference that can be drawn, then, is that variations among legal cultures within a legal *mentalité* can be attributed to fluctuations within *the specific social context* of that culture and, therefore, that these social mutations and influences, in the form of historical events, political decisions and societal developments, contribute to the constitution of a given legal culture *itself*. That is the very essence of Legrand's conception of "culture", as being:

> the framework of intangibles within which an interpretative community operates, which has normative force for this community (even though not completely and coherently instantiated), and which, over the *longue durée*, determines the identity of a community *as community*.[274]

Legrand does not so much see "legal culture" as a bounded entity; rather, his approach revolves around attempts to achieve an understanding of the cognitive structure that defines that culture – a necessarily epistemological undertaking that inevitably includes considerations of both *mentalité* and social context. The laws of a culture cannot be unpicked or detangled from the meanings that arising as a result of its unique cognitive structure, as these are both embedded within and constitutive of the whole legal culture. The legal variations generated by the functioning of the social in a legal culture have *meaning* – they are a product of the social context, and thus, so Legrand argues, a legally-comparative interpretative analysis of these can provide valuable insights into the legal culture.

The next two sections will seek to exemplify two particular facets of a legal culture by looking at instances of legal development and selections of regulatory approach, subsequent to which the final section of this chapter will bring the focus back to questions of the Europeanisation of law within the EU.

3. Case Study: The Effect of a Legal Feature on a Legal Culture

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[271] A question that springs to mind here is whether or not the status of *mixed* jurisdictions (e.g. Scotland) is problematic in this sense, and this is something I would like to consider in more depth at a later date. For an explanation of mixed jurisdictions and the viability of a mixed system model within the EU, see J. Smits, "Scotland As A Mixed Jurisdiction and the Development of European Private Law" in (2003) *Electronic Journal of Comparative Law* 7.5, available at <http://www.ecjl.org/ecjl/75/art75-1.html>

[272] Legrand allows for a legally pluralist structure at the subnational level and, in terms of its pluralist character, his work encounters the same problems as the sociological approaches criticised above do. For example, when he asserts that local properties of knowledge exist and are powerful despite "remain[ing] inchoate and uninstitutionalised", he also removes any institutional normativity from the local "legal culture". See P. Legrand, (2002) "Public Law, Europeanisation and Convergence" *supra* note 264 at 228

[273] P. Legrand, "Legal Systems Are Not Converging" in (1996) 45 *International & Comparative Law Quarterly* 52-81 at 63

[274] P. Legrand, *Fragments on Law-As-Culture* (1999, Deventer: W.E.J. Tjeenk Willink) 27

- The Scottish Not-Proven Verdict

An example of a "fortuitous difference" to which meaning can be attributed arising from the functioning of the social is that of the Scottish third verdict of "not proven" in a criminal jury trial. This "bastard verdict"[275] was essentially a product of historical accident, but its continued existence and use can also be identified (or interpreted) as, among other things, an assertion of the difference of the Scots legal system, and especially its criminal law, from the English legal system subsequent to the Union of Parliaments in 1707.[276] The three verdicts available to the fifteen-man jury in a Scottish criminal trial are guilty, not proven, and not guilty, with the last two both essentially having the same effect – namely acquittal. If either of these verdicts, all of which must be reached by simple majority, is given then the accused is at once assoilzied from the charge and set free; the rule of tholed assize or *res judicata* comes into play and no criminal record is kept. The difference between a verdict of "not proven" from one of "not guilty" is, however, the indication that the individual is not completely innocent but that the burden of proof required for a verdict of 'guilty' *i.e.,* "beyond reasonable doubt", has not been met, or, in other words, the jury *still* has a reasonable doubt as to the accused's guilt.

The "not proven" verdict has been criticised and lauded in equal measure since its inception: indeed, the romance and exasperation surrounding this verdict arise mainly from the lack of an actual concrete definition in either common law or statute. For every call that it is a historical anomaly that should be binned, that it is an embarrassing idiosyncracy, that it taints with stigma all those "acquitted" by it, there is another voice singing its praises as a necessary protection in light of conviction being possible by simple majority, and as the very embodiment of a sophisticated legal system.[277]

The notion of something being proven or not arose from juries having to produce once of these "special verdicts" in relation to charges levelled in indictments. Interestingly enough, it was due to what can only be called jury belligerence that this situation came about – between 1660 and 1688 juries had refused to convict under what they felt were unjust statutes, and so the finding of *guilt* was left to the judge, who inferred guilt or innocence on the balance of the charges being "proven" or "not proven". This practice continued until 1728, when a jury's right to convict or acquit was re-established, but the special verdicts lingered on until the early 19th century. Even then, the verdict of "not proven" was to be "retained for those cases in which there was insufficient lawful evidence to convict, but suspicion attached to the prisoner",[278] thus paving the way for what has been sometimes been referred to as the "hybrid" or "not *quite* guilty"[279] verdict.

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[275] As referred to by Sir Walter Scott, novelist and Sheriff, in his personal journal of 1827

[276] "When in 1707 separate Kingdoms of Scotland and England dissolved themselves and united into the new Kingdom of Great Britain, one of the important aspects of the Treaty concluded between the Kingdoms on 22 July 1706 and of the separate Acts of Union passed by the Parliaments of both Kingdoms, was the preservation of the separate identity of the Scottish legal system". See M.C. Meston, W.D.H. Sellar & Lord T.M. Cooper, *The Scottish Legal Tradition* (1991, Edinburgh: The Saltire Society & The Stair Society) at 2

[277] J.M. Barbato, "Scotland's Bastard Verdict: Intermediacy and the Unique Three-Verdict System" in (2005) 15 *Indiana International & Comparative Law Review* 3, 543-582

[278] J.I. Smith, "Criminal Procedure" in *Introduction to Scottish Legal History*, (1958, Alva, Scotland: Robert Cunningham & Sons Ltd) 426-442, quoted by J.M. Barbato, *ibid* at 7

[279] Or, to be exact, "not quite guilty, you tricky bastard". See I. Bell, "Cutting Compensation for Miscarriages of Justice Makes Sense … If You Mistrust People" in (23 April 2006) *Sunday Herald*, Glasgow.

The main reason cited for the existence of the "not proven" verdict within Scots criminal law is that it is simply a result of an historical error that came about when the jury's task was extended from simply ascertaining whether certain charges or facts had been proven or not to actually *deciding upon* guilt or innocence.[280] However, the fact that it has been maintained and even given a subsequent vote of confidence after extensive consultation[281], suggests that, despite being a historical accident, it has embedded itself within the Scottish "legal culture" to the extent that it now contributes to its intrinsic cognitive framework, to its *mentalité*: after all,

> [n]o aspect of the legal system of any importance survives unless some concrete interest derives from some benefit, or wants it to survive for whatever reason, and works to keep it going. … Law is an inherently practical matter. It has no attachment to the old or obsolete.[282]

A number of reasons have been given for its continued existence and utilisation, one of them being the contentious modern argument that a third verdict allows for a more "merciful" verdict in light of extenuating circumstances, a "subtle way of 'nullifying' the law instead of having to confront it directly".[283] This argument is similar to another one touted for its very retention in the first place, namely that it allowed juries to avoid giving a guilty verdict that would result in the imposition of the death penalty.[284] That said, the more usual and oft-cited reasons given for the maintaining the verdict are, firstly, that the jury may not be convinced that the accused is innocent and are therefore unwilling to pronounce it and, secondly, that a simple choice between guilty and not guilty could result in many more wrongful convictions. The argument for the former tends to arise in relation to cases where the jury is fairly certain of guilt dependent upon the testimony of a single witness, but that there is insufficient corroborating evidence for a conviction as a result of the Scots criminal law requirement that evidence be corroborated. Much more interestingly, the latter reason for the verdict's retention was given by the Thomson Committee *in spite of* recognition that a three-verdict system is illogical,[285] not to mention the fact that there is *always* the possibility that a guilty verdict will be given erroneously and thus result in a wrongful conviction, not to mention the fact that *every* other jurisdiction in the world contents themselves with a two-verdict system.[286]

Sir Nicholas Fairbairn, QC and MP, commented in 1994 that Not Proven is not a "let off" verdict but rather "the proper verdict when the jury are not satisfied beyond reasonable doubt but cannot say guilty"[287] and, despite substantial pressure to abolish it, the Scottish Office appears to have agreed with this summation. Whether, therefore, the "not proven" verdict is a national treasure or a national embarrassment, it is most definitely *national*, and looks likely to remain part of Scots criminal law and thus intricately linked with the Scottish legal culture for the foreseeable future. Indeed, it can be stated without any great fear of

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[280] Meston *et al*, *The Scottish Legal Tradition*, *supra* note 276 at 27

[281] Scottish Office, (1994) *Juries & Verdicts: Improving the Delivery of Justice in Scotland 26*, HMSO, Edinburgh Press

[282] L.M. Friedman, "The Place of Legal Culture in the Sociology of Law" in M. Freeman, (ed) *Law & Sociology: Current Legal Issues,* Vol.8 (2006, Oxford: OUP) 185-199 at 187

[283] P. Duff, "The Scottish Criminal Jury: A Very Peculiar Institution" in (1999) 62 *Law and Contemporary Problems* 2, 173-201

[284] S.S. Robinson, "Nineteenth Century Criminal Justice" in (1991) *36 Journal of Law & Society of Scotland* 151

[285] Thomson Committee, (1975) Criminal Procedure in Scotland, Second Report, Cmnd. 6218, 51.46-.47 at 51.05

[286] P. Duff, (1999) "The Scottish Criminal Jury: A Very Peculiar Institution", *supra* note 283

[287] Sir N. Fairbairn, "The Not Proven Verdict" in (1994) 37 *Scots Law Times* 367 at 367-8

reprisals that the "not proven" verdict is seen as being a particularly "Scottish" kind of verdict, for which reason there is for many Scots a specific attachment to or identification with it, and it is in this sense that it is such an interesting example for a discussion of legal culture. For example, to quote Scotsman columnist Alan Massie:

> There is something characteristically hair-splitting about it: "We'll not say you did it, but then we'll not affirm you didn't either". This is not only a very Scots response, expressed otherwise as 'away you go and don't do it again': it also expresses an admirable scepticism, so honest indeed that it might be the most honest verdict a jury can truly give.[288]

While this looks like a frivolous comment, it is in fact an interesting observation about how a legal *mentalité* (even a sub-state legal *mentalité*) is reflected and made manifest within a specific legal culture.

There has, however, been some recent speculation and discussion about the possibility of the United States of America adopting a third verdict of "Not Proven",[289] while the extension of the concept to English criminal law has also been mentioned.[290] Whatever the accuracy of these reports, they do pose some interesting questions in terms of the Scottish legal culture and an idiosyncrasy that is intrinsic to it. Leaving aside, for the moment, any question of the viability or otherwise of legal transplants and legal borrowing, which will be discussed in detail later,[291] the primary question to spring to mind is, if "Not Proven" is not only a result of the operations but also *constitutive* of Scots legal culture, to what extent is that legal culture undermined by sharing it with other legal cultures? The vote to retain the third verdict shows that a majority of Scots believe it to be a better system – but would they be as happy if they ceased to be the only ones with this unique third verdict option? In essence, my question is: how much of the Scots attachment to the undeniably unusual third verdict is linked to its being particular to the Scots legal system and legal culture as opposed to its actual strength (or weakness) as a legal feature? An obvious adjunct to this question is that, considering it would naturally be legal systems in the Anglo-American tradition who would be able to apply a verdict of Not Proven, would the transplantee be an issue, considering that the differences the Scottish legal system has from the English one are viewed as so important in terms of avoiding being dominated by English law?

An investigation of what effect the "donating" in terms of a legal transplant has on the donator would be an interesting one to carry out, mainly because the majority of work on legal transplants is from the perspective of the receiving system or culture, and not the one donating or being "borrowed" from. Obviously the metaphor of donation is stretched slightly here, although arguably no more so than that of transplantation – in the medical sense a transplant is something that is *removed* from one individual before implantation in another, while, even in a general sense, transplantation connotes a transfer or relocation of something from one situation to another. To transplant something, therefore, is to remove it from somewhere and place it elsewhere – there is no sense of "removal" when the term transplant is used in the legal sense, and thus the term "donation" is also flawed, as it

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[288] A. Massie, "Arguing the Case For Our Bastard Verdict" in (22 Nov 2004) *Scotsman*, Edinburgh, at 17. Quote translated from the original Scots.

[289] See the discussion of this in the section "The American Bastardization of That Bastard Verdict" in J.M. Barbato, (2005) "Scotland's Bastard Verdict: Intermediacy and the Unique Three - Verdict System", *supra* note 277 at 572-577

[290] I. Bell, *supra* note 279

[291] See the next (comparative) case study on "How *Mentalité* Shapes a Legal Feature Within a Legal Culture"

implies that the thing being transplanted is being taken away. Nevertheless, while this is not the case, one wonders about the legal culture whose indigenous feature is being borrowed or copied. For example, does the relative size of the legal culture(s) involved matter? What about the weight of their own historical and socio-cultural contexts? It may be the case that the Scottish example is the only occasion that this consideration would arise; nonetheless, this is a line of thought I would like to dedicate more time to in the future.

The example of the "Not Proven" verdict is, in essence, a look at the effect of specific feature of the law upon a legal culture, and how the two are intrinsically linked. To flip that around, then, would be to look at a situation where two or more legal cultures aim to regulate or alter a particular feature of their society, or rather: how a particular *mentalité* shapes a legal culture in terms of a specific law.

4. Case Study: How *Mentalité* Shapes a Legal Feature Within a Legal Culture
- *The Regulation of Prostitution in Scotland & Sweden*

The example I have chosen for this comparative case study is that of the regulation of prostitution in two specific jurisdictions, Sweden and Scotland, with additional reference to the wider legal system of the United Kingdom. The selection of Scotland is due to the fact that it does not belong to the "civil law" tradition that Sweden arguably belongs to,[292] while my selection of these two particular legal cultures is principally due to their completely different approaches to the question of prostitution regulation. This section will first give a general overview of the field before turning its attention to the comparative element.

Historically, the approach to the subject of prostitution in the United Kingdom was always less institutionalised that it was on the continent, where the system of regulation fostered police corruption, dependence on pimps, and organised brothels,[293] and a number of quite striking differences within specific Member States and legal cultures persist to the present day. The international criminal law provides for some common ground, of course, but these provisions relate more to the prohibition of coercion and duress to become involved in prostitution, the prohibition of pimping or promotion of prostitution, and the protection of those deemed to be vulnerable on grounds of youth or incapacity; there are no specific provisions in terms of regulatory approaches. Four possible regulatory options have been identified, which are: criminalisation, decriminalisation (entire or selective non-application of the existing law), legalisation, and regulation (under which prostitution would be recognised as having a special status under the general law).[294] Hence these choices: while in the UK the current situation is that the *sale* of sexual services is a criminal offence, the Netherlands and Germany have chosen to legalise the sale of sexual services, while Sweden have moved in the opposite direction and have criminalised the *purchase*.

a) Sweden

[292] Here I am applying the Legrandian categorisation of Scandinavian countries as following the civil law tradition, although this could be disputed.
[293] L. Mahood, *The Magdalenes: Prostitution in the 19th Century,* (1990, London: Routledge) at 41
[294] Report of the Expert Group on Prostitution in Scotland, "Being Outside: Constructing A Response To Street Prostitution", (2004, Edinburgh: Scottish Executive) at 53-4

Sweden's criminalisation of the *purchaser* of sexual services is not only unique among the European Union Member States but globally. That said, Finland and Estonia[295] have all been observing the Swedish situation with interest, a situation that would appear to support Legrand's legal *mentalité* thesis. In January 1999 Sweden enacted the Prohibition of the Purchase of Sexual Services Act 1998, section 408 of which criminalised the purchase of sexual services, thus effectively switching the criminality from the seller to the "punter".[296]

This groundbreaking legislation is part of an Act on Violence Against Women (*Kvinnofrid*), enacted on July 1, 1998,[297] which chose to treat sexual harassment, violence against women, rape and prostitution as related problems. It was the outcome of two Commissions of Inquiry that took place in 1995: the Commission on Prostitution and the Commission on Violence Against Women. Initially the Commission on Prostitution had recommended a prohibition on *both* the buying *and* selling of sexual services, first of all in order to emphasise that (Swedish) society did not consider prostitution to be an acceptable behaviour, but also on the basis that it would be "peculiar" if only one party was seen as guilty of a crime, particularly in a country that prides itself on being gender equal.[298] The Swedish Government, however, decided to restrict criminalisation to the purchaser *only*, making the arguments that the seller (usually female) is the weaker party who is being "used" by the purchaser[299] and that criminalising both parties would "obscure the core issue of prostitution – men's power and men's sexuality".[300] Criminalising the punter, on the other hand, would mark a "historical turning-point in relation to that double standard which has always permeated the patriarchal society, which is the basis of the existence of prostitution"[301].

In terms of public opinion this approach appears to be a popular one: in 2001, eight out of ten Swedes were reported to support the criminalisation of sex clients, although an opinion poll also showed that a high percentage of Swedes (42%) were also in favour of the double criminalisation of both clients and prostitutes.[302] This is in direct contrast to the unified stance taken by the Swedish women's movement, who vehemently rejected the idea of criminalising women, arguing that it would be akin to "blaming the victim".[303] Indeed, that this law was passed owes much to the coherence of the feminist message in Sweden and to the greater priority assigned to women's groups in the Swedish political process. There is also a high degree of cooperation among female politicians, many of who have strong connections to women's organisations, and who not only make up 40% of the Riksdag but also constitute 50% of government ministers.[304]

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[295] A. Holli, "Debating Prostitution/Trafficking in Sweden and Finland", presented at the Second Pan-European Conference on EU Politics, June 24, 2004. Incidentally, and although it is not an EU Member State, Norway's approach to prostitution is elucidating for the purposes of this investigation: similar legislation to that in existence in Sweden has been proposed and should come into force during 2009.

[296] J. Scoular, "Criminalising 'Punters': evaluating the Swedish Position" in (2004) 26 *Journal of Social Welfare and Family Law* 2, 195-210

[297] Swedish Goverment Offices, 2001

[298] Y. Svanström, "Through the Prism of Prostitution: Attitudes to Women and Sexuality in Sweden at Two Fin-de-Siècle" in (2005) 13 *Nordic Journal of Women's Studies 1 (NORA)*, 48-58 (11) at 15-16

[299] M. Kasparsson, "The Swedish Law on Prohibiting the Purchase of Sexual Services", (2004) 1

[300] Y. Svanström, *supra* note 298, 15

[301] S-A. Månsson & H. Olsson, "Den röda horluvan tillbaka", *Dagens Nyheter,* 14 March (1995)

[302] A. Holli, (2004) *supra* note 295

[303] A. Gould, "The Criminalisation of Buying Sex", in (2001) *Journal of Social Policy* 3; see also J. Scoular, (2004) "Criminalising 'Punters': evaluating the Swedish position on prostitution" *supra* note 296 at 197

[304] J. Scoular, *ibid* at 197

Another factor that has been commented on is "a national anxiety over entry into the European Union and a perceived need to assert a coherent national identity against a growing permissiveness in Europe.[305] The "pro-prostitution lobby" in the rest of Europe, particularly in the Netherlands and Germany, both of whom legalised prostitution in 1999 and 2001 respectively, caused alarm in Sweden, where this was seen as representing a permissiveness in law and society which could potentially envelop a culturally homogenous Swedish society in an enlarging EU. This generated support for a firm stance against an external threat, namely the assertion of a coherent national identity and position[306] intended to operate as a bulwark. This stance now means that Sweden has some of the most repressive sex law in Europe, although these are, as Don Kulick argues, "justified not by moral prudishness or religious conservatism, but, rather, by individual fulfilment and the social good."[307]

b) Scotland

In comparison, the Scottish approach to regulating prostitution has been a more pragmatic one: the current situation is Scotland is that, while prostitution is not illegal *per se*, many of the acts associated with prostitution are illegal, and a number of statutory provisions exert indirect control. In terms of the UK as a whole there is no cohesive, "harmonised" legal strategy as regards prostitution – for example, there is stronger statutory regulation in England & Wales than in Scotland: purchasing sex from a person under 18, kerb crawling and "carding" (advertising) are all prohibited.[308] The main statutory provision in terms of prostitution in Scotland, s46 of the Civic Govt (Scotland) Act 1982, makes it an offence for a "prostitute" to solicit and/or importune any person in a public place; despite the apparent gender neutrality of the language, it is widely recognised that this provision is predominantly applied to women, street prostitutes being mainly female.[309] The soliciting of women by men is not a statutory offence, although it may come within the ambit of the common law offence of breach of the peace.

It has been argued in Scotland, however, that by effectively criminalising the *sale* of sex, albeit in a *partial* sense, the current law has an inherently moral tone – moral condemnation and stigma still attach to the person soliciting and not to the client. Other criticisms of the existing law (s46) focus more on the problems caused by the criminalisation of soliciting: for example, not only does the legislation fail to provide any protection for vulnerable people involved in prostitution, it has the effect of causing displacement from "safe" locations covered by police patrols and CCTV as the "prostitutes" move to avoid detection.[310] Additional objections to the existing legislation are that penalties in the form of fines and custodial sentences have no rehabilitative function and serve to undermine the efforts of assistance and protection services, while there is also no specific provision in place to address the needs and concerns of communities affected by prostitution.

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[305] *ibid*, 195
[306] *ibid*, 199
[307] D. Kulick, "400,000 Swedish Perverts", draft paper from "Sexuality After Foucault" conference, 28-30 November, Manchester University (2003)
[308] C. Gane, *Sexual Offences*, (1992, Edinburgh: Butterworths) 155
[309] There is also an obvious gender imbalance here, considering that, under current legislation, only the (usually female) seller and not the (usually male) purchaser is criminalised, thus serving to concretise the attitude that prostitution is a female problem.
[310] *Being Outside* Report, *supra* note 294 at 59

In light of these recognised problems with the existing legislation, the Scottish Executive[311]commissioned an Expert Group to carry out an investigation and present a report on street prostitution in Scotland with a view to changing the law. This 2004 report, called "Being Outside: Constructing A Response To Street Prostitution", both recognised and condemned the situation as failing to recognise that prostitution is

> not a lifestyle of choice, nor essentially a sexual behaviour, but…a means of survival by people with accumulated personal difficulties and few resources with which to develop a less damaging way of life.[312]

It criticised the current Scottish approach of partial criminalisation, proposing instead that the criminalisation of soliciting be replaced by a legal focus on offensive behaviour or conduct arising from a prostitution-related sexual transaction – whether caused by purchaser or seller.[313] This would change from a case-based discretionary suspension of the criminal law to one that is within the law and could be considered and used in the right circumstances as part of the agreed local strategy. It is also the Group's view that it would be important not to define buying or selling sex as a sexual offence but rather as offensive behaviour or conduct. The purpose of the offence is to penalise offensive behaviour or conduct arising from prostitution if it occurs, rather than the sexual behaviour itself.[314]

c) The Scottish & Swedish Approaches: Some Legal-Cultural Differences

The causes of prostitution in Scotland have changed very little since the 19th century – poverty, poor education, a broken home, homelessness, early sexual experience (or abuse), and even mental illness are all recognised as factors. However, a substantial problem specific to the modern day is that of drug misuse: by far the vast majority of Scottish prostitutes are drug mis-users, whether or not they fit into any of the categories also given above. Making an impact on the level of drug misuse is recognised as being an essential part of reducing the likelihood of women becoming involved in prostitution, reducing the risk of harm once involved, and allowing women to take advantage of support services in order to exit prostitution.

In this sense Scotland differs markedly from Sweden, where a substantial percentage are of the prostitutes are from outside Sweden and which finds human trafficking much more of a pressing problem than drug misuse. There are moves underway in Scotland, therefore, towards constructing a less morally-judgmental law that provides some form of protection for vulnerable people who have gotten involved in prostitution through what they themselves perceive as being the lack of any viable alternative, alongside exit-strategies and rehabilitation, mainly in terms of programmes to combat drug and alcohol misuse but also in the form of housing and general support strategies. In effect, the methods proposed to combat prostitution in Scotland are completely different to those in Sweden because they focus more on the causes behind it and its situation as a last-resort for those involved instead of approaching it in terms of trying to stifle the demand for sexual services.

Indeed, the Swedish unilateral approach has encountered a number of problems: indeed, the Swedish Government's response to criticisms that the new law is likely to have a detrimental effect on the women working in prostitution, they replied that the law was not

311 Prior to its 2008 rebranding as the Scottish Government.
312 *Being Outside* Report, *supra* note 294 at 26
313 *Ibid* at 62-3
314 *Ibid* at 62-3

intended to improve conditions for prostitutes but to eliminate prostitution, stating that "any negative impact on sex workers is outweighed by the message conveyed by the law".[315] Whether this is an entirely honest standpoint is open to debate – for example, the comparatively high percentage of women involved in the Swedish Parliament has certainly been influential in putting this item on the legislative agenda – but the pride that Sweden takes from its tradition of equality could also be cited as a contributory factor in the absence of a distributive justice component to the law criminalising the purchaser, despite its apparent feminist-based motivation.

5. Legal Culture in the Debate on Europeanisation of Law

All the different approaches, political situations, culture-specific problems and opinions regarding social order discussed above are evidence of the legal culture, constructed through and within its specific legal *mentalité*, which is irreducible. As a result, and following Legrand, the legal features of a legal culture can be considered to be deep-seated structures that pertain specifically to the social context of that legal culture. The legal *mentalité* behind the legal features attributes meaning to them: any legal meaning, therefore, is an inherently legally-cultural one. Legrand argues that, in comparative legal studies,

> Culture is made to function as an omnibus category which allows the comparatist to point to the posited law not only in terms of its materiality (the rules and so forth) but, more importantly, at the level of its meaning which alone can reveal why the posited law was created in the way it was (and not otherwise) and disclose the goals sought by the community as it invests itself into its posited law. No formulation of the posited law can safely escape a cultural interpretation…[316]

This is the central feature of Legrand's thesis – that despite any apparent or superficial comprehension of legal principles among and across different legal cultures, no common understanding either is or can be achieved *at the level of deep structures*, however much an apparent consensus exists. In essence, his argument is that, even if legal cultures (which he also refers to as "*epistemes*") are talking about the same legal feature, the very comprehension each has of that feature is fundamentally at variance from that of the other. Whether that fundamental misunderstanding goes unnoticed or not is, Legrand argues, irrelevant to the fact that it exists, unseen and irreducible, and at the root of divergent or dissimilar legal meanings.

This, in a nutshell, is the argument that Legrand projects against any harmonising or integrationist project engaged with the law in the EU. His premise goes right to the very heart of the process of the Europeanisation of Law – namely, the recognition of certain legal commonalities across the Member States of the EU – and seeks to undermine it. For Legrand the notion of integration of legal cultures, even within an overarching institutional framework, is a deeply flawed one, for those legal features believed to be common are, in his conception, anything but. He also rages against what he calls the "strategies of simplification" utilised by instrumentalist approaches to European integration that "purport to show that the problem of understanding across cultures and traditions is a false

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[315] D. Kulick, "Sex In The New Europe: The Criminalization of Clients and Swedish Fear of Penetration" (2003) *Anthropological Theory* 3(2), 199 at 225, cited in J. Scoular, *supra* note 296, at 201

[316] P. Legrand, (2002) Public Law, *supra* note 264 at 232-233

one because…there is very little difference across laws" and that "wish to efface difference, to erase it".[317]

The terminology Legrand uses here should be noted because, as mentioned earlier, in his rejection of any degree of European legal unification Legrand employs the term "convergence" to mean a process that tends towards an eventual endpoint – a utilisation of the term in line with its dictionary definition and one that I support.[318] A number of commentators, however, use it to mean more harmonisation than unification; for example, the terminological explanation given by Mark van Hoecke is that:

> [c]onvergence does not mean unifying everything, it simply means getting closer to each other. This happens, even if the transplant from a foreign legal system is 'incorrectly' interpreted or adapted in order to fit with the local legal culture. [319]

Selecting which of these usages to apply is quite straightforward, as van Hoecke's use of "convergence" is simply erroneous – if it is his intention to elucidate a more interdependent, commonality-based situation or process, then the related term "harmonisation" is a better expression of this than "convergence".

a) The Evolution of a Legal Culture

Much of Legrand's work relies heavily on historical facts to support his arguments – for example, his hostile article against a European Civil Code delves into the history of the civil law tradition,[320] while references to historical and cultural differences also abound in his other articles. It strikes me as strange, therefore, that a scholar who so evidently puts such emphasis on the past, and on history and tradition in terms of their effects upon the creation of a distinct and unique legal culture[321] – seems only to see that process from the one angle. Legrand's perspective appears to be almost entirely backward looking, focussing on the pull of tradition instead of that of development.

Legrand argues for distinctions to be drawn regarding legal cultures predominantly in terms of their *mentalité*, which, as discussed above, is a discrete epistemological underpinning for that legal culture. This epistemological formation, which could also be expressed as "legal tradition", stems from the selections made by and processes that occur within a legal culture, which also serve to distinguish that legal culture from another with the same *mentalité*.[322] At this point, however, Legrand appears to consider the process as completed – the co-constitution of the legal culture by historical and cultural processes appears by now to have come to a standstill, with the result of these processes being the effective *closure* of the legal culture. What is unusual here is simply

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317 P. Legrand, (2002) "Unbearable Localness", *supra* note 262, at 63

318 Definition taken from Merriam Webster's English Dictionary, 2002, 10th ed. at 253 as: "converge": 1. to tend or move toward one point or another: come together : meet: 2. to come together and unite in a common interest or focus... ; and "convergence": 1. the act of converging and esp. moving towards union and uniformity...

319 M. Van Hoecke, "The Harmonisation of Private Law in Europe: Some Misunderstandings" in M. Van Hoecke & F. Ost (eds) *The Harmonisation of European Private Law* (2000, Oxford & Portland, Hart) 1-20 at 9

320 See P. Legrand, (1997) "Against A European Civil Code" in 60 *Modern Law Review* 46

321 Indeed, recently Legrand even appears to have gone as far as to conflate the terms "culture" and "tradition", and "legal culture" and "legal tradition; see P. Legrand, "Comparative Legal Studies and the Matter of Authenticity" in (2006) 1 *Journal of Comparative Law* 2, 365-460 at 381-3

322 See Chapters 3, 4 and 5 for discussions of Legrand's legal *mentalité* thesis.

that a legal culture *thus defined* can go from being a creation of these very processes but then, suddenly, lose all flexibility in terms of its own evolution. Legrand's standpoint can be said to "[hold] the future captive to the past"[323] by viewing things are they were and currently are, while giving little consideration to the two-way causality of the Europeanisation of law process. Indeed, it is a pessimistic stance to take towards the process, rejecting as it does any ongoing capacity for "learning" and adaptation.

In addition to the importance of historical conditioning and developments, Legrand places great stock in the notion of "experience",[324] which he conceptualises as the non-legal and factual interplays that constitute the social. His argument *contra* the Europeanisation of law in this regard is that a harmonising measure such as the European Civil Code would place constraints upon these diverse processes and imprison them within rigid understandings represented by one-size-fits-all legal principles.

While this argument makes an interesting point, it should be noted that Legrand's understanding of "experience" here is somewhat restricted, as he only refers to the *social* interplays while overlooking the legal ones. If "experience" is conceptualised more holistically and in terms of a legal culture, however, then *both* considerations of the law and the social are necessarily included and 'experience' becomes – instead of something in the social that cannot be contained within the code form of the legal – rather something that is *inherent* to the legal culture itself. "Experience" also has connotations of learning, of having made choices or selections and of being conditioned by those choices – indeed, the choices themselves condition subsequent choices, hence the differentiation and re-differentiation of legal cultures. The main point here, however, is that the ongoing quality of the *process* cannot be overlooked – a legal culture cannot be considered as being finished or fully-formed. While it takes its specificity from its past, a legal culture is always able to make choices to alter traditions and past practices: indeed, as Lawrence Friedman says:

> No aspect of the legal system of any importance survives unless some concrete interest derives from some benefit, or wants it to survive for whatever reason, and works to keep it going. … Law is an inherently practical matter. It has no attachment to the old or obsolete.[325]

I am not arguing that the choice is between either tradition or development; on the contrary, I would argue that the best approach is one that facilitates an accommodation the two. Indeed, in terms of the process of the Europeanisation of law, such an approach is the only one with any chance of success of achieving a balance between the opposing forces of legal unity and legal diversity.

b) Legal Meaning: Context and Interpretation

Legrand identifies three main problems in the Europeanisation movement, which are: the methods either used or proposed; the selection and promotion of the civil law

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[323] E. Christodoulidis, "Law's Immemorial" in E. Christodoulidis & S. Veitch (eds) *Lethe's Law*, (2001, Oxford: Hart) at 208

[324] He does refer to it as "Bataille's 'immense labour of renunciation, dispersal, and turmoil that constitutes human life, distinct from legal existence and as it takes place in fact'". See P. Legrand, "Antivonbar" (2006) *Journal of Comparative Law* 1 at 21

[325] L.M. Friedman, "Rethinking Legal Culture" in M. Freeman (ed) *Law & Sociology* (2006, Oxford: OUP) at 187

tradition at the expense of the common law one; and the difficulties inherent to the interpretation of a harmonised legal form. This last point is the focus of the this section, which will dwell on the problems that multiple interpreters of the law pose for the process of Europeanisation of law. There are two particular situations of multiple interpreters that I would like to draw attention to here: that of legal *mentalité* as argued by Legrand, and that of a multiplicity of legal cultures.

First, there is Legrand's legal *mentalité* approach, by which he means the epistemological formations and articulations that are the common law and civil law traditions. They can be described as discrete *Weltanschauungen* in the sense that they represent a *way* of thinking, or a mindset, as it were. These separate worldviews of the civil law and common law traditions are problematic in terms of codification because, as Legrand has repeatedly asserted, the civil law formation intuitively understands the form of a code, while the common law formation not only does not, but also sets itself in direct opposition to it. This, he argues, will lead to the misappropriation of the entire legal field by the civil law epistemology, which achieves its hegemony by means of the code, a form that the common law epistemology cannot even begin to comprehend and thus accommodate.

It is worth noting here that this development, instead of giving rise to a situation of multiple interpreters, actually *reduces* the multiple to the singular. This outcome is not, however, a welcome one, as the only way it can be achieved is simply to deny the existence of the alternate epistemological formation, to disguise the fact that it exists, even if that existence is a subjugated or outlawed one. The alternative, therefore, is actually what Legrand argues in favour of, namely, the preservation of both *mentalités*, but this naturally leads us back to the original problem: how can there be "meaning" when there are multiple interpreters of what that meaning is?

The second possibility of multiple interpreters is less a specific legal *mentalité* approach and more a legal culture approach. Simply stated, codification does not remove the necessity for interpretation – codification does not equate to unification, because it only provides principles that still need to be brought to life, as it were. Even in the event of there being a pan-European Civil Code or other harmonised form, there is no guarantee that the interpretation of any given Article of it will be the same in Germany as that in the UK, or that either the reasoning or the decisions will be equivalent.[326] Indeed, this is similar to the situation mentioned above, where the codified form simply masks the actual situation. This problem also manifests itself in relation to the interpretation by a national legal culture of any European-level legal document due to the fact that any legal meaning is necessarily a legal-cultural one. By this I mean that the legal culture will interpret any European directive, for example, on its own terms and through its own established categories. The top-down method of integration is especially subject to this criticism, as this next chapter will argue, with its focus on EC directives in general, and the Product Liability Directive in particular.

My opposition to these autochthonous, culturally-reductivist approaches to the Europeanisation of law within the EU framework is, quite simply, that they are far too negative: that law within the EU is not being and cannot be "Europeanised" is, I think, both defeatist and erroneous. While the drive for a harmonised law arguably overlooks the differences that Legrand argues should be included, he himself appears to neglect the

[326] For an elucidatory and entertaining scenario along these lines, see P. Legrand, (2006) *supra* note 321 at 26

commonalities, many of which mainly arise as a direct result of the influence of EU law upon national legal systems and cultures.[327] Legrand starts from the idea of a complete understanding and, finding it lacking, sees integration as being impossible. The comparative law project actually highlights the existence of EU-generated commonalities most obviously, for:

> where national systems of EU Member States are compared, as opposed to where a national system of an EU Member State is compared with that of a 'third' State, the terms of comparison will differ to some extent due to the duty of all Member States' courts to construe their national law in conformity with EC law.[328]

This is the crux of the matter. Whatever inherent differences exist among European Union legal cultures, there is an *overarching* commonality as a result of this requirement. I do not mean to overemphasize this commonality and thus fall into the trap that has already caught the *Lando* and *Von Bar* projects[329], but within the European Union there *does exist* a body of legal principles that serve as a framework within which Member State legal cultures operate, which framework could arguably be construed as the beginnings of a European Union legal culture. These principles are certainly subject to interpretation by the Member States, an interpretation that will always be structured and conditioned by the legal culture of that Member State, but to dismiss out of hand the claim that law within the European Union is being "Europeanised" is, I think, an untenable position. The next chapter will criticise these "formalist" approaches to the Europeanisation of law process.

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[327] While many of the commonalities across the Member State legal cultures of the EU can be attributed to the existence and operation of the EU itself, there are also those that can be attributed to a base, overarching common European culture. This will be discussed in chapter 6.

[328] W. Van Gerven, "Comparative Law in a Regionally Integrated Europe" in A. Harding & E. Örücü (eds) *Comparative Law in the 21st Century*, (2002, London, The Hague, New York: Kluwer Academic Publishing) 155-178 at 158

[329] To name but two. These approaches will be discussed in more detail in the next chapter arguing against "formalist" approaches.

Chapter 4: **Against "Formalist" Approaches to the Europeanisation of Law**

[T]o stress the autonomy of the law is to abandon a key insight of legal sociology, namely, the dependence of law on social factors, and to recreate the traditional division between jurisprudence and social science.
-Gunther Teubner[*]

"'Pictures', he thought with annoyance, 'they have no positive force, they are no more than suggestions; indeed, their existence depends on me, I am free as I confront them'. Too free; he felt burdened by an additional responsibility, and somehow at fault."
- Jean-Paul Sartre[**]

1. Legally "Formalist" Approaches

This chapter will look at the second of the two identified paradigms of understanding, which I will refer to as "formalist" approaches to the Europeanisation of law within the EU. My main critique of these approaches is that they tend to overlook the culturally-embedded, reflexive and contextual quality of the law that this thesis takes as its starting premise; they reify the legal by avoiding any consideration of the cultural (or contextual) and, as such, over-emphasise the autonomy of the law.

By formalist approaches, I specifically mean those undertaken by (mainly private law) scholars who "simply equate Europeanisation with the substitution of national private law with European-wide applicable rules and principles"[330] and who "pay little attention to the 'regulatory embeddedness of private law".[331] While contextualist approaches, as has been discussed in the previous chapter, tend to adopt a normative stance that designates legal-cultural diversity as a good thing and thus legal unification as something undesirable and indeed impossible,[332] many formalist approaches see the process of Europeanisation as creating a new European legal order, and are suspicious of what they consider to be a new form of nationalism. Formalist approaches tend to view the Europeanisation of private law as a move away from unnecessary national legal differences and towards a post-national, common European legal culture; in essence, they less ignore or overlook contextual considerations than downplay of their importance. This can most clearly be seen in the moves underway for the creation of a unified or harmonised law within the EU, such as the European Civil Code and the optional instrument of the Draft Common Frame of Reference (DCFR); however, the majority of the critique in this section will revolve around, instead of private law in general, one of its constituent elements – the law of

[*] G. Teubner, "Substantive and Reflexive Elements in Modern Law" in (1983) 17 *Law & Society Review* 2, 239-286 at 248
[**] J-P. Sartre, *The Age of Reason* (1945; Penguin edition, 1990) 71

[330] C. Joerges, "The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective" in (1997) 3 *European Law Journal* 4, 378-406 at 379
[331] C. Joerges, "The Challenges of Europeanization in the Realm of Private Law: A Plea for A New Legal Discipline" in (2004) *EUI Working Papers (LAW)* at pdf 47
[332] M.W. Hesselink, "The Politics of a European Civil Code" in *The Politics of a European Civil Code* (2006, The Hague: Kluwer) Chpt 9, 143-170 at 147

contract – for the simple reason that this field is the "most advanced and internationally most widely noted academic project aiming at the Europeanisation of private law".[333]

2. Towards A Harmonised Law of Contract in the EU?

Codification of European private law was not something that was on the cards from the outset of the European project; on the contrary, it was not until the latter half of the 1980s that a European Civil Code was touted as being a realistic option. Similarly, the harmonisation of those core fields of private law, such as contract or tort, had not been viewed by the European Community (EC) as being inherent to the market project for the simple fact that existing, national, private law systems could be used instead.[334] During the first two decades of the EC's existence, in fact, attitudes among private lawyers were distinctly cool towards the entire "Europeanisation" enterprise, no doubt due to the somewhat patchy and haphazard methods that had previously been used in the field of, for example, consumer credit. These reservations notwithstanding, the late 1980s saw the idea of a unified collection of common principles of European private law come to be met with more enthusiasm that had previously been exhibited, not only in professional circles but also in political and academic ones; in 1989 the European Parliament passed a resolution requesting that preparatory work for a European Civil Code or, at least, a European Code of Contract Law be embarked upon,[335] with further support for this undertaking being given by means of a second resolution in 1994.[336]

a) Common Principles of Contract Law

The first legal field to be tackled, in terms of there being an overt endeavour to identify and/or establish a set of common principles that would be applicable across the whole of the EU, was that of contract law, with moves to this effect occurring even prior to the Parliamentary resolutions. The Commission on Contract Law, headed by the Danish professor Ole Lando (who also lent his name to the group), began their work in 1982 but actually did not publish their first findings, "Principles of European Contract Law" (PECL) until 1995, with a more complete version following in 2000 and a third part subsequently appearing in 2003.[337]

Whether or not this project was at its genesis considered to be laying the bedrock for a codified European law of contracts, there is no doubt that they had adopted this very mission statement by the turn of the millennium; the introduction to Parts I and II of the Principles states that "one objective of the PECL is to serve as a basis for any European Civil Code of Contracts. They could form the first step in this work".[338]

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333 R. Zimmermann, "*Ius Commune* and the Principles of European Contract Law: Contemporary Renewal of A New Idea" in H. MacQueen & R. Zimmermann (eds) *European Contract Law: Scots & South African Perspectives*, (2006, Edinburgh: EUP) at 3

334 C. Schmid, "Adjudicative & Legislative Integration in Private Law" in (2002) 8 *Columbia Journal of European Law* 3, 415-486 at 416

335 European Parliament Resolution on action to bring into line the private law of Member States, 1989 O.J. (C. 158) 400

336 European Parliament Resolution on the harmonisation of certain sectors of the private law of Member States, 1994, O.J. (C. 205) 518

337 O. Lando & H. Beale (eds) *Principles of European Contract Law. Part I: Performance, Non-Performance and Remedies* (1995, Dordrecht: Kluwer); see also *Parts I & II* (2000) and *Part III* (2003, The Hague & London: Kluwer)

338 *ibid*, at xxiii

The second step along this road, then, could be considered as being the establishment in mid-1999 of the Study Group of the European Civil Code (SGECC), chaired by the German Professor Christian von Bar.[339] While it does include the field of contract law within its ambit, the work of the Study Group also addresses the law of non-contractual obligations and certain parts of the law of moveable property – namely, those areas of relevance to the functioning of the internal market – which served to move the focus away from resting *solely* on the law of contract.[340] Nevertheless, and as has become clear from subsequent developments, contract law remained the field in which most of the moving and shaking was to occur, no doubt due to its principally technical character; as Zimmermann notes:

> …most of the basic concepts and evaluations informing the law of contract have not been deeply affected by legal developments under the auspices of the age of legal nationalism. The differences between the national legal systems are largely on the level of technical detail [whereas,] in other areas of private law, the situation is more complex.[341]

This statement can also be cited as something of a concession on Zimmermann's part in terms of identifying both the reasons behind certain difficulties of private law harmonisation and the varying fields in which those difficulties manifest themselves.[342] He seems to suggest that the highly technical character of the law of contract lends itself to codification while some of the more culturally embedded fields of law would present more of a problem; nevertheless, what he appears to overlook here is that the very language through which the technical details of the law are expressed, the terms used, and the comprehensions of those terms, are all constructed and affected by the legal context from which they stem, namely their *legal culture*. In the spectrum of "difficult to codify", therefore, while contract may appear to be the more straightforward proposition,[343] it is important not to assume that its mere technical character alone would serve to reduce its contextual quality. It is as Wittgenstein said, unless we share a certain concept we cannot agree or disagree on its use – the result is merely an illusory consensus based entirely on a misunderstanding.

While the European Parliament's support for the codification project was clearly evident, mainly due to the resolutions of 1989 and 1994 mentioned above, the Commission's position is much harder to ascertain.[344] 2001 saw the release of their Communication on European Contract Law in 2001, but this rather underwhelming document did not serve to

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339 Considering many of the same names were on the membership lists of both groups it is disputable just to what extent of a progression this was.

340 "The Group is addressing the law governing certain particular types of contract (sales, services, credit agreements and credit securities, contracts of insurance, and long-term commercial contracts: agency, distribution and franchise contracts), the law of non-contractual obligations (tort law, the law of unjustified enrichments and the law on *negotiorum gestio*) and those parts of the law of movable property which are particularly relevant to the functioning of the internal market (credit securities in movables, transfer of ownership in movables and, prospectively, the law of trusts)." See: C. Von Bar & O. Lando, (2002) "Communication On European Contract Law: Joint Response" in 10 *European Review of Private Law* 183-248, at 191, part 1, para 5

341 Zimmermann, *supra* note 333, at 3

342 This observation will be returned to in the next section.

343 It is evident from a quick perusal of the literature on the topic of private law codification that the majority of work has been done on the law of contract.

344 Joerges, "Challenges" *supra* note 331, at 11 pdf.doc

reveal any actual preferences on the part of the Commission itself[345], but rather merely laid out four possibilities for future action. These were: (i) do nothing and just leave the question of Europeanisation to market forces; (ii) aim to derive / construct a set of common principles under the restatement technique; (iii) consolidate what had happened thus far by means of reflexive harmonisation, which would basically mean a reorganisation of the *acquis communautaire* or; (iv) go all out for a full-scale regulation of contract law in Europe via a comprehensive programme of legislation.[346] A possible fifth option not officially included was that of undertaking research. Subsequent to a widespread, although not overly lengthy, process of consultation, the Commission published an Action Plan stating which steps were to be taken, using a mix of regulatory and non-regulatory measures. These included: (i) increasing the coherence of the Community *acquis* in contract law by establishing a Common Frame of Reference (CFR); (ii) promoting the expansion of EU-wide general terms of the law of contract, and; (iii) undertaking further study as to whether "problems in European contract law require non-sector-specific solutions such as an optional instrument on the subject".[347]

In essence, both options two and three of the Communication were selected by the Action Plan, with the fourth choice of a legislative document remaining as a still-viable alternative.[348] In terms of this final option it is worth noting that, despite not receiving much in the way of support during the consultation process, an (optional) Civil Code remained a possibility.[349]

Indeed, the entrenched response of both the Lando (PECL) and von Bar (SGECC) groups was a pledge of support to this fourth option; in submitting their *Joint Opinion* the academics involved advocated that a process of restatement be followed in order to glean a set of common "Principles"[350] that could serve at the first draft of a Civil Code.[351] This evidently scholarly approach[352] called for "the composition of uniform basic rules (Principles) based on a careful analysis of pros and cons, which overcome existing substantive differences" and goes on to argue that these Principles "construct a building plan for a future European legal system".[353] As mentioned earlier, it is not as if the Lando and Von Bar groups had no regard for the specificity of the national orders of private law but rather that they appear not to consider the substantive legal-cultural differences as

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345 Joerges, "True Conflicts" *supra* note 330, at 12 pdf.doc

346 2001 Communication on European Contract Law, COM (01) 398 final; see paras 49-51, 52-56, and 57-60; see also C. Von Bar & O. Lando, "Communication On European Contract Law: Joint Response" in (2002) 10 *European Review of Private Law* 183-248; hereafter Joint Response

347 H. MacQueen & R. Zimmermann (2006) *supra* note 333, Introduction at viii

348 A More Coherent European Contract Law – An Action Plan, COM (03) 68 final

349 According to Martijn Hesselink, it is only in the academic community that the notion of a common Civil Code finds any purchase. He reports that, in the Action Plan (*ibid*, at 27, 7), that the Commission concluded that "a majority was, at least at this stage, against [this option]". See Hesselink, *supra* note 332, at 158

350 This reliance on principles raises the question, as noted by Walter van Gerven, as to "what are principles, as distinguished from legal rules?" Van Gerven subsequently states that "Francis Jacobs was right to say…that European (like other) general principles 'exist only at the level of generality so broad as to be of little practical use' and that 'in practice the Court has had itself to fashion them'", and in addition argues that the PECL provisions are not principles but rather merely "rules which are formulated and structured in a code-like enactment." See W. van Gerven, "About Rules and Principles, Codification and Legislation, Harmonization and Convergence, and Education in the Area of Contract Law" in A. Arnull, P. Eeckhout & T. Tridimas (eds) *Essays in Honour of Sir Francis Jacobs* (2008, Oxford: OUP) 400-414, at 401-403 and 406

351 Joint Response, *supra* note 346 at paragraphs 62-69

352 C. Joerges, "True Conflicts" *supra* note 330 at 13 pdf.doc

353 Joint Response, at paragraphs 62

being an obstacle to this process of restatement; despite recognising that "in the European Union a shared law cannot be claimed to exist", the intention was, quite simply, to *make* one.[354] It is the assumed ease with which they appear to have believed that "existing legal diversity [can be transcended] by a dispassionate development of the more appropriate rules for a Community wide private law"[355] that this section sets itself out to argue against.

b) The (Draft) Common Frame of Reference (DCFR)

The research alliance forged by the Commission subsequent to their 2001 Communication,[356] which adopted the title of Network of Excellence, comprised the *acquis* group and the study group, with the former focussing on the *acquis communautaire* and the latter following the example of the Lando group by espousing a comparative approach. Since their genesis seven years ago both groups have been prolific: the study group already have six books to their collective name,[357] while the *acquis* group recently published their first findings, along with their own set of Principles.[358] In line with the challenge they accepted in 2002, and under no little pressure from the European Commission,[359] the *acquis* Group and the Lando Group merged their Principles[360] and submitted them to the Commission as the Draft Common Frame of Reference (DCFR).[361]

The DCFR, which is considered as being a toolbox for "better legislation",[362] consists of ten "books", each dealing with a separate area of the field, which actually covers a wider field than contract law alone.[363] This, along with the fact that it is an "academic" and thus *optional* document, is the main difference from the *official* CFR, whatever form that is likely to take. That said, the DCFR also forms a possible basis for the CFR to adopt; despite the fact that it is first and foremost an academic document, it has endeavoured to bear in mind

354 *ibid*, at paragraph 65

355 *ibid*, at paragraph 63, italicised section

356 See the 2002 establishment of the network of researchers under the Sixth Framework Programme for Research (Decision No. 1513/2002/EC, OJ L 232, 29.08.2002, 1)

357 All volumes published under the banner "Principles of European Law: Study Group on a European Civil Code"; see the PEL series published by Sellier.

358 Research Group on the Existing EC Private Law Acquis (ed), *Contract I, Pre-contractual Obligations, Conclusion of Contract, Unfair Terms - Principles of the Existing EC Contract Law* (2007, Acquis Principles) and *Contract II, Performance, Non-Performance, Remedies - Principles of the Existing EC Contract Law* (2008, Acquis Principles)

359 H-W. Micklitz, "The Visible Hand of European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation" in (2008) *EUI Working Papers (LAW)* 14 at 7.pdf

360 This is an interesting situation: on the one hand, a sceptic could argue that, considering the Principles of European Contract Law and those of the *acquis commaunitaire* both purport to be common principles, there should not be many differences at this stage, thus raising the question what actually occurred during this "merger"; on the other hand, however, is the acknowledgement that the DCFR comprises a *body* of legal work undertaken over the years and thus draws upon a variety of sources in order to achieve the optimum expression. See E. Clive, "An Introduction to the Academic Draft Common Frame of Reference", published online at ERA Forum (2008) 9: S13–S31, section 1 at S14 and S20

361 See European Parliament Resolution of 3 September 2008 on the Common Frame of Reference for European Contract Law

362 European Contract Law and the Revision of the *acquis*: the Way Forward, COM (2004) 651 final, para 3.1.3, at 11 and paragraph 2.1.1. at 3

363 These ten books are: (Book I) General Provisions, (Book II) Contracts and other Juridical Acts, (Book III) Obligations and Corresponding Rights, (Book IV) Specific Contracts, (Book V) Benevolent Intervention in Another's Affairs, (Book VI) Tort Law, (Book VII) Unjustified Enrichment, (Book VIII) Acquisition and Loss of Ownership in Movables, (Book IX) Security Rights in Movables, and (Book X) Trusts.

the formal stipulations of the Commission, namely to provide, along with considerations of clarity and coherence[364]:

> clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC acquis and on best solutions found in Member States' legal orders[365]

This character provides a degree of flexibility for the Commission as to its future decisions regarding the DCFR, leaving open to them the option of employing is as either a starting point or a component of the official CFR, or when revising the existing *acquis*. That the DCFR will be exposed to the rigours of academic scrutiny and critique is also seen as a positive aspect that the antecedent can bring to bear on its eventual progeny, along with the increased awareness of the existence of such a document can bring to the project and ongoing process of ascertaining common principles across the various European Member States' laws of contract. In a similar vein, it is hoped that the close association of the academic DCFR with any subsequent official document will give it a certain gravitas and credibility, despite the inevitable differences between the two articulations.

Nevertheless, there is an easily identifiable stumbling block for the operation of the DCFR as a result of its academic and optional character when it comes to actual reliance upon the principles contained within it. By virtue of the restrictions imposed upon contracting parties in the first Rome Convention of 1980[366], Article 1 of which stipulates that the only contract law regimes that can be relied upon and subsequently enforced by domestic courts are, in fact, *only* those of the Member States (and their sub-state component contract law regimes, should there be a multiplicity of legal orders within a Member State[367]). While the principles and terminology[368] contained within the DCFR can be included within the contract by the parties to it, they can only be relied upon in situations of non-judicial arbitration to the exclusion of actual judicial application or enforcement at the domestic level. One might have doubts, therefore, as to the utility of including such principles within the contractual agreement – why, for example, would the parties exert themselves to frame their agreement in such a way when legal reliance upon them is precluded? This non-enforceability problem also serves to undermine the possibility of ascertaining the extent of the actual reliance on the principles contained within the DCFR and thus whether its has been positively or negatively received by those who employ it (or not) on the ground. That said, the *unenforceable* character of the DCFR allows it to side-step any allegations that it lacks legitimacy, democratic or otherwise.[369]

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[364] See E. Clive, *supra* note 360 at S.18, plus both the Commission's First Annual Progress Report on European Contract Law and the *Acquis* Review (2005) and the Commission's Second Progress Report on the Common Frame of Reference (COM (2007) 447 final)

[365] Communication from the Commission on "European contract law and the revision of the *acquis*: the way forward" (COM (2004) 651 final)

[366] Convention on the Law Applicable to Contractual Obligations (1), opened for signature in Rome on 19 June 1980, OJ C 027 , 26/01/1998, 34-46

[367] Article 19, Rome I Convention, *ibid*

[368] DCFR I. -1:103 and Annex 1

[369] "This seems worrying from two different angles. First of all, the scholars that are involved in the drafting of the DCFR lack democratic legitimacy. The group represents neither all of the populations of the Member States, nor their political convictions. Secondly, it is questionable whether professors should be vested with the translation of social-political reality into legislation. In a democratic society, this would seem to principally be the task of the (democratically legitimised) legislature (…)." See B. van Zelst, *The Politics of European Sales Law* (2008, unpublished doctoral thesis), quoted in J.M. Smits, "European Private Law and Democracy: a Misunderstood Relationship" in M. Faure & F. Stephen (eds.) *Essays in the Law and Economics of Regulation in Honour of Anthony Ogus* (2008, Antwerp & Oxford) 49-59 at 50

As this situation is still very much one in flux, however, it can be granted a certain leeway at the moment; nevertheless, these concerns will need to be addressed if the drafters of the DCFR want it to have any utility and application whatsoever, not to mention avoiding the fate of being bypassed to the extent of being consigned to a desk drawer. The next couple of years will be crucial in this regard.

c) The "Reasons" Behind the Harmonisation Project

The project of private law codification is one that polarises both the academic and professional communities – numerically considered, the advocates and opponents seem to be finely balanced,[370] although the academic community appear to be overwhelmingly and even inordinately pro-codification. What, however, can be cited as the reason for this apparent reluctance of the Commission to pin their colours to the codification mast for so long? An additional consideration here is why, when they had been noncommittal for so long, did the Commission suddenly begin to undertake pro-unification steps in 2001 with the Action Plan? Indeed, what are the reasons that can be cited as being behind the drive towards such a pan-European civil codification in the first place?

These reasons are threefold. The first is, quite simply, to facilitate the smooth functioning of the internal market by removing the barriers to market integration caused by legal differences across the EU, legal diversity being perceived as an obstacle to market integration.[371] Next, to prevent the systematic coherence of national systems of private law from being jeopardised by the piecemeal and sectoral approach adopted thus far in areas such as consumer protection law. The third reason behind codification can be seen as a more symbolic one, namely that of the "cement[ing of] a legal unity across European legal cultures",[372] and thus acting as a symbol of cohesion.

Let me take each of these three in turn, starting with market integration. The argument here is a predominantly technical one in favour of private law codification and tends to run along the lines of: if dissimilarities among the treatment of certain fields of private law across the single market, such as product liability or unfair terms in contracts, can be considered as imposing restrictions upon inter-Member State free trade, then comparable differences in other fields, such as property, contract or delict (or tort) must give rise to similar market restrictions – for the sake of the market and the possibility of its completion, therefore, there should be a common and unified private law across the EU.[373] Similarly, as well as placing restrictions on the "proper" functioning of the market, it has been argued that intra-market legal diversity promotes a fragmented market, or even just "a collection of discrete markets"[374]; the optimal means of avoiding such a scenario, therefore, would be to remove, as much as possible, the situation where different treatments exist in different jurisdictions and seek to replace this multiplicity of laws with a single, Community-wide rule.

The second reason given for the compilation of a harmonised law of contract within the European Union, the *coherence* argument, submits that the targeted, sectoral approach to

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370 C. Von Bar, "From Principles To Codification: Prospects for European Private Law" in (2002) 8 *Columbia Journal of European Law* 379-388 at 380

371 See (2001) Commission Communication, *supra* note 346

372 P. Legrand, "Against A European Civil Code" in (1997) 60 *Modern Law Review* 1, 44-63 at 44

373 H. Collins, "European Private Law and the Cultural Identity of States" in (1995) *European Review of Private Law* 3, 353-365 at 353

374 Joint Response, 208-9 paragraph 33

European regulation within private law fields is having a detrimental effect on the coherence of domestic private law regimes in the Member States, and that codification is the best means by which to achieve legal clarity and coherence at both the European and domestic levels. Unlike the economically-informed argument given above, this reasoning focuses predominantly on legal considerations, although the specific *aims* of the undertaking are efficacy, transparency and consistency of application. An ancillary point here is the contention that this situation of legal diversity within the EU appears to be hugely confusing to those who have to work with it. The Von Bar and Lando groups, in their *Joint Opinion*, argue that the European citizen, who already benefits from freedom of movement of goods, services and labour, as well as from a (predominantly) uniform currency, "will react with complete incomprehension when confronted with the diversity of legal rules which dominate his daily life". It is their argument here that "it is more important to give due consideration to this expectation of the European citizen than to insist all too strongly on diffuse conceptions of the preservation of legal cultural identities".[375] However, while this argument makes a valid point – that circumstances of legal diversity are confusing and options of "which law?" lead to incoherence – it falters in terms of its reasoning, which basically takes a "we are part of the way there, why not just keep going?" approach. Indeed, it can hardly be a surprise that such a project of juridification, namely an economically-motivated move towards integration that uses law as its instrument, has resulted in the requirement for more and better law:

> [o]nce the interaction among European legal systems had acted as a catalyst for the creation of a supra-system, the need to achieve reciprocal compatibility between the infra-systems and the supra-system naturally fostered the development of an extended network of interconnections…which eventually raised the question of further legal integration in the form of a common law of Europe.[376]

To phrase this another way, what is being argued here is that the "problems" generated by the early stages of the Europeanisation process can only be solved by *further* Europeanisation. This also assumes that any confusion or conflicts are removed by codification, which, I will argue later in this chapter, is not necessarily the case.

Taking these two main reasons for contract law codification together, however, it is still questionable to what extent, firstly, these obstacles actually hinder the functioning of the internal market, and secondly, what effects minimum (instead of total) harmonisation has upon the implementation of law at either level. Once again, if we look at the Commission's Action Plan, it is clear that the main supporters for codification are academics, who also happen to be alone in giving such weight to the problems arising from a multiplicity of national laws[377] – Member State governments seem to be split on the issue. It is also interesting to note that, while the governments of civil-law jurisdictions (Germany, Austria, Belgium and Portugal) all viewed the complexity of the situation as being problematic, the common-law jurisdiction government of the UK came to the conclusion that "it does not consider that the co-existence of different national contract laws is in itself necessarily inimical to the functioning of an internal market".[378] This reasoning was based on the existence of varying regimes across the UK in Scotland and in England and Wales; similarly, UK legal practitioners consulted came to the conclusion that any obstacles to

[375] Joint Response, at 216 paragraph 50
[376] P. Legrand, "European Legal Systems Are Not Converging" in (1996) 45 *International Comparative Law Quarterly* 52, at 52
[377] Annex of Action Plan, *supra* note 348, at 33, part 3.1.5
[378] *Ibid*, at 30, part 3.1.1

market functions were "less substantial than assumed", and cited both the UK and US as examples of existing legal orders where there is neither a unified system of contract law nor any perceived need for such a system.[379] Even at the early stage of consultation, it is worth taking note here of the results of differing *Weltanschauungen* in the civil and common law traditions.

The third and final reason, that a European Civil Code will fulfil a symbolic function in terms of cross-legal-cultural unity, leads us into perhaps the most vehemently argued areas of the whole debate, a situation that is mainly due to conflicting comprehensions of what civil law codification actually involves. With minimum harmonisation measures, as noted above, being considered by some commentators as problematic, one of the options for codification is that it takes a maximal approach, namely, that a comprehensive Code covering all matters of private law would replace existing national law. Alternatives to this maximal option take the form of a number of halfway houses, so to speak; either the Code could be limited in its scope, for example dealing only with patrimonial law or even simply contract law, or it could be limited in its application, for example only being applicable to international and not to domestic contracts, or to certain parties such as consumers or businesses.[380] However, it is difficult to see what symbolic value, if any, a merely minimally harmonising Code could purport to have; surely a partial measure would be such a weak unifying emblem that its symbolic value becomes close to useless?

In terms of the symbolic quality of the purported Civil Code, it is interesting to observe that, once again, the Commission appeared to be playing its cards close to its chest. As noted by Von Bar, while:

> the Commission's Communication is … quite plainly directed towards the economic requirements of the common market…the symbolic force of a uniform private law does not come in for a mention.[381]

Nevertheless, whether the Commission's standpoint is apparent or not, the success or failure of moves towards civil law codification has obvious political capital *as a result of* this symbolic character. As mentioned in chapter one, such instrumental policy attempts to harness the law as a basis for European unity, symbolic or otherwise, is not a new occurrence; however, once again it simply becomes clear that the problem of "unity in diversity" lies at the very heart of the Europeanisation process, even in the most black-letter of settings. The previously discussed tension between "deepen[ing] the solidarity between the peoples [of the Member States] while respecting their culture and traditions"[382] becomes even more obvious when we cognise Member State regimes of private law as being "deeply entwined in the economic and political circumstances of the polities which they order and to which they owe their legitimacy"[383] or, in other words, as being separate legal cultures with their own unique social context.

Ignoring this contextual quality of (private) law, then, as many formalist accounts do, not only overlooks the uniqueness of Member State legal orders but also pays no mind to what the effects of a supposedly uniform application of law across the EU could be. As Hugh Collins phrases it, the problem faced by the codifiers is that they must:

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[379] *Ibid*, at 32, part 3.1.4. These points are also made by H. Collins, *supra* note 373, 354-5
[380] Hesselink, *supra* note 332, 151
[381] Von Bar, *supra* note 370, at 383, paragraph c
[382] Preamble to the Treaty on European Union, OJ 1993 C 224, paragraph 4
[383] Joerges, *supra* note 331, at 14 pdf.doc

> …overcome the conceptual differences between legal systems, which represent more than technical contrasts, but reflect different justifications for the imposition of legal obligations and the creation of rights, and these underlying justifications both inform the interpretation of the law and reflect differences between the moral and political foundations of different private law systems. Even with a common set of rules and concepts, the habit of mind of lawyers in different legal systems, no doubt reinforced by rules of civil procedure, are too deeply ingrained to achieve practical uniformity in approach.[384]

Indeed, this is exactly the problem of codification: the notion of "unity in diversity" is discarded in favour of "*overcom[ing]* manifest problems of legal diversity",[385] but the *possibility* of doing so is always-already conditioned by that diversity, meaning that the problem of interpretation is merely disguised and neither solved nor removed.

It is my contention that this 'formalist', codifying approach to the Europeanisation of law is simply naïve, creating as it does more problems than it solves. This is not a new argument, of course: as has been discussed in the previous chapter, Pierre Legrand has been fighting the corner of national legal specificity against the encroaching harmonising forces since the very beginning of the codification debate. While often being perceived as hugely pessimistic, Legrand has grudgingly been granted a degree of ground by many others working in the field, a concession that tends to be along the lines of "well, his argument is hugely exaggerated but sort-of has a point".[386]

3. Pierre Legrand – Codification Killjoy

Although by no means being completely isolated in his opposition, Pierre Legrand is the Civil Code's most vocal antagonist. Somewhat polemic in his method, Legrand has nonetheless brought a healthy scepticism to the notion of the Europeanisation of private law, which Hesselink has conceded was, at its conception, a "romantic", open and harmonious field of study.[387] Ironically enough, it is Legrand's approach that appears to be the more romantic; his advocation of legal diversity treats the concept almost tenderly, evident from the way he claims that:

> a comparatist who…is a friend of legal diversity will readily take the view that legal diversity ought to be suppressed only when there are compelling reasons for so doing and will readily argue, further, that, even as legal diversity is being recast, this process ought to take place in a sensitive way, that is, in a way that is sensitive to the singularity of local experience.[388]

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[384] H. Collins, *supra* note 373, at 356.
[385] C. Von Bar & O. Lando, *supra* note 346, at 183
[386] See, for example, M.W. Hesselink, *supra* note 332 at 155; J.M. Smits, "Legal Culture as Mental Software, or: How to Overcome National Legal Culture?" in T. Wilhelmsson, E. Paunio & A. Poholainen (eds) *Private Law & the Cultures of Europe* (2007, Kluwer Law Internationational) 141-151 and, although regarding a different legal field, that of torts: C. van Dam, "European Tort Law and the Many Cultures of Europe" in T. Wilhelmsson *et al* (2007) 53-76
[387] M.W. Hesselink, *supra* note 332, at 155
[388] P. Legrand, "On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations" in (2002) *European Review of Private Law* 1, 61-76, at 62

Legrand takes umbrage with three main points of the Europeanisation of law process,[389] these being, first, the methods through which the project has been tackled; second, the moves underway to impose the civil law tradition upon the common law tradition, not merely as the hegemonic form within the EU but as the *only* form; and, finally, the difficulties inherent to the interpretation of a harmonised legal form. While it is clear that all these points are interlinked, in the interests of clarity I will consider each separately.

Legrand's argument relating to the first point is twofold: he objects to what he calls these "instrumental initiatives",[390] his gripe being that not only do these enterprises fail to promote legal-cultural difference within Europe but also – and even worse – they either deny that such difference exists or claim that it is of little importance. Indeed, instead of embarking from a position sympathetic to the existence of legal diversity, the majority of initiatives have begun from a standpoint that either assumes or endeavours to discover or construct *commonalities* of law across the EU; the Mattei and Van Gerven projects, for example, take the approach that they are merely drawing attention to existing commonalities, while the Lando project, as discussed above, is the example *par excellence* of commonalities being not even just recognised but *created*. For Legrand, as a self-styled comparatist-at-law, this is simply outrageous – his automatic point of departure is one of assumed diversity,[391] of course, and so he sees these "strategies of simplification" as being intentionally duplicitous.[392] Moreover, he considers initiatives like the codification process to cause the law to be used instrumentally *against* itself, that is, to perpetuate a violence upon itself in order to fit more neatly into the categories and conceptions that have been decided upon for it on its own behalf.[393]

This leads us neatly to Legrand's second main point of contention, which is that any attempt to codify private law in Europe has the effect of privileging the codified form, and thus a continental and civil law approach, over the more amorphous and responsive common law articulation. These two distinct epistemological formations cannot be merged or conflated and so, in the integration process, it appears to be the case that one must give way to the other – the common law tradition must yield to the might of the civil law tradition. In effect, this situation would require the law to perform a sort of auto-operation of severing and discarding anything that did not fit into the parameters as thus defined by the root choice, that of the civil law tradition over the common law one. The reason that the civil law tradition has been selected as dominant is, claims Legrand, due to its inherent scientificity, rationality and clarity, its ability to overcome the vagaries of the common law

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389 Actually, he takes umbrage with many more than that. Legrand himself cites six counts on which the European Civil Code can be criticised, which can be summarised as follows: (i) it is arrogant to privilege the civil law tradition over and at the expense of the common law tradition; (ii) it is misleading to rely upon the 'myth' of the *ius commune*; (iii) it promotes the false notion that unification would dispose of the need for interpretation, and denies that problematic varying interpretations will arise; (iv) it promotes a formalist conception of rules-as-truth, which functions as an 'epistemological barrier to an appreciation of the complexity of legal knowledge'; (v) pro-codification claims are under-theorised, and finally; (vi) it contravenes both the letter and the very ethos of EU law by rejecting the existence of differences across legal systems as laid out in the Treaty of Rome. That said, I believe that all of these counts barring the last one can easily be accommodated within the three reasons I have given above, while the latter concerns the question of 'unity in diversity', which is the main focus of this project. See P. Legrand, "A Diabolical Idea" in A.S. Hartkamp & E.H Hondius (eds) *Towards A European Civil Code* (2004, Nijmegen: Kluwer) Chapter 14, 245-272 at 255-266

390 P. Legrand, (2002) *supra* note 388, at 63

391 A reciprocal criticism that could be levelled at Legrand is that he overemphasises difference in much the same way that he accuses others of doing with commonality.

392 See chapter 2 section 4 for a more in-depth discussion of this point.

393 See P. Legrand, "Antivonbar" in (2006) 1 *Journal of Comparative Law* 1, 13-40 at 31

tradition by producing an "institutionalised system of concepts and rules that claims to speak all at once and once for all, that asserts unalloyed pan-Europeanism".[394] Legrand also hints (less than subtlety) that the civil law mindset of Von Bar himself has much to do with this selection, although this appears to be unfounded barring Von Bar's obvious personal favouring of a codified system of private law for the EU.[395]

The link between these two arguments is, obviously, that codification is simply another "strategy of simplification" in that it has the effect of glossing over or masking existing differences. Legrand's argument *contra* Von Bar is that, instead of simply being against legal specificity in terms of the uniqueness of Member State legal orders, private law codification will have the effect of removing *all* legal specificity for

> in the context of Professor Von Bar's strategy of world-appropriation, the case sees its distinctive features effaced until it completely dissolves into the concept or the proposition. […] The code, as a form of law, will contain what would otherwise overflow: experience.[396]

As an epistemological construct within the distinctive formation of the civil law, the code is fundamentally incompatible with the common law tradition, which would lose all its *own* epistemological character were it to be forced into such a straitjacket. The common law and its practitioners, or anyone with a common law-informed *Weltanschauung* would thus be "outlawed",[397] argues Legrand (albeit somewhat theatrically), because they would be from the very outset of the codification programme *outwith* the newly-created European law. Despite never having been in any way either faulty or at fault, the common law epistemology will be forced to attempt to identify with a formulation that it not only fundamentally differs from, but has historically even *rejected*.[398] At the very basis of the codification agenda, therefore, is the unacknowledged but "effective denial of sites of contestation within [the legal order of the EU]".[399]

4. Against A Top-Down Approach: An Investigation using the Product Liability Directive

The problem of "which law?" that was encountered moment the leap was made from the purely national to the supranational is now becoming more obviously pertinent. Those formalist approaches that overlook the importance of culture and thus a culturally influenced context for the law have throughout this chapter been exposed as simply naïve, but that merely serves to show that the cultural and contextual *is* important in this setting, instead of providing a solution to the puzzle. This next section will not, unfortunately,

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394 *Ibid* at 24

395 Although, that said, the recently published German text with German editors and German contributors could be cited as an example of von Bar's overwhelmingly German-minded approach; see R. Schulze, C. von Bar & H. Schulte-Nölke (eds), *Der akademische Entwurf für einen Gemeinsamen Referenzrahmen Kontroversen und Perspektiven* (Feb. 2009, Tübingen: Mohr Siebeck)

396 P. Legrand, *ibid* at 21. See the discussion of "experience" in the previous chapter

397 P. Legrand, *ibid* at 31

398 "The contemporary challenge facing Europe is, therefore, to appreciate that English law not only is different, but that *it has wanted to be* different by taking the road not travelled. This willed particularism may or may not be a matter of regret. It is, however, a matter of historical record, which ought to command respect from those civilians within the European Community agitating in favour of the *idée fixe* of civilianising (or, as they no doubt mean, 'civilising') the common law."
Emphasis in original, see Legrand, P. (2004) *supra* note 47 at 247-8

399 Legrand, (2004) *ibid*, at 267

provide one either, but the aim in writing it is to elucidate the main problems inherent to a top-down approach to the Europeanisation of law in circumstances of "interlegality".[400]

Marc Amstutz also recognises this problem of "interlegality" in the EU, his main argument being that, in a supranational setting, law and legal communications come to inhabit these "in-between worlds"; namely, the grey area not within but rather outwith and *amid* all the nation states comprising the EU. The prime examples of such legal communications, he argues, are European Directives (procedural, instrumental), which "merely harmonise national legal orders without replacing them with unified rules applicable homogeneously in all the countries concerned".[401] Much of Amstutz's argument revolves around the requirement for *interpretation in conformity with Directives*, which he says can be considered as a three-pronged affair in that this requirement produces normative compatibilities, triggers an evolutionary field of law, and can be seen as meta-law.[402]

Utilising the term "constitution" *sociologically* to denote a tool for the integration of legal norms into actual social processes, Amstutz argues that the constitutionalisation hurdle that interlegality has to overcome is, basically: how can norm-integration occur when the norms themselves arise from a non-nation state context, and thus exist in the gaps between national legal orders? In essence, this problem can be described as one of polycontextuality; the concrete context of the national legal order is undermined by the step up from the level of the national to the supranational, and the strictly hierarchical quality of this state-based context is challenged by a more interactive and heterarchical logic in terms of the EU integration process, which has multiple possible contexts for the law. Amstutz argues that the requirement for interpretation in conformity with directives is an instrument for the "heterarchical" constitutionalisation of (private) law in the supranational setting of the EU.

However, this very requirement of interpretation in conformity with Directives is in itself awkward in that what constitutes conformity in any given situation can be unclear – hence the very need for interpretation. This requirement makes two assumptions: firstly, that the Member State will act in good faith, and secondly, that the legal meaning being communicated by the directive will be understood by the Member State legal culture in the same way.

The (methodological) problem that both the utilisation of a Directive and the requirement of interpretation in conformity with a Directive run into is one of *interpretation*. Each Member State, prior to the introduction of a Directive, has their own approach to a particular sector of the law, which can be described as an approach that is specific to its own legal culture; that is, the law takes its content and aims from its specific cultural, political, economic, and social context. Therefore, in terms of a given legal field, there would be a particularly German approach, and a French approach and an Italian approach, and so on and so forth. Let me attempt to illustrate this with the use of a concrete example: a specific sector of private law that has been regulated by means of an EU Directive for a decent length of time, that of liability for defective products. Prior to the introduction of

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[400] B. De Sousa Santos, "Law: A Map of Misreading" in (1987) 14 *Journal of Law and Society* 3. As quoted earlier in chapter 2, "our legal life is constituted by an intersection of different legal orders, that is, by interlegality".

[401] M. Amstutz, "In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning", in (2005) 11 *European Law Journal* 6, 766-784 at 766-767

[402] Amstutz, *ibid* at 768-770

the Product Liability Directive[403] in 1985 there existed numerous diverse and discrete legal-cultural approaches to regulating this area of the law, each of them distinct from the others in terms of the basis of their aims, priorities, and concerns, all of which are, of course, context-specific. The regulations in France were substantially different to those of the UK, for example, a situation that has resulted from the organic process of evolution within each of those Member States.

The most obvious difference between the two legal cultures mentioned here is the legal traditions to which they belong, namely the common law tradition in the case of the UK (notwithstanding the mixed-jurisdictional status of Scotland) and the civil law tradition in France. However, leaving that aside for the moment, there are numerous additional factors that have contributed to the asymmetry between the two regulatory approaches.

The French approach has traditionally been heavily consumer-oriented, the result of the Courts being very active; indeed, that state of affairs was to continue following the introduction of the Directive. Prior to its implementation, it is probably fair to say that, of all the Member States, the French had the most protective product liability laws in the Community,[404] including the liability of seller for hidden defects and a presumption established by the *Cour de Cassation* in 1965[405] that bad faith can be assumed in the case of a professional seller so that a claim can be brought in tort instead of in contract. It is not necessary here to delve deep into the formal law to further this analysis; rather, the question that should be posed is: why should this be the case? Why did France have such a buyer-friendly regime of product liability in comparison to other Member States? What is it about the French "legal culture" or legal tradition that protects the consumer in a way that other Member State 'legal cultures' do not?

The answer to these questions can be found in the socio-cultural setting, *i.e.* context, of the French law, namely the social, political, economic, ethnic and cultural strands that comprise the social environment for the law, both past and present. An obvious factor that can be cited as a possible basis for such comparatively elevated standards of consumer protection from defective products is the much-vaunted French welfare state, with its underlying principles of social inclusion and solidarity. The French welfare state, as Timothy B. Smith concedes, "generally succeeds in securing the majority of French people against the risks of modern life", such as becoming unemployed, or falling into poverty as a result of unemployment, injury or old age.[406] Suffice to say, the French approach has not exactly been one of liberalising the market – indeed, the resistance of the (perceived) global pressure to adopt a 'market society' in favour of the existing 'social market economy' has been decreed a mission of utmost, if not paramount, importance[407]. Despite the argument that the existence of this very 'social market economy' in contemporary France has been cast in doubt, the traditional social values that give rise to it remain deeply rooted within the collective psyche of the French citizen, are reflected thus in the political sphere, and manifest themselves within the "legal culture" of the Member State; namely, that a high

[403] Council Directive of 25 July 1985 on the approximation of the laws, regulation and administrative provisions of the Member States concerning liability for defective products (85/374/EEC), OJL 210, referred to hereafter as the Product Liability Directive

[404] This is the case despite there being no explicit legal recognition of the category of product liability in either the Civil Code or the court jurisprudence. See S. Whittaker, *Liability For Products* (2005, Oxford: OUP) at 5

[405] Civ.2, 14 Jan. 1965. D. 1965, p389; see G.G. Howells, *Product Liability, Insurance, and the Pharmaceutical Industry* (1991, Manchester: Manchester UP) at 104

[406] T.B. Smith, *France In Crisis: Welfare, Inequality & Globalisation since 1980*, (2004, Cambridge: CUP) at 3; 3-5

[407] *Ibid*, at 5

standard of protection for the citizen would be maintained over most considerations of the market.

How, then, does the UK's treatment of product liability compare to the French model? For a start, and prior to the recognition of product liability as a separate discipline, the more conservative British judiciary had steadfastly refused to conflate the positions of the contracting party and an injured third party, thus forcing the third party into an action in either tort or delict instead contract; a position that is in stark contrast to the active French judiciary's circumvention of the doctrine of privity of contract.[408] While the French laws on product liability were predominantly contractual in nature, the UK relied much more on an approach in negligence, under the ambit of the famous Scottish case of *Donoghue v. Stevenson*,[409] which allowed for a delictual claim against the negligent manufacturer for harm caused to a non-contracting party under Lord Atkin's famous "neighbourhood principle".

What about the protection of the consumer, then? Why were producers in the UK held to a lower standard than they were in France? One possible answer can be found in the politico-economic atmosphere of the UK in the late 1970s and 80s, where a burgeoning and vibrant free market economy was considered by many to be the greatest good and undue fetters upon it were disapproved of. Thatcherism in the UK broke with the politics and economics of the 1950s and 60s that were based on full employment and the welfare state and, in a climate of recession and "stagflation", established instead a politics of individualism, a rejection of collectivism and a newfound belief in the market economy.[410] As Tony Judt states, "the Thatcherite revolution strengthened the state, cultivated the market – and set about dismantling the bonds that had once bound them together".[411] This runs indirect contrast to the situation in France where, even although some privatisation of public utilities and firms was taking place in the mid/late 1980s, cautious and careful management made it a much more regulated affair than in the UK. Similarly, while Mitterand's socialist government in France began leaning towards involvement with Europe, the UK under Thatcher became more the European *enfant terrible* than ever, repeatedly rejecting the notion of "ever closer union" in favour of a more insular, national capitalism.[412]

In terms of consumer protection, therefore, the politico-economic climate's influence on the law of product liability in both nation states is evident – the UK's lower standard is in many respects a forerunner of the more market-oriented approach adopted by the Product Liability Directive and reiterated by the ECJ in the *Sanchez* case.[413] However, I do not mean to suggest that these factors are anything other than contributory to the development of the law in either of these Member States prior to the introduction of the Directive in 1985; indeed, it would be impossible to give a complete account of all factors complicit in influencing a legal culture. In addition and to quote Gunther Teubner, "law's contemporary ties to society are no longer comprehensive, but are highly selective and vary

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[408] An '*action directe*' in France allows for a sub-purchaser to pursue an action in contract against the producer responsible for the defective product, *if the product was defective at the time he sold it*. This selection of a contractual remedy, however, would eliminate the option of pursuing an action in tort, under the rule of *non-cumul*. For more on this see G. Howells, *Comparative Product Liability* (1993, Dartmouth: Aldershot) Chpt 7 at 106-108

[409] *Donoghue v Stevenson* [1932] AC 562

[410] See R. Skidelsky, "Introduction", and R Dahrendorf, "Changing Social Values Under Mrs Thatcher", 191-202, both in R. Skidelsky (ed) *Thatcherism* (1988, London: Chatto & Windus)

[411] T. Judt, *Postwar* (2005, London: Heinemann) at 542

[412] *Ibid*, at 526 and 553

[413] Case C-183/00 *Gonzalez Sanchez v Medicina Asturiana SA* [2002] ECR I-3901

from loose coupling to tight interwovenness"[414] – there are no hard and fast rules about which factors are reflected in the law. Rather, I am trying to elucidate the existence of two very different legal cultures and thus contexts for the law dealing with product liability in each jurisdiction. Indeed, I intend to argue that this situation continued subsequent to and was even compounded by the introduction of the Directive.

So let us return to the problem of a top-down approach to legal integration, such as a Directive, namely that of interpretation. The very switch from the national to the supranational level is at the root of this problem, for it introduces this top-down format where the law is "given" at the EU level and "understood" at the national level, a situation that can easily be observed in that judicial interpretation of a case in a national court is to be undertaken in conformity with the Product Liability Directive. As mentioned above, the intention of legislation by Directive is to allow for some measure of national legal *mentalité,* of national legal context, to be maintained despite its intended overall harmonising effect, to bypass the problems encountered by the clunky codification approach. Nevertheless, this results in the incidence of two particular difficulties: firstly, the test of interpretation and, secondly, the inevitability of unexpected results (new divergences), which builds on the first point.

Amstutz is well aware of the problems posed by an interpretative approach of the text of a Directive, hence his leap to the meta-level. He states that:

> [I]nterpretation brings indeterminacy into the law, because a text enables repeated reading, and correspondingly also ever-new understanding. This immediately … makes the text's horizon of meaning infinite, and the law too becomes infinite, losing its character as law.[415]

His proposed solution to this separation of sign and meaning is twofold: first, a firm designation of *what the law is* and, secondly, a limited number of potential interpreters, which in this case would be those institutions responsible for the jurisprudence within a national legal order, namely the legislative and judicial branches. However, this does not provide any real solution, resulting as it does in a multiplicity of possible meanings: 27 Member States, plus the legal order of European Union itself, each liable to have a varied or divergent interpretation. As Pierre Legrand explains, interpretation is only ever carried out on a subjective and thus culturally specific basis; he describes an interpretation as being a "subjective product…[which] is necessarily a cultural product",[416] because the interpretation is always-already conditioned by cultural considerations. Each Member State legal order, therefore, has its own legal-cultural context within which the interpretation of the Directive has to occur and, while the effect of this is positive in terms of the cohesiveness of each national legal culture while accommodating to a degree the EU law, it is precisely in this notion of "degree" that the ongoing quandary for the "Europeanisation" of law within the EU resides.

To look at this more concretely: even when a Member State claims to have the legislative will[417] to interpret the meaning of the directive "correctly", *i.e.* according to ECJ

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414 G. Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up In New Divergences" in (1998) 61 *Modern Law Review* 1, at 8

415 M. Amstutz, *supra* at note 401, at 776

416 P. Legrand, "What Legal Transplants?" in D. Nelken & J. Feest (eds) *Adapting Legal Cultures* (2001, Onati International Series in Law & Society, Oxford: Hart)

417 M. Amstutz, *supra* note 401, at 773

recommendation, and at the expense of the pre-existing national approach, how can the Court of Justice be certain that this has occurred? The national legislation will state that the national courts interpreted the case in light of the Directive, and the ECJ will subsequently interpret their interpretation; despite the best of intentions on either side, there is no guarantee of understanding. How can there be a requirement of conformity of interpretation when there can be no test of whether it has taken place, let alone to any specific degree? It is as Wittgenstein observed – the difficulty in ascertaining whether a consensus has been reached is in distinguishing between a disagreement based on the *same* concept and an agreement where *different* concepts may have been used.[418] The continuous process of interpretation by national courts and subsequent re-interpretation by the ECJ is undermined by the lack of an ultimate overseer with a comprehension of the original meaning of the law.

To phrase this differently, without a meta-understanding of what the original information is, the understanding of it is necessarily constructed by the selector. As Urs Staheli notes, "Understanding *contextualises* the difference of information/utterance [… and thus] the contextualised event remains the same while the perspective which observes it changes".[419] The difficulty is in determining the meaning of a (legal) communication when there exists a multiplicity of interpreters, in the form of a plurality of legal cultures. If there can be no view of the communicative event from the outside and thus no meta-observer, then each and every understanding is observer-specific. A plurality of observers results in a plurality of meanings.

This leads us to the second consideration, namely the likelihood of unanticipated divergences as a result of the process of interpretation. Or rather, as Teubner phrases it, how "the efforts of Europeanisation of national legal orders produce new divergences as their unintended consequences".[420] The crux of this argument is that the rule once interpreted may look the same but be fundamentally altered as a result of its incorporation into the receiving legal order. For an example, then, we should return to the Product Liability Directive and its effects on national legal orders' treatment of liability law.

The intention of the Directive, which should be borne in mind, is that the approximation of the Member States' product liability laws is necessary because:

> the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property".[421]

In this undertaking, therefore, it is arguable that it fails in its aim: in fact, Jane Stapleton goes as far as to argue that the Product Liability Directive is *ultra vires* because it does not facilitate any harmonisation of laws but, rather, gives rise to an increased "diversity of product liability rules between Member States".[422] Her argument that the directive gives rise to "new divergences" was based on the wording of Article 13, which provides that the Directive "shall not affect any right which an injured person may have according to the

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[418] See H. D. Sluga & D.G. Stern (eds) *The Cambridge companion to Wittgenstein* (1996, Cambridge: CUP)
[419] U. Staheli, *Sinnzusammenbrüche*, (2000, Weilerswist: Velbrück Wissenschaft)
[420] G. Teubner, Good Faith (1998) *supra* note 414, at 13
[421] Product Liability Directive, *supra* note 403, First Recital
[422] See C.J. Miller & R.S. Goldberg, *Product Liability* (2004 Oxford: OUP) at 217; see also J. Stapleton, *Product Liability* (1994, London: Butterworths)

rules of the law of contractual or non-contractual or a special liability system existing at the moment when this directive is notified".[423] In effect this Article states that the European law is an addition to and not a replacement for the laws already in existence at the national level, and that the regime of product liability under the Directive is without prejudice to pre-existing national laws.

This could have been seen as an argument that the approach of the Council in this situation is one of attempted reflexivity, of accommodating the existing differences in Member State national domestic law by only legislating in relation to a specifically truncated part of the field of product liability law, but that standpoint has been undermined by the recent ECJ jurisprudence on the subject. The 2002 case of *Sanchez*[424] provided, firstly, that the aim of harmonisation by means of the Directive was for internal market purposes and not for consumer protection as such and, secondly, that the Directive was to effect complete and not minimum harmonisation. Additionally, the Advocate General Geelhoed, in his Joint Opinion, stated that the very aim of the Directive, contained in its preamble, is the

> remov[al of] the obstacles to a uniform common market, which are caused by the coexistence of national legal systems with different legal traditions, by the adoption of a system of liability for defective products. In addition, a uniform system would be able to remove the distortion of competition caused by the existing divergences between legal systems of the Member States.[425]

However, as has been argued above, whether such a uniform system has resulted from this recent clarificatory jurisprudence is highly unlikely: the introduction by the Directive of a variety of terms, for example "defect" and "putting into circulation"[426], and the resulting necessity of their interpretation by and incorporation into the national legal cultures can be cited as examples of "legal irritants".[427] In addition, the fact that there are parallel regimes of product liability, for example where a Member State has retained what it sees as a more favourable method under its indigenous law,[428] would seem to put a question mark over the existence of a uniform system in this area. Indeed, it is more probable that the attempt at achieving uniformity has resulted in subsequent differences among the national legal orders' treatment of this sector of that law. As Duncan Fairgrieve states, "[t]he success of the [Product Liability Directive] is likely to depend upon the harmonised *interpretation* of the provisions by the national courts"[429] – however, the difficulties inherent to interpretation outlined above would suggest that any steering of interpretation is impossible to achieve.

In effect, my argument here is not that the Europeanisation of law in the EU using the apparatus of Directives is ineffective: on the contrary, it does facilitate the maintenance of legal diversity within the Union by providing for interpretation in light of the national legal orders' own "legal culture". Nevertheless, actually *controlling* this process is impossible, and the resulting new divergences function to undermine any *real* claim that harmonisation has occurred (within this specific legal field) across the Member States of the EU.

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[423] Product Liability Directive, *supra* note 403, Art 13.
[424] Case C-183/00 *Gonzalez Sanchez v Medicinia Asturiana SA* [2002] ECR I-3901
[425] Advocate General Geelhoed in his Joint Opinion for the cases of *Sanchez, ibid,* and Case C-52/00 *Commission v France* [2002] ECR I-3827, at paragraph 38
[426] Examples cited by D. Fairgrieve, *Product Liability in Comparative Perspective* (2005, Cambridge: CUP) Introduction (with L. González Vaqué) at 1
[427] G. Teubner, *supra* note 414
[428] D. Fairgrieve, *supra* note 426 at 7
[429] *Ibid* at 5, emphasis in original

One additional thing that should be noticed about the top-down process is that there exists within it an inherent lack of reflexivity. The obvious lack of reciprocality in terms of the interaction between the European Union's legislature, ECJ, and the Member States' courts highlights the fact that there in little in the way of *actual* communication, that is, interaction in terms of the law that is guaranteed to be understood in the same way by both parties to that communication.

This chapter has endeavoured to point to the inherent weaknesses of purely formalist approaches to the Europeanisation of law, such as codification and top-down harmonisation by means of Directive. As has been demonstrated, the failure to include a consideration of the contextual serves to facilitate an avoidance of such legal-cultural concerns as those that force their way into the reckoning the instant that a contextual aspect is acknowledged[430]; however, instead of strengthening these formalist approaches, this circumvention of the *unitas in diversitate* conundrum has the effect of undermining them entirely and . Such a blinkered view of the Europeanisation process is equally as untenable as those culturally-reductivist ones discussed in the preceding chapter.

[430] Some of the most obvious ones that could be mentioned include: should these divergences of legal meaning actually be understood as a *negative* situation? Is equivalence of legal meaning required for understanding? Is such equivalence even possible? Must there be coherence across the legal cultures of the EU or is mere consistency sufficient? Are misunderstandings of legal meaning damaging to the process of the Europeanisation of law? Moreover, what form could be adopted as a less top-down and more bottom-up or *reciprocal* form of law-making within the EU?

Chapter 5: **Differentiation and the European Union**

The whole is a riddle, an enigma, an inexplicable mystery.
- David Hume[*]

In a theory of society I think the most important distinction is between structure, as the form of differentiation in modern society, and semantics.
- Niklas Luhmann[**]

As has been demonstrated by the preceding two chapters, there is little endeavour apparent in either the culturally-reductivist or formalist approaches to achieve any sort of balance between the competing forces of legal unity and legal diversity within the process of the Europeanisation of law. These polarised approaches of autochthonous culturalism and deracinated formalism sit at the very extremes of the spectrum, each operating in effective denial of the claims of the other; indeed, their opposition is so vehement that Cees van Dam has likened the discussion to one between "believers and heathen".[431] That is not, of course, to say that moderate, middle way approaches do not exist; on the contrary, the current discussions underway within the legal academic field exhibit a definite re-appropriation of the centre in terms of this debate.[432] This shift in the centre of gravity within the debate can be attributed to a number of separate causes, but two of the most influential events can be said to be, first, the referenda rejections the Treaty establishing a Constitution for Europe[433] by France and the Netherlands and the subsequent Irish "No" to the Lisbon Treaty, and second, the publication of the Draft Common Frame of Reference (DCFR) and the resultant elevation of academic discussions in this field to a European level.[434] The concept of *unitas in diversitate* finds itself at the heart of this shift.

My own approach also opts for this middle way by arguing for a state of equilibrium between legal unity and legal diversity, and for the maintenance of that equilibrium throughout the process of Europeanisation of law; these arguments will be the focus of both this and the subsequent chapter. While the next chapter will concern itself with the process of the Europeanisation of law and the possibility of positing the existence of an

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[*] David Hume, *The Natural History of Religion* (1889, London: A. & H. Bradlaugh Bonner), Section 15: General Corrollary. See also J.C.A. Gaskin (ed) *David Hume: Principal Writings* (1993, Oxford) at 185

[**] N. Luhmann, "Answering the Question: What is Modernity? An Interview with Niklas Luhmann" with E. Knodt & W. Rasch in W. Rasch, *Niklas Luhmann's Modernity: The Paradoxes of Differentiation* (1995, Stanford, Stanford University Press) 195-221 at 195

[431] C. van Dam, "European Tort Law and the Many Cultures of Europe" in T. Wilhelmsson, E. Paunio & A. Poholainen (eds) *Private Law & the Cultures of Europe* (2007, Kluwer Law Internationational) 53-76 at 56

[432] See, among others, the more balanced approaches (particularly in terms of the field of European private law) of: C. van Dam, *ibid*: W. van Gerven, "About Rules and Principles, Codification and Legislation, Harmonization and Convergence, and Education in the Area of Contract Law" in A. Arnull, P. Eeckhout & T. Tridimas (eds) *Essays in Honour of Sir Francis Jacobs* (2008, Oxford: OUP) 400-414; J.M. Smits, *The Making of European Private Law,* (2002, Antwerp, Oxford, New York: Intersentia); and B. Schäfer & Z. Bańkowski, "Emerging Legal Orders. Formalism and the Theory of Legal Integration, in (2003) 16 *Ratio Juris* 4, 486-505

[433] Treaty establishing a Constitution for Europe, OJ C 310 of 16 December 2004

[434] The importance of this observation cannot be downplayed; the processes contributing to the drafting of the DCFR are excellent examples of both *de facto* cross-border European legal thinking and epistemic unity within a specific sector or "legal area".

EU legal culture, the focus of this chapter will be on how the opposing forces of legal unity and legal diversity can be harnessed in order to engender the balance required for the ongoing process of Europeanisation of law to operate with openness, contingency and reciprocality. The notion of achieving a balance between the opposing forces of unity and diversity and thus a situation of legal *unitas in diversitate*, as was discussed in the introduction, is reliant upon the existence of a double fragmentation *within* the legal system, namely two separate fragmentations that pull in opposite directions. I will argue that it is this dual legal system-internal differentiation (*Binnendifferenzierung*) that facilitates a conceptualisation of legal *unitas in diversitate* as the vital equilibrium that is both the precondition and the default aim of the process of the Europeanisation of law.

Throughout this thesis repeated mention has been made to systems theory and its particular vocabulary, all geared towards its application to the problems established and explained in the earlier chapters. In these preceding chapters I have criticised two of the main (albeit extreme) approaches to the question of the Europeanisation of law and their polarised standpoints on legal similarity and difference within the EU, with the intention of presenting a "middle way" theoretical approach to this conundrum. I submit that a systems-theoretical approach to the puzzle of legal "unity in diversity" as regards the process of Europeanisation of law is optimum because it provides for the accommodation of legal context *vis-à-vis* the Member States of the EU, thus maintaining legal diversity within the EU, while also facilitating a limited transcendence of these territorial borders *within* the EU's overarching jurisdiction, and therefore creating the possibility of a mediated form of legal unity.

That said, the notion of applying systems theory to an analysis of law in the European Union (EU) is not one that lacks its sceptics. In fact, these naysayers are numerous enough that they can be split into two separate camps: those who criticise the use of systems theory in terms of the EU, and those who reject the EU as an object of analysis for systems theory. Indeed, in terms of the former, it is easy enough to recognise where many of the misgivings stem from: what is the point of applying a theory that takes as its basis the notion that society has to be *world society* (*Weltgesellschaft*) to the European Union, an entity that is necessarily restricted to its own territorial boundaries? Why utilise an approach that relies on a rejection of a structure of commonly shared values and principles when it is precisely that from which the European project takes its impetus? In other words, what can this theory bring to the EU table?

In the other corner, however, the scepticism is not aimed at the theory but rather at the object of analysis: the EU itself. One of the main criticisms of any consideration of the EU in systems-theoretical terms is that it is a step backwards, that it drags us back into a state-centric debate at a time when many proponents of the theory are endeavouring to think bigger, to think in terms of a global instead of simply a national or even European society, to consider the peripheries as opposed to focusing on the centre.[435] Indeed, the prime criticism appears to be one of methodological nationalism, which I have already argued is not the case,[436] despite the analysis being in terms of EU Member States. The contention that the concept of world society is a "dismissal of geography (topography) as

[435] G. Teubner, "Global Bukowina" in G. Teubner (ed) *Global Law Without A State* (1997, Dartmouth: Aldershot); and "Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory" (2003/04) Storrs Lectures, Yale Law School

[436] See the introduction to this investigation.

an agent of differentiation"[437] is a compelling one, but not one, I believe, that overrides every situation where the national legal order could and should be considered.

In comparison to the previously discussed approaches, this systems-theoretical one must necessarily be treated somewhat differently, being as it is somewhat technical and abstract, but also because it is a theory that presents (or attempts to present) a complete worldview. It has even been argued, in fact, that the theory of autopoietic systems should not be espoused as an instrumental theory in the traditional vein of jurisprudence, political philosophy and socio-legal scholarship, as this would simply serve to diminish the theory itself.[438] Rather, it should be utilised in a way that makes the most of its abstractness and scope; as Teubner says, the theory's central message:

> emphasises a creative, almost playful and artistic development of different knowledge fields [which] has nothing to do with the instrumental manipulation of actors or systems…social autopoiesis is essentially an aesthetic theory whose main importance is in an analysis of the way new and unexpected worlds of meaning emerge by processes which create their own reality.[439]

Taking this as its starting premise, this chapter will argue the following: first of all, that it is legitimate to use systems theory in such an undertaking, that is, one that relies not only on the functional differentiation of social systems, but also on the system-internal *sectoral* distinctions that could be described in terms of territory (*jurisdiction*) and legal area (*epistemic community*), and; second, that the coincidence of this double fragmentation allows for the process of the Europeanisation of law to be cognised differently from those approaches rejected earlier in and throughout this thesis, namely as a contingent process that aims to achieve unity without uniformity and diversity without discontinuity, and which lacks any *finalité*.

Historically, Europe has been characterised by differentiation, specifically *functional* differentiation, which it has adopted as its structural basis. This chapter will first of all discuss the historical progression from pre-modern segmentary and stratified social structures to the modern functionally-differentiated form, before turning its attention to the theoretical (sociological) discussions of these developments. Subsequent to this account I will provide an overview of the main tenets of Niklas Luhmann's systems theory, specifically his insights into the differentiation of society, before exploring in turn the two legal-system internal "fragmentations" that I identify as being present in terms of the contemporary EU, the first being *jurisdiction*, the second being *epistemic community* pertaining to specific areas of law.

1. On Differentiation

Social differentiation can be understood as a specific social construct, the aim of which is to create unity from difference – as such, its significance to this investigation is evident. While Luhmann considered differentiation on the basis of function to be the only viable

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[437] A. Schutz, "The Twilight of the Global Polis" in G. Teubner (ed) *Global Law Without A State*, (1997, Dartmouth: Aldershot) at 276

[438] M. King, "What's The Use of Luhmann's Theory?" in M. King & C. Thornhill (eds) *Luhmann on Law and Politics: Critical Appraisals and Applications* (2006, Oxford: Hart) at 48-9

[439] See D. Schiff & R. Nobles, *The Autopoiesis of Law* at 295

structural form available to modernity, it should be noted that society was not always functionally differentiated but, rather, was structured in terms of various other forms of differentiation. The functional "turn" is conceptualised as giving rise to society understood as a differentiated unity but, prior to this, society progressed through phases of limited differentiation on various bases. These earlier stages of differentiation were predominantly hierarchical and vertical, in stark contrast to the horizontal form exhibited by functional differentiation, and were restricted in their scope by simple geographical constraints and limitations. There are three "early" structural forms that differentiation could follow, these being: segmentary, stratified, and centre/periphery.

First, the segmentary form can be explained as a division into relatively similar social units on a *non-hierarchical* basis. Membership to these social units could be either ascribed, in the sense of being part of a family or an ethnicity, or achieved. The "part" systems formed by segmentary differentiation are similar to each other and considered to be equal. Conversely, the stratified form is aimed at drawing attention to both inequality and dissimilarity, and is based upon hierarchically-understood differences such as those found in feudal or class-based societies. The essence of the centre/periphery form of differentiation, finally, can be encapsulated by the example of clans, whereby a society distinguished itself as being different from the rest. In a more contemporary vein, this structural form is often considered to be a linking one between those of segmentary and stratified differentiation, in that the periphery components tend to be similar or equal to each other but unequal when compared to the central one. Each of these forms is markedly different to functional differentiation, which occurs on the basis of differences between similar social systems, with these differences being so great that any shared meaning is eroded. These "part" systems, having been formed for the purposes of fulfilling a *function*, can as a result be said to have been differentiated unequally in that they are the sole system that *can* carry out that task.

Nevertheless, it cannot be said that these segmentary and stratified forms of differentiation have withered away since the advent of the functional form; indeed, Luhmann himself acknowledges that "relics" of stratification and segmentation persist within modern society, although he does maintain that these have to be both viewed in light of and explained as a consequence of functional differentiation.[440] Nevertheless, while both segmentary and functional forms are always in existence, it is the gradual change from the former to the latter as the *primary* form of societal differentiation that exemplifies societal development.[441]

As regards the contemporary EU, therefore, it can be said that modern systems theory conceptualises segmentary and stratified forms of differentiation as being particular forms of internal differentiation.[442] The next section will discuss the internal differentiation of the legal system in terms of the national legal orders of the Member States, which, I will argue, have their own sub-systemic understandings of the law by virtue of the contextual quality of the national legal cultures. Instead, therefore, of the differentiation of the *Weltgesellschaft* being solely in terms of function, which could be referred to as horizontal differentiation, there can also be internal differentiation of a

[440] N. Luhmann, "Answering the Question: What is Modernity? An Interview with Niklas Luhmann" with E. Knodt & W. Rasch in W. Rasch, *Niklas Luhmann's Modernity: Paradoxes of Differentiation* (2000, Stanford, Stanford UP) 195-221 at 197

[441] N. Luhmann, *A Sociological Theory of Law* (1985, New York: Routledge)

[442] See N. Luhmann, *Der Gesellschaft der Gesellschaft* (1997, Frankfurt/Main: Suhrkamp) at 595

function system, which can be phrased as vertical,[443] and thus similar in this respect to the segmentary and stratified forms discussed earlier. For the legal system this can be seen in terms of law at the global, European, or national "level", that is to say, in terms of the specific *territory* to which the legal culture belongs. Before that, however, some time should be spent covering the main tenets of systems theory, and this next section will endeavour to do just that.

2. Systems Theory: Excursus

The premise from which Niklas Luhmann's, the theory's founding father, embarks is that society is a system of communications[444] that is both *autopoietic* and *evolutionary*, that is:

> [S]ociety exists through its communications, uses communications to establish structures, and stabilizes those structures to form the basis of communications that establish new structures (evolution); and that it communicates to itself about its environment, and thus establishes its physical environment for itself within its communications and itself as separate from that environment (autopoiesis).[445]

Society can thus be considered as being the totality of communications, and is itself considered to be a social system, often also referred to as the "environment." As a result of increasing complexity within it, society is differentiated into functional sub-systems, such as law, or politics, or the economy. These sub-systems, which Gunther Teubner has termed "second order autopoietic systems",[446] exist as distinct and irreducible constructs within the environment, within the whole.[447] An autopoietic system, therefore, is an inseparable part of the whole, an "inextricable part of the network that reproduces the society by recursively connecting communication with communication".[448] In order to carry out its function and retain systemic autonomy, the system must be separate and distinct from its environment, hence a boundary has to be drawn between the system and its environment so that the system is able to identify what is internal and external. It is only by means of this severing of the whole that the system can come into being, as prior to the boundary existing there can be no meaning (*Sinn*), although the boundary on

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[443] By using the term "vertical" in this sense I do not intend to establish any form of hierarchy. For an example of a vertical conceptualisation in terms of the Open Method of Coordination (OMC), see S. Smismans, "Reflexive Law in Support of Directly Deliberative Polyarchy: Reflexive Deliberative Polyarchy as a Normative Frame for the OMC" in S. Deakin and O. de Schutter (eds.) *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (2005, Brussels: Brulyant)

[444] It should be noted here at the very outset to the discussion on systems theory that the terms "system" and "subsystem" both refer to the functionally differentiated systems of society. The reason for the term *sub*system is because these are cognised as being subsystems of *the* social system that is society (*Weltgesellschaft*), which, as mentioned above, is a "system of communications". Instead of using "subsystem", however, for the sake of clarity I will restrict my usage to the term "system" because much of the analysis in the later part of this chapter relates to system-*internal* distinctions that are *not* purely function-based.

[445] R. Nobles & D. Schiff, "Introduction" to the English translation of N. Luhmann, *Law As A Social System*, (2004, Oxford: OUP) at 25; see also E.M. Knodt "Foreword" to the English translation of Luhmann, N. *Social Systems*, (1995, Stanford: Stanford UP) at xxxv

[446] G. Teubner, *Law As An Autopoietic System* (1993, Oxford: Blackwell) at 70

[447] Alongside the legal system and the economic system there are also psychic systems, which are individual streams of consciousness and are equally as irreducible. These will be discussed in detail in the final section to this chapter.

[448] N. Luhmann, "Operational Closure and Structural Coupling: The Differentiation of the Legal System" (1992) 13 *Cardozo Law Review* 5, 1419-1441 at 1425

its own is not sufficient: one side must be selected or indicated, thus giving rise to the form of system and environment. This system / environment distinction is central to the theory, as is the concept of the *observing* system.

Once the boundary has been erected and this distinction has been drawn then the system is able to construct its own reality by means of observing its environment *in terms of* that boundary, which it does by utilising specific communications of binary value: in the case of the legal system, these communications are legal ones, based on the coding *law* and *not-law*.[449] Every observation takes this form of marked and unmarked; for example, I can observe that this section of my thesis is about systems theory (*i.e.* marked) and not about something else (*i.e.* unmarked). Thus the legal system, by means of these two steps of severing and indicating, creates itself and maintains that form against the myriad of possibilities that existed for it previously. As Lee & Brosziewski state, "every observation (and every system!) entails a marked state, an unmarked state, and a self-referentially constructed border that produces the difference"[450] or, in other words, establishing an observer requires that: "(i) that the distinction be drawn; (ii) that one side of the distinction be indicated, (iii) that the distinction be reintroduced into the indicated side (re-entry)."[451] This process, more simply phrased as distinction–indication–re-entry, allows the system to observe both itself and its environment in terms of its own understanding, its own "reality".

Meaning arises from this because of the self-reference of the observing system, which follows the two-step process of observation according to its own logic; again, in terms of the legal system this is the coding of law and not-law. The binary code utilised by a system operates as a rule of attribution, a filter established at the operational rather than the institutional level through which the system can identify whether a particular communication is relevant to it or not. The system *observes* its environment and understands it *only* in terms of this coding – in effect, the observing system makes a selection between those two options, the grounds for which are generated by the *original* distinction through which the system was created. Thus any "meaning" gleaned is and remains specific to each system in terms of its own systemic boundary, despite the fact that a communication can pertain to more than one sub-system at a time, and thus can be observed by both or, indeed, all of those systems simultaneously. Any meaning, therefore, is only ever produced *within* the observing system itself. It is as Stephan Fuchs says:

> Since the world itself contains no information, only unstructured complexity, information is information *for* an observer in this world. … Observing means using a distinction according to which an observation is an observation of something, and some thing, and not something else, or some other thing. Information is the difference that makes a difference. That is, observing is an observer-dependent and -specific relation *to* the world *in* the world.[452]

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[449] I use law / not-law deliberately, as legal / illegal conveys a different meaning to Luhmann's original German version of Recht / Unrecht.

[450] D.B. Lee & A. Brosziewski, *Observing Society: Information, Communication and Social Systems*, unpublished manuscript, at 5

[451] E. Christodoulidis, *Law & Reflexive Politics* (1998, Dordrecht: Kluwer) at 79

[452] S. Fuchs, *Against Essentialism: A Theory of Culture & Society* (2001, Cambridge, Mass.: Harvard UP) at 17-18

In this way, the system is able to organise the vast complexity of its environment; indeed, this "organised complexity" can *only* be achieved by means of system formation, which highlights the importance of first establishing and then maintaining the difference between system and environment,[453] for this is simultaneously the grounds for selection and, therefore, also for meaning. Environmental complexity necessitates selectivity, and this selectivity causes a reduction of complexity because it is the basis for system-creation, that is, the original distinction. This two-step process of observation (severing and indicating) *differentiates* the system from its environment and allows the system to both protect itself and generate its own *internal* complexity. Thus differentiation is a method of reducing the complexity of this environment and thus a subsystem must be distinguished from it, in order to perform its function, maintain systemic autonomy, and observe its environment.

The interdependency of system/environment is not undermined by this construction; on the contrary, the mutual dependency is heightened by the operation of drawing the distinction and the systemic observation that it facilitates. It is at *this* point, at the point of differentiation, that the system becomes fixed.[454] To put this in another way, this "fixing point" is the moment at which the system establishes itself in terms of this distinction, in terms of its own function, and becomes able to observe itself. To quote Luhmann:

> Self-observation is the introduction of the system/environment distinction within the system, which constitutes itself with the help of that distinction; self-observation is thus the operative factor in autopoiesis, because for elements to be reproduced, it must be guaranteed that they are produced as elements of the system and not as anything else.[455]

Systems theory achieves increased manoeuvrability by utilising *communications* as the systemic elements.[456] I should emphasise at this point that, despite being referred to as an element, a communication for the purposes of this theory is actually a synthesis of three selections: information, utterance and understanding.[457] It can be said, therefore, that communication can only occur when these selections are congruent. Utterance is the active component (the "doing" part) of the communicative event, and thus "action is always an elementary component of the element".[458] Not all of these communications will be relevant to the system; indeed, as mentioned above, the reason behind functional differentiation was to facilitate a *reduction* of complexity. To reiterate, then: the system makes selections based upon its own perception of the communications,[459] a perception that is conditioned through the principal distinction between system and environment, which is manifest in its own binary coding. This coding can be described as a rule of attribution, which allows the autopoietic system to make "order from noise."

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453 N. Luhmann, *Social Systems* (1995, Stanford: Stanford UP) at 25

454 I believe that this is as close to any "originary violence" as systems theory gets, and this is an idea I would like to dedicate some more time to at a later date.

455 N. Luhmann, *Social Systems, supra* note 453, at 37

456 A system "constitutes the elements of which it consists through the elements of which it consists." See N. Luhmann, "The Unity of the Legal System" in G. Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (1988, Berlin: de Gruyter) at 14

457 In the original German this is: "Information, Mitteilung, Verstehen". It should be noted that understanding could, of course, also be *mis*understanding.

458 E. Christodoulidis, *supra* note 451, at 77

459 Luhmann's explanation for this is that "the system's inferiority in complexity must be counterbalanced by strategies of selection."; See N. Luhmann, *supra* note 453 at 25

On the basis of the system-specific binary coding, the same communicative event is interpreted differently by each system (that it is relevant to) within society and, as a result, the meaning that the system gleans from any given communication is highly system-specific. To choose an obvious example, the autopoietic legal system can only "see" or "understand" the legal aspects of a communication because its comprehension of the communication is based on the coding law and not-law. The argument that this oversimplifies the functioning of the law can be countered by the fact that it is the *legal* nature of the communication that is provided for by this coding, while subtleties are accommodated via further system-internal programming and complexity.[460] Luhmann uses the legal system as an example of self-referential autonomy, noting that:

> Only the law can say what is lawful and what is unlawful, and in deciding this question it must always refer to the results of its own operations and to the consequences for the system's future operations.[461]

However, while this gives rise to an internal "autonomous legal reality", the "understanding" of a communication by a system deletes the meta-systemic character of any message. Every communication must occur within the environment, the totality, because there is, quite simply, no outside. As a result, there is no external Archimedean point from which a full panoramic view and thus a complete understanding of the social can be gained; in effect, the totality always eludes the system's observation as a result of the "severing" of the whole, as it is only from the inside that the distinction inside/outside is perceivable. The system's knowledge is and can only ever be partial.[462]

Despite the fact that there can be no external observers in autopoiesis theory, there can in fact be a *multiplicity* of observers. As noted above, a communicative event can pertain to more than one sub-system at any one time, and thus can be observed by both or, indeed, all of those systems simultaneously, although the "meaning" is understood system-specifically. It should be noted that it is this system-specific understanding in Luhmann's theory that precludes any deliberation between two (or more) systems on the same point of reference. This is in contrast to Habermas, whose argument is that, once all the "techniques of argumentation" are removed, a "pure" discourse can be achieved, through which interaction on the same level can occur. The normative closure of the autopoietic system rules out any possibility of a pure discourse, a situation that cognitive openness (by means of irritations, interferences or structural couplings) cannot remedy. Even if two systems were observing the same communicative event, only the "utterance" part of that event is the same for both systems: "the elements of understanding and information vary according to which system the utterance refers to".[463]

How, then, does this system-specific "understanding" of the environment come about? An alternate way of referring to this understanding would be that the system has a *constructed* view of reality based upon its observation of its environment in terms of its primary difference. The system constructs within itself a simplified model of all of the other systems, and uses this to make predictions about how they will function, predictions which solidify within the system into a series of *expectations*. This gives the system a restricted perception of the outside from its own perspective. These internal

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460 E. Christodoulidis, *supra* note 458, at 90

461 N. Luhmann, "Law As A Social System" in (1989) 83 *Northwestern Law Review*, 136-150 at 139

462 E. Christodoulidis, *supra* note 458, at 79

463 G. Teubner, "Social Regulation through Reflexive Law", in G. Teubner (ed) *Law As An Autopoietic System*, *supra* note 463 at 88

models, to be clear, are not constructed from any absorbed structures but are system-internal cognitions. This is probably explained best by the use of the following example:

When I eat something, say for example a slice of pizza, it goes into my stomach and takes a different state to what it had outside of my stomach. But an autopoietic system cannot interact with another autonomous system in this way and so, to maintain the internal/external distinction, the system "constructs" the other system within itself as a model, consisting of the understanding it has of that system as a result of its observation of it. It is as if, rather than consume the pizza, I merely had to imagine the slice as being inside my stomach while it remains outside of me all the time.

In addition to models of other systems, the legal system also contains a simplified model of its *own* operations, and it is due to this necessarily simplified model that the legal system cannot be fully self-aware. This self-observation is a phenomenon of self-reference, and it is the basis upon which the system regulates itself; however, this situation is also one that precludes any hierarchy of sub-systems – none can be hegemonic because none can ever have the full "picture".

Before progressing further, I would like to return to the notion of systemic expectations, which are a method utilised by the system to reduce the possible meanings contained in every communication. As Luhmann states, expectations provide for "connective action" by limiting possibilities.[464] The flip side of this coin is that this limits the domain of possible changes, and thus restricts the possibility of learning. Like Talcott Parsons, Luhmann views shared expectations as a source of stability within society; indeed, norms and cognitions in autopoiesis theory are akin to Parsons' concepts of control and conditioning within the normative structure of a social system.[465] These expectations are learned and societally contingent, and in many occasions maintained without any real notice of them being required. This situation changes, however, when an expectation is disappointed, as this produces a choice as to whether it should be "counterfactually" maintained or revised. An autopoietic system will react to a disappointed expectation in the same way as you or I would, and Luhmann draws attention to this by explaining that:

> Most of one's daily expectations are familiar and secure enough so that one does not have to think about them any further. If, however, sociocultural evolution creates occasions that place expectations in an insecurity one can anticipate, this reflects back on the expectations themselves. They cannot simply be consigned to insecurity. One cannot simply answer insecurity in the system with more insecurity concerning expectations. […] A predis-position to disappointment is built in to expectations. This enables one also to anticipate how one will behave if one is disappointed.[466]

Expectations that are willing to learn are termed "cognitions," while those not disposed towards learning are "norms".[467] In effect, "the norm quality serves the autopoiesis of the system, its self-continuation in difference to the environment. The cognitive quality

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[464] N. Luhmann, *supra* note 453, at 289

[465] Parsons sees both social order and change as carrying out constant "negotiation," with control moving down the hierarchy of the system and promoting stability while, moving up the hierarchy, conditioning uses societal demands and tensions to create pressure for change. See T. Parsons, *Sociological Theory and Modern Society* (1967, New York: Free Press)

[466] *ibid*, 320

[467] Normative and cognitive expectations are sometimes expressed as norms and facts. *Ibid*, 320

serves the co-ordination of this process with the system's environment."[468] Cognition is represented semantically by "is," and is of an epistemic character, relating as it does to the difference between knowledge and ignorance, whereas the moral character of a norm is evident in its semantic representation, "ought."[469]

The legal system creates the sphere of its own reference by means of its normative closure, which suggests, in effect, that it establishes itself and its own validity. As the validity of a norm is constructed *within* the system, it is the system *itself* that decides what it will consider to be valid or not. This apparent tautology is a product of the legal system's operative closure and cognitive openness, with societally contingent normative expectations being observed and then internalised by the system as it "sees" them. This gives rise to the situation that:

> What counts as a relevant consequence of a legal rule or decision derived from legal doctrine is, in a circular fashion, defined by legal doctrine itself. Thus doctrine that originally was supposed to be controlled by its social consequences now controls its social consequences.[470]

The system, in this way, uses its own internally constructed expectations to anticipate the outcome of social action, and then applies its own internal coding to that outcome. However, despite this state of affairs, systemic norms are not forever set in stone - this situation would be counterproductive to the autopoiesis of the system, as they would provide a huge external constraint upon the functioning of the legal system. The system is in a process of continual self-generation and, as it is inextricably linked to the environment, it can accommodate changes occurring in the environment within itself, albeit *in its own way*.

Teubner states "…as a precondition for the incorporation of social knowledge, the legal system defines certain fundamental requirements relating to procedure and methods of cognition,"[471] and these requirements are a means of maintaining operative closure in light of an increased level of cognitive openness. It is important to reiterate that, at all times, the normative closure of the system remains intact; the new "reality" that results from the introduction of social knowledge is neither a legal nor a political construction, and there is no external authority that threatens the epistemic autonomy of the autopoietic system.

Thus far, of course, mention has only been made of *the* legal system (*Rechtssystem*) of society, which can also be referred to as world society (*Weltgesellschaft*). For Luhmann, world society embodies "the boundaries and the limits of all that is recognized as societal communications and transmittable as such"[472] and is itself a system of communication. The systems within it (often also referred to as subsystems) are, as discussed above, differentiated from society and each other on the basis of their function, thus resulting in the legal system, the political systems, the economic system, and so on and so forth. In terms of the legal system, therefore, the question becomes, where do both national legal orders and the supranational legal order of the EU fit into this construction? This next

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[468] N. Luhmann, *supra* note 453 at20
[469] N. Luhmann, *supra* note 441 at 322
[470] G. Teubner, *supra* note 446 at 651
[471] *Ibid*, at 653
[472] M. King & C. Thornhill, *Niklas Luhmann's Theory of Politics and Law* (2003, Basingstoke; New York: Palgrave Macmillan) at 8

section will discuss the system-*internal* differentiation of the legal system in terms of the national legal orders of the member states, which, I will argue, have their own sub-systemic understandings of the law by virtue of the contextual quality of the national legal cultures. Instead, therefore, of the differentiation of world society being solely in terms of function, which could be referred to as horizontal differentiation, there can also be internal differentiation of a function system, which can be phrased as vertical.[473] For the legal system this can be seen in terms of law at the global, European, or national "level", that is to say, in terms of the specific *territory* to which the legal culture belongs.

3. Legal System-Internal Differentiation

a) . Legal Culture & Jurisdiction

To return to the quotation from Anton Schutz given earlier**,** that the concept of world society dismisses geography as an agent of differentiation',[474] it would appear that to consider nation states as being societies in themselves is an error, because the *territorial* boundaries through which a state is defined and maintained do not pose any barrier to communications. As Schutz explains, "the boundaries that separate nation states are themselves a result of communication", nation states being political constructs and thus pertinent to the political system alone.[475] As such, so the argument goes, they can only be seen by the political system; they are constructed and interpreted in light of ongoing political communications involving state sovereignty. With the primary system differentiation being based upon function instead of territory, the result is that no other function system should be aware of nation state boundaries.

It is my contention, however, that the argument cannot be so neatly encapsulated, and that more attention should be paid to the systemic elements, communications. As noted by Imelda Maher, efforts to escape a state-bound conception of law take place at the highest level of abstraction[476] but, even at an abstract level, it can be argued that embedded within the (political) construct that is the nation state there exist facets that are not simply political but pertain to and have relevance for many other function systems. That the nation state itself is based on and given meaning by territorial boundaries does not prevent subsequent communications being *informed* by concerns that have *their* source in the nation state. To put it in systems-theoretical terms: the information contained within the utterance is conditioned by its context and, vice-versa, the communication is assembled by the selector, whose perspective is also coloured by contextual considerations. Social and cultural contexts are inherent to communicative acts, and it is from these that meaning is derived; in essence, meaning is socially and culturally constructed. It is my contention that the specific context of the Member State legal culture is intrinsically linked to its scope, that is to say, its authority and applicability, which can also be termed its *jurisdiction*. The nation state is, of course, a political construct, and the political system can be cognised as itself being internally differentiated

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[473] By using the term "vertical" in this sense I do not intend to establish any form of hierarchy. For an analysis of the Open Method of Coordination (OMC) in terms of this vertical construction, see S. Smismans, "Reflexive Law in Support of Directly Deliberative Polyarchy: Reflexive Deliberative Polyarchy as a Normative Frame for the OMC", in S. Deakin & O. de Schutter (eds.) *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (2005, Brussels: Brulyant)

[474] A. Schutz, *supra* note 437

[475] A. Schutz, *ibid*

[476] I. Maher, "Community Law in the National Legal Order: A Systems Analysis" in (1998) 36 *Journal of Common Market Studies* 2, at 240

on a territorial basis; however, I would argue that the territorial aspect of the nation state can be "understood" by the legal system at the level of a particular national legal culture in terms of its own jurisdiction. Similarly, this thinking could be extended to the political construct that is the European Union, as its territory can be "understood" in terms of the legal system as the jurisdiction of the European Union legal culture which covers the jurisdiction of its member states. Incidentally, while membership of the EU is a political construct, its construction and articulation through international Treaties makes it simultaneously a legal one as well.

Raising this discussion to the level of the EU introduces the additional consideration of the supranational, which brings with it the notion of legal culture. A question often levelled at this stage is: why "legal culture"? Why approach the complex and contested concept of legal culture with systems theory? Subsequent questions tend to follow along the lines of: are you trying to insinuate that there is some sort of "cultural" function system? A binary logic of cultural/not cultural? This, of course, is not the intention – indeed, such a social system would be a simple impossibility; the dichotomy of cultural/not cultural has no meaning, and neither does that of culture/not culture. And still the questions come: Where does culture fit into systems theory, then? And what does it have to do with the law or the legal system? And, for that matter, the European Union?

The premise of this section can be encapsulated as follows: while the emergence of the EU can be said to represent a shift (*Verschiebung*) away from the segmentary (territorial) and stratified forms of differentiation that typified the nation state and towards an increased reliance on functional differentiation,[477] its post-national character has been too quickly assumed at the expense of the legal-contextual. The search for a "third way" alternative to either positivist or purely sociological approaches that first led to the use of both responsive[478] and reflexive law[479] reaches an impasse when faced with the EU because, prior to its existence, there was no need for a cultural underpinning of the theory; the statist framework both prevented and disguised this problem. At the level of the nation- or Member State there is no real need for a consideration of context[480] but it becomes an issue once any additional level, be it the supra- or transnational, is included in the analysis. Legal culture and considerations thereof are key in any theoretical undertaking concerning law at the supranational level.

In a similar way to that of the nation state, as discussed earlier, the territorial boundaries of the European Union and indeed the EU itself are also political constructs; however, state sovereignty has ceased to be the only relevant basis for selection of communications. By means of shared sovereignty and competence, by contractual agreements in the form of the Treaties, by the following of a "legal path" for its effectuation, the EU as an entity is more open to interpretation by the legal system. Indeed, it can (although not without contestation) be considered as being a legal order in its own right, and it is this switch from thinking about the national legal order to contemplating a supranational one that introduces the notion of legal culture in the sense of "which law?". However, as discussed in chapter two, the term "legal culture" is a

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477 P.F. Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation* (2008, Florence: EUI doctoral thesis) at 262

478 P. Nonet and P. Selznick, *Law & Society In Transition: Towards Responsive Law* (1978, NY: Harper)

479 G. Teubner, "Substantive & Reflexive Elements in Modern Law", (1983) 17 *Law & Society Review* 2, 239-86

480 This statement will probably draw some criticisms from legal pluralists, but that debate is one for another time.

problematic one to work with, largely due to its having *two* variables, namely, the legal *and* the cultural, as well as being both understood and utilised in a variety of ways.

In what sense is the term "legal culture" meant here, then? For the purposes of this paper, 'legal culture' is simply an articulation of a notion of *law within a specific cultural context*. Instead of leaving the concept of legal culture hanging around like the floating signifier it has become, its very malleability can be utilised by a systems-theoretical construction that provides for a *selector-specific* understanding of a communication.

Looking at how Luhmann uses the terminology of "culture" and "cultural" is helpful in clarifying this statement. A distinction can be drawn between his conception of the "cultural", which can also be called the "social", and "culture" itself, which can be referred to as the "memory" of a society.[481] Rephrasing "cultural" as "social" goes a way to remove the confusion here – in systems-theoretical terms society is the whole, the totality, the environment, that which is external to the (or any) given system.. The use of the term "cultural" infers an influence of the cultural (or social) on the legal system, and this influence manifests itself differently depending on the differing contexts from which it stems. It is my argument, despite the sceptics, that internal[482] differentiation[483] of the functionally differentiated legal system facilitates the inclusion of the cultural as a context for the law at the different "levels" of the legal system (*Rechtssystem*).

To be clear about terminology at this point, I use the term "level" here due to the effective lack of a suitable term. It is not strictly in keeping with the non-hierarchical nature of the systems-theory approach, but continued use of the term "legal order" is also rather confusing. There is no hierarchical connotation to the term as I use it: perhaps "regime", "field" or even "culture" would be better, but each also seems to carry with it additional baggage, as does the term "subsystem", which many seem to favour but which, in my opinion, tends to blur many of the lines that this analysis needs to keep distinct. "Level" will have to do for now. I use the term only to define the area to which my argument refers; namely, the legal orders of the European Union and its constituent (national) Member States. These legal orders exist *within* the global *Rechtssystem* in a situation of *internal complexity* or, also, *internal differentiation*.

The difference between a legal "system" and a legal "order" should at this stage also be clarified and then maintained; indeed, casual use of these term as interchangeable leads to a lot of confusion. I want to present the basic idea that a legal order, be it national, European, or even global, is a collection of rules and norms supported by *institutions*. This simplistic idea is necessary to elucidate the situation of a number of legal orders existing simultaneously in a certain legal space. The EU legal order, for example, has to live in a situation of interaction with national legal orders; it has to rely upon national legal orders for enforcement. Legal system, on the other hand, will be the term used for the *Rechtssystem*, the global legal system that is differentiated from other function systems on the basis of its dealing with law and only law.

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[481] N. Luhmann, *Die Gesellschaft der Gesellschaft* (1997, Frankfurt/Main: Suhrkamp) at 588: "Culture is nothing more that the memory of a society; the filter of forgetting/remembering and the utilisation of the past to set parameters on variety in the future…" (translation from Lee & Brosziewski, *supra* note 9 at 16)

[482] At this point the internal differentiation being discussed is the jurisdictional, that is in terms of global, European or national legal culture.

[483] Here I use the term "differentiation" but "internal complexity" could also be used. This is a subsequent, system-internal differentiation based on additional conditions that are also "seen" by the legal system.

Despite the operation of the process of Europeanisation of law since the advent of the European project, there are clear and obvious variations in existence within the laws of Member States. Indeed, the very claim that there is such a thing as European Union law can be conceptualised as a legal fiction; as Christian Joerges points out:

> One could say that there is no European law. […] What we have instead (and have learned to live with) are Belgian, Dutch, English, French, German, Italian, and many more versions of European law. In essence, there are as many European laws as there are relatively autonomous legal discourses, organized mainly along national, linguistic and cultural lines. How could it be otherwise?[484]

Imelda Maher also provides for this in her systems analysis of community law when she argues that each Member State legal order, as an internally-differentiated subsystem of the legal system, is able to apply European directives according to its own norms, thus allowing the subsystem to "misread" the communication in order to maintain *its own coherence*.[485] This construction allows for the perpetuation of the legal fiction that there is a unified body of European law. Marc Amstutz makes a similar point to Maher, noting that:

> The internal culture-specific constraints on national adjudication remain unaffected by the requirement for interpretation in conformity with Directives; local specificities of the various legal discourses are not pushed aside, say by rational arguments which in the end are always weaker than the constraints of organically grown legal cultures.[486]

To summarise. the primary differentiation for the *Rechtssystem* is that of the basic function, which is effected and maintained by the coding law/not law. The additional internal complexity can be conceptualised as *a subsystem of the function system*, being as it is wholly contained within the legal system, or as an additional layer of complexity, of further differentiation. So why is this important? As Joerges notes above, the legal landscape of the EU comprises (at the time of writing) 28 distinct legal orders: that of the EU itself plus those of the 27 Member States. In terms of the *Rechtssystem*, these can be described as existing *within* it – any communication pertaining to any of these 28 legal orders will be "seen" by the legal system. The legal orders are "components" of the system and therefore "speak" the same language (namely, that of law, based on the binary coding *Recht/Unrecht*), but despite being essentially in and of the law, they differ from each other due to their legal-cultural *context*. This is a difference that is simultaneously relevant to the legal system but that is not based solely on the law, rather on the nature of the law in question. The *Rechtssystem* should be able, by means of its own internal complexity, to recognise the legal-cultural differences that subsist among multiple understandings of the communication.

The best way of understanding this point may be through the use of a metaphor. If the legal system's coding could be described as a language, the additional coding that serves to differentiate, say, German law from UK law could be described as an accent (or a flavour). In this way, conversation between a German legal practitioner and a lawyer

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[484] C. Joerges, "The Challenges of Europeanization in the Realm Of Private Law: A Plea For A New Legal Discipline", (2004) 160

[485] I. Maher, *supra* note 476

[486] M. Amstutz, (2003) *Zwischenwelten*, 21

from the UK about, say for example, unfair terms in contract, could be understood quite differently by each of the participants, who could at the same time be completely convinced that they were on the same wavelength. Here, the devil is in the accent, as it were; due to the two "accents" being different, any understanding is necessarily qualified, and the lawyers only ever comprehend things in terms of what they already know.

Taking it back into systems-theory proper, therefore, and designating the individual (psychic system) as being a simple point of attribution[487] for the communication, it is straightforward enough to see that the information conveyed by the utterance could be understood differently in any of these different legal cultures or "levels" of the *Rechtssystem*. A communication stemming from the German legal-cultural context is likely to be understood differently by the German "level" of the system that it would be in the UK "level" or the French "level", and so on and so forth. In the same vein, the fact that the EU legal order "speaks" in a way that the member state legal orders can understand, *albeit on their own terms*, is heightened in comparison with a non-member state legal order as a result their existing linkages to and interaction with it.

The relevant "level" of the legal system deals with communications relevant to it in terms of *its own contextually-influenced parameters* of the coding law and not-law and can, therefore, designate a communication as being legal or illegal on the basis of its *own* norms, *independent* of whether another member state decides differently. By this I mean that, systems-theoretically, the relevance of the communication to a jurisdiction is determined by the context of that legal order, which is constructed by and through (culture) involvement and embeddedness within that jurisdiction. Thus a communication could, for argument's sake, be considered as illegal in England while being considered as legal in Scotland, or legal in Germany but illegal in Sweden.[488] It is the specific level *within* the legal system that provides for the recognition and processing of the communication and therefore the outcome of that process.[489] To phrase it another way, the specific level of the legal system receives the relevant communication and makes a selection[490] on its own terms. The understanding (*Verstehen*) of that communication is also a selection, and this is what allows variations of meaning to exist at those different levels.[491] Conceptualising "legal cultures" as being internal to the legal system, as different *levels* within it provides for meaning to be "thematised differently at different levels, *e.g.* national and European, but also even at one and the same level it is simultaneously the "same and different".[492]

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[487] Institutions are points of attribution for communications; in contrast to the positivist reliance on institutions, in systems-theory they are *merely* points of attribution and nothing more. The institutionally based structure required to give weight to and make use of the concept of legal culture could initially be seen as problematic for systems theory, but the context here is not *dependent* on institutions *per se*. Rather, as discussed above, the "accent" of a communication is determined by the *context*, which relates to the jurisdiction of the legal culture. Legal institutions, therefore, are only of importance as points of attribution for societal communications and as those structures that construct the jurisdiction within which a communication is relevant or "seen".

[488] Such as the example of the regulation of prostitution, as discussed in chapter 3

[489] This construction provides for subsystemic coherence, which will not be dealt with in this paper.

[490] N. Luhmann, *Theories of Distinction*, (2002, Stanford: Stanford UP); see also, N. Luhmann, *Social Systems*, *supra* note 453 at chapter 1.

[491] "Not only information and utterance but understanding [*das Verstehen*] is itself a selection. Understanding is never a mere duplication of the utterance in another consciousness but is, rather, in the system of communication itself, a precondition for connection onto further communication, thus a condition of the autopoiesis of the social system." See, N. Luhmann, *Theories of Distinction*, *supra* note 490 at 158

[492] Z. Bańkowski & E. Christodoulidis, "The European Union as an Essentially Contested Project" in (1998) 4 *European Law Journal* 4, 341-354 at 350

Indeed, it is the "symbolic representation of validity claims that determines [the] local, national, or global nature [of discourses]".[493]

To reply to the sceptics, therefore: the assertions that "legal culture" cannot be understood in systems-theoretical terms, that the term "legal-culture" itself is indeterminate, and that the binary coding of law and not-law precludes the legal system from "seeing" any "cultural" quality of a communication can all be undermined by the argument that legal-cultural considerations are not overlooked by the legal system as such but, rather, are implicitly contained within the *different levels* of the legal system.

In this way autopoiesis theory can bypass what Nelken calls its "need for a universalist definition of law"[494] while allowing for the cultural specificity that Legrand demands, albeit in a more limited way. The legal system still operates on the basis of the coding law and not-law, and this binary code is not interfered with because only communications of a legal nature are "seen" by the system. However, the communications are subsequently dealt with by secondary programmes, and it is this secondary programming that allows a particular level or (subsystem) of the legal system to "deal" with the communication with reference to what *it* does or does not consider *to be* law. Secondary programmes, it should be mentioned, are the means by which the system's code is both applied and regulated – they are internal to the system and stipulate when one or other side of the code should be employed. In effect, these programmes, often called conditional programmes (*Konditionalprogramme*), add detail to the simplicity of the main code, that is, they deal with "the question as to how the values "legal" and "illegal" are allocated and what is right or wrong with respect to them".[495] The main code, the fundamental distinction that was involved in the establishment of the system, cannot change or be altered, but the legal system's programmes are wholly changeable. Past facts and processes are woven into the actual context of the legal structure by these programmes, and this self-referential assessment of previous behaviour gives rise to the conditions under which the legal system can consider something to be "legal" or "illegal". This reference to the past functioning of the legal system is important to its primary function of stabilising the normative expectations of society; indeed, it draws attention to the fact that "law solves a problem in relation to *time*".[496]

This *jurisdictionally-based* internal differentiation of the legal system can be identified as a diversifying force within the Europeanisation of law process.[497] In order to achieve any form of equilibrium within this process, however, this strong (territorial) form of differentiation must be counterbalanced by an opposing *unifying* force. This next section will argue that this force is embodied by the existence of legal epistemic communities that pertain to particular legal areas in existence within the EU.

b) Epistemic Communities & Sectors of Law

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493 Teubner, G. (1997) "Global Bukowina: Legal Pluralism in the World Society", 11

494 D. Nelken, "Beyond the Metaphor of Legal Transplants?" in D. Nelken & J. Priban (eds), *Law's New Boundaries: The Consequences of Legal Autopoiesis* (2001, Dartmouth: Ashgate) 285

495 N. Luhmann, *Law As A Social System*, *supra* note 461, at 118

496 M. King & C. Thornhill, (2003) at 53; see also N. Luhmann, *Law as a Social System*, *ibid*. The temporal dimension of systems theory is discussed in terms of the Europeanisation of law process in the next chapter

497 This argument is also applicable to world society, but this investigation will limit its focus to the EU and its Member States.

Much of the literature on the concept of epistemic community comes from the field of political science,[498] despite relating heavily to the law and legal professionals. In this section I aim to conceptualise epistemic communities as *network constellations*[499] pertaining to specific legal fields that are distinguished into *sectors* of the law, for example, public and private law, contract law, human rights law, labour law, etc. These legal system-internal distinctions are, in contrast to those discussed in the previous section, not related to territory or jurisdiction, although they do, of course, take their context from the legal cultures within which they are embedded. Nevertheless, this section will argue that the sectoral[500] similarities that exist cross-jurisdictionally are strong enough to constitute an alternative force to differentiation on a territorial basis, and which – along with it – create a latticework that maintains the equilibrium of the Europeanisation of law process.

The internal differentiation of law has followed the "political logic of nation states" for centuries, manifesting itself in the existence of a whole host of national legal orders and corresponding territorial jurisdictions. However, this incidence of system-internal differentiation cannot be assumed to be the only one in existence, especially not in the case of the EU which, for this same reason, arguably represents yet *another* legal order and territorial jurisdiction.[501] As Teubner states, "the internal differentiation of law along national boundaries is now overlain by *sectoral fragmentation*"[502]; in the EU it can be said that the process of the Europeanisation of law has, by virtue of its operation, given rise to a form of *sectoral* differentiation in terms of the law, whereby those individuduals working in and with the law are connected with other individuals engaged with the same legal field.[503] This situation is not one of exclusivity; an individual legal professional or academic could simultaneously be involved with European labour law and European social policy, or could be working in the field of European constitutionalism while also engaging with public law debates within their own Member State legal order; the individual legal professions could be construed as being internal to *both* their own Member State legal culture *and* their EU-level epistemic community.

An epistemic community can be described as a constellation or network of knowledge-based experts,[504] namely those (professional) individuals who have a recognised mastery or proficiency within a specific domain – this could be articulated as a coincidence of

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[498] I do not accept this political-scientific definition wholesale but rather rearticulate it *vis-a-vis* the law. If anything, my application is more in keeping with Thomas Kuhn's "thought collective", which denotes a sociological group with a common style of thinking, than with Peter Haas' four-point definition of "epistemic community". See T.S. Kuhn, *The Structure of Scientific Revolutions* (1970, Chicago: Chicago UP) and P.M. Haas, "Introduction: Epistemic Communities and International Policy Coordination" in (1992) 46 *International Organization* 1 on *Knowledge, Power & International Policy Coordination*, 1-35 at 3

[499] It is not my intention here to enter into the debate on network governance in the EU. Rather, the term "network constellation" is utilised to show the amorphous nature of these epistemic communities, which are neither bounded nor restricted as regards participation, and which transcend Member State borders.

[500] Conceptualising the EU in terms of sectors is not a new approach – although his approach differs from my own, John P. McCormick characterises the EU as a state composed of sectors or *Sektoralstaat*. See J.P. McCormick, *Weber, Habermas & Transformations of the European State* (2007, Cambridge: CUP)

[501] This point, and the corresponding one regarding an EU legal culture, fledgling or otherwise, will be discussed in the next chapter.

[502] G. Teubner and P. Korth, "Two Kinds of Legal Pluralism: Collision of Laws in the Double Fragmentation of World Society", plenary lecture given in Amsterdam at the *Ius Commune* conference, 27 November 2008

[503] While the jurisdictional differentiation could be characterised as formal, by virtue of its institutional quality, the sectoral differentiation should be understood as more *informal*, being based upon the exchanges and connections between "legal" individuals.

[504] P.M. Haas, *supra* note 498 at 3

specialisation and autonomisation.[505] While the legal domain can be seen as the overarching one, it is actually its sub-domains that are more pertinent to this analysis, which, after all, focuses upon the legal system. These different fields or areas of law vary in terms of the degree to which they have been "Europeanised", a situation that can be said to stem from both the attention these areas receive at the EU level, whatever the motivation,[506] and the nature of a given area's *embeddedness* within its Member State context. For example, areas such as environmental law, which have a less embedded character than, say, criminal law, are subject to more pan-European initiatives than purely national ones – the Member State-specificity is less a consideration in this regard than it is for an area that is heavily contextual. Similarly, the more technical character of contract law can be cited as an example of its (comparative) openness to codification, while its importance to the economic system should also not be downplayed. Indeed, the moves underway regarding the Europeanisation of private law within the EU can be directly attributed to its location at both the outset and the forefront of the European project, while the public (constitutional) law debate not only came much later but, by virtue of being intrinsically linked to the political struggle, also strongly reflects and only thinly mediates those tensions. Nevertheless, it would be an error to assume any real degree of parity between the degree of "Europeanisation" of a particular area of law and the scope or interconnectedness of its particular epistemic community; while interest tends to coalesce around action, there is nothing that stipulates that this be the case.

Lawyers, in the broad sense of the term, can be said to be central to the wider processes of Europeanisation, fulfilling a variety of roles and functions within European affairs, namely as "consultants or advisers for national governments or European institutions, as experts and academics involved in political or civil society mobilizations, as legal practitioners and judges".[507] In terms of the Europeanisation of law, therefore, their contribution has to be conceptualised in a more introspective sense or, rather, at least one which relates purely to their *legal* communications. My argument here is not that there exists in the EU some form of European legal elite, as Antoine Vauchez does,[508] but rather that the dual role of the "lawyer" within the EU facilitates the maintenance of a identity position that is simultaneously internal to their Member State legal culture and to the EU itself. The engagement of these individuals with each other across territorial, spatial and linguistic boundaries is an embodiment of the shift in the centre of gravity from the purely territorial to the epistemic.[509]

This argument faces the same Legrandian pitfalls as any cross-jurisdictional or cross-*mentalité* theory could expect, namely that the lack of a common epistemological framework precludes any *real* communication and understanding between interpretative communities and those individuals who are conditioned by and through their interaction with their own legal "culture" or *mentalité*. Nevertheless, as even Legrand could not countenance the notion that legal cultures within Europe sprang into existence, fully-formed, there must

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505 A. Vauchez, "Embedded Law.Political Sociology of the European Community of Law: Elements of a New research Agenda" in (2007) *EUI Working Papers (RSCAS)* 23, at 4

506 The motivations behind certain Europeanisation endeavours, as has been seen throughout this investigation, can be political or economic, for example, which relies more on the instrumentalist, law-as-agent approach.

507 Vauchez, *supra* note 505 at 3

508 *ibid*

509 "European Community does not merely happen by establishing a centralised power structure, but in the day-to-day transactions of its citizens. Society in this picture is not presupposed but emerges out of the totality of individual exchanges." See B. Schäfer & Z. Bańkowski, "Emerging Legal Orders. Formalism and the Theory of Legal Integration" in (2003) 16 *Ratio Juris* 4, 486-505 at 491

necessarily be some form of *evolution* provided for since the time of the Westphalian turn. As was discussed earlier,[510] a major flaw in Legrand's *mentalité* thesis is that he recognises the influence of experience and historical development upon the formation of these epistemological frameworks but seems to consider the zenith of this legal-cultural evolution to occur at the same time as the Westphalian turn, thus prioritising the nation state form while also seeing it as being a culmination of the advance of these legal cultures in terms of their particular legal tradition. Legrand concedes that legal cultures can evolve but simultaneously closes off that evolutionary capacity *vis-à-vis* the Europeanisation of law. This, I believe, is not only an unnecessary restriction to his *mentalité* thesis but also one that is erroneous in view of his acknowledgement of previous adaptive capability on the part of legal cultures and in terms of the interpretative communities that comprise them.

It is from this *evolutionary capacity* of legal cultures that this argument takes its impetus. While the "knowledge" is sectoral and thus only partial, this engenders a certain unity across the network constellation; it is not such a stretch to assert that Scottish and Italian criminal lawyers, for example, will have more of a shared mindset[511] and interests than they would have with public lawyers in their own domestic jurisdiction, or with contract lawyers or academics working on governance. This shared mindset can only be achieved by means of *exchange*; in essence, the connections formed through this type of interaction serve to constitute discrete interpretative communities.

Relying on this very idea that "mentalities and cultures are not homogenous entities",[512] Burkhard Schäfer and Zenon Bańkowski suggest a "modular" construction of legal *mentalité* as an alternative to Legrand's pessimistic thesis. From the starting point of a "deep-level" conception of cognition, which concerns patterns and actions that are not legal rules but do affect how legal rules manifest on the surface, and drawing on cognitive science, they understand "legal mentality" – with reference to the individual – as comprising multiple autonomous modules.[513] They subsequently argue that the groups or constellations formed at or as a result of socialisation in various jurisdictional arenas, professional fora and academic conferences can facilitate a cross-legal-cultural understanding between individuals working in and with particular modules of law within the EU. These shared experiences and interactions also provide for a reflexive form of network and community creation. As was mentioned earlier, an pertinent example here is that of the DCFR, which is not to say the document itself but, rather, the processes and exchanges contributing to its drafting, such as the Study Groups themselves, the publication and promotion of their findings, conferences about the process (within which some of those academics were involved), and the online communities of individuals working in or with regard to the project.[514] This cross-border interaction and the participation within a specific epistemic area gives rise to a distinct community of interest.

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[510] See chapter 3, section 5(a) on the evolution of a legal culture.

[511] B. Schäfer & Z. Bańkowski, "Mistaken Identities: The Integrative Force of Private Law," in M. van Hoecke & F. Ost (eds), *The Harmonisation of European Private Law (European Academy of Legal Theory Series)* (2000, Oxford: Hart) 21-47 at 23

[512] *Ibid*, 23

[513] *Ibid,* 25

[514] Online groups and fora relating to (areas of) European law abound, ranging from the standard website variety, such as www.copecl.org to blogs such as www.comparativelawblog.blogspot.com/ and www.ecjblog.com. More recently there has also been a rise in social networking manifestations, such as Facebook's European Law Network group, but these appear to be too wide-ranging in their ambit to have any real effect.

While this "modular" construction is at variance with Legrand's pure *mentalité* argument, it has much more utility. Instead of solely recognising the legal tradition behind and contextual quality of a legal *mentalité*, and consequently prioritising this to the extent of construing it as an epistemic block to cross-legal order comprehension, the modular approach allows the interaction of individuals, their connections, and the resultant exchange of ideas to drive the dynamic process of *community* creation. Schäfer and Bańkowski therefore rely upon the cross-jurisdictional and sectorally-restricted communication of lawyers within the EU to posit – as opposed to a top-down imposition – the *organic* emergence of communities with these same characteristics, their explanation being that:

> [T]he constituted self comes about through exchange; individuals grow and are formed because they are open to the input of others – they give to others and receive from them and the individual is dynamic not static – she is always growing. It is in this exchange that a community is formed and that community in a reflexive way aids that interaction. But if we extend this picture to the level of communities, we see that communities too emerge and grow from this sort of exchange interaction, and are hence both stable and dynamic.[515]

However, and while I agree with this argument thus far, it is at this point that I part company with Schäfer and Bańkowski. While our starting premises are similar, namely the existence of network constellations of individuals premised upon processes of exchange and interaction, my argument deviates from theirs in that they transfer the argument about individuals to the level of legal orders with the intention of applying their conception of continually-negotiated identity to the nations and legal orders, specifically those of the Member States within the EU.[516] My aim here is perhaps less ambitious in that it does not attempt to make the leap from the individual or community level to that of the Member State; rather than relying on the jurisdictional, I prefer to see the unifying potential within a sectoral approach that is unconnected (so far as is possible) with territorial, Member State-related concerns. To turn the *mentalité* thesis on its head, instead of taking the basic distinction from legal tradition I propose that a comparable distinction can be made in terms of the differing sectors of law. Although the legal-contextual considerations remain and cannot be completely overlooked, the ongoing process of exchange within a specific area of law generates an interpretative legal community within the EU that is both rooted in the Member States and separate from them. This *mentalité*-lite approach employs the existence of both an overarching, inclusive framework and a number of discrete legal epistemic communities within the EU to facilitate a form of interaction that is simultaneously organic and dynamic.

Far from only relating to the legal *mentalité* understanding of legal culture, however, this discussion of legal epistemic communities brings this investigation full-circle by having substantial commonalities with the various *ideational*[517] conceptions of legal culture discussed in Chapter 2. From Savigny's conception of lawyers as interpreters of culture via Friedman's notion of "internal" legal culture to Cotterrell's "legal consciousness" and community approaches, the concept of legal culture and the place of legal professionals in relation to them as considered to be heavily intertwined, with much of the literature in the field geared at conceptualising the (causal) relationship between the two. Aarnio suggests that, legal professionals were, in fact, "a kind of transmitting link between the spirit of

[515] B. Schäfer & Z. Bańkowski, *supra* note 511 at 492-493
[516] *Ibid,* at 496
[517] See chapter 2, section 3

the people (the legal consciousness or *Volksgeist*) and the norms of law, since only the professionals were equipped with the necessary technical tools for the framing of a legal consciousness".[518]

There is no real consensus here, but yet these disagreements have little bearing on my argument in terms of *sectorally*-distinguished epistemic legal communities, which transcend the national level.[519] Indeed, the main difference between this application and the myriad articulations of "internal legal culture" (to select a phrase) is that they exist *in spite of* national, territorial boundaries instead of as a result of them.

A criticism, of course, could be that this network constellation of epistemic communities relating to particular legal areas is far weaker than the territorially-delimited and bounded notion of jurisdiction. I would concede this point to an extent; indeed, while a jurisdictionally-differentiated Member State legal culture can be described as a formal articulation, the sectorally-differentiated articulation relating to epistemic communities must necessarily be designated as being informal, yet I am still reluctant to construe this as a *weakness*. It is less influential, certainly, especially when we look at the EU and the process of Europeanisation of law, but weaker? This value judgement serves to disguise much of the potency of the network constellation by making a weakness out of what could otherwise be characterised as a positive feature, namely the ability to transcend national territorial boundaries, not to mention both innate flexibility and potential to evolve.[520]

As may have become evident, this is not strictly Luhmanian approach *per se*. Having expended substantial time and effort to move forward from segmentary and sectoral understandings of social differentiation to the functional form that characterises his theory of autopoietic social systems, Luhmann would undoubtedly not appreciate a reintroduction of sectorally-based distinctions. Nevertheless, he does provide for the existence (or persistence) of segmentary, stratified and even centre-periphery forms of differentiation alongside the functional:

> If we have functional differentiation [...], then the system needs for its own optimal running a kind of segmentary, a secondary segmentary differentiation. So, in this sense, one could say that functional differentiation achieves or allows for a complexity which is then able to use, to have new uses for, inequalities – centre-periphery differentiation, say, or stratificationary differentiation, or segmentation.[521]

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[518] A. Aarnio, "Who Are We? On Social, Cultural & Legal Identity" in T. Gizbert-Studnicki & J. Stelmach (eds) *Law & Legal Cultures in the 21st Century: Diversity & Unity – Plenary Lectures* (2007, Warszawa: Oficyna) 133-147 at 145

[519] Although Friedman does not actually state this, it stands to reason that the internal legal culture comprising judges, lawyers and legal specialists is *internal* to a specific unit. His delimitation of a unit of legal culture is less clear, however: this point is discussed in chapter 2.

[520] Similarly, the formal, institutionally-supported, jurisdictional form of differentiation argued for *vis-à-vis* Member State legal cultures can be postulated as being stronger than the informal, internal-border-transcendent, legal epistemic communities form, even in spite of its own territorial underpinning in terms of the encompassing EU jurisdiction and institutional framework. As discussed at the very beginning of this investigation, distinctions can be drawn on innumerable grounds, and hence diversity is always in existence in the social, whereas unity, conversely, has to be *constructed*. This necessarily makes the task of creating or identifying unity far more difficult than ascertaining its diversity counterpart, meaning that the playing field is always-already an uneven one. This, however, has no bearing on the situation of equilibrium argued for in terms of these opposing forces.

[521] N. Luhmann, "Answering the Question: What is Modernity? An Interview with Niklas Luhmann" with E. Knodt & W. Rasch in W. Rasch, *Niklas Luhmann's Modernity: The Paradoxes of Differentiation* (1995,

More problematic in terms of the Luhmann canon, however, is the positing of the sectoral form of *internal differentiation* required as a "unifying counterbalance" to the jurisdictional within the Europeanisation of law process. The sectoral distinctions that give rise to distinct epistemic communities are premised upon legal area, such as commercial law or family law, for example, and so the question becomes: are these sectoral distinctions sufficient to constitute a form of legal system-internal differentiation? Luhmann's thoughts on the matter appear to be quite clear:

> These forms [of the internal differentiation of the legal system] *cannot be established by reference to the different areas of law* and to the corresponding historical change of distinctions. We are not talking about distinctions such as public law and private law, administrative law and constitutional law, law of property and law of obligations, nor are we talking about a principled division of legal matters, for instance with the formula *persona/res/actio* of Roman law. *Semantic* divisions of this kind cannot develop independently of the level of complexity of the system...[522]

Luhmann, therefore, considers the division of law into various areas such as those listed above to be merely semantic instead of structural, the result of which is that they lack the capacity to effect their own development and evolution. I would argue, however, that Luhmann is perhaps too hasty in his designation of these legal areas as merely semantic and that he overlooks the both the existence and influence of *specialist courts* and *tribunals* in this regard. The ability of the legal system to evolve and therefore accommodate structural change is at the heart of its capacity to deal with diversification or increased complexity,[523] and while this evolution cannot be construed as "planned" in any way, the legal system relies upon its own ability to make innovative selections in order both to maintain its operational closure and preclude the redundancy of previously stabilised expectations. Indeed, as Luhmann himself states, "it is easy to see that the maintenance of autopoiesis, as a *condition sine qua non* of all evolution, can be equally well achieved with the help of a change of structure or that evolution is compatible with a change of structure.

Specialist courts and tribunals that pertain to specific legal areas, such as employment law and social security at the level of the Member State, for example, or the European Court of Human Rights (ECtHR) at the European level, cannot be considered to be simple semantic constructs in the way that Luhmann appears to conceptualise the various areas of law; courts operate as a sub-system within the legal system, and as such are *internally differentiated*.[524] These specialist institutions have a sense of working within a particular area, to the extent that they would consider certain issues to be outwith their remit or *ultra vires*, and so the legal system has evolved to accommodate these specialist courts, which

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Stanford, Stanford University Press) 195-221 at 197-8. Indeed, Luhmann acknowledges that *nations* can be construed as remnants of segmentary differentiation; see N. Luhmann, "Die Weltgesellschft" in N. Luhmann, *Soziologische Aufklärung*, vol. 2 (1975, Opladen: West Deutscher Verlag) 51-71 at 53; and A.F. Müller, "Some Observations on Social Anthropology and Niklas Luhmann's Concept of Society" in M. King & C. Thornhill (eds) *Luhmann on Law & Politics* (2006, Oxford, Portland: Hart) Chapter 8, 165-185 at 169 and 177

[522] N. Luhmann, *Law As A Social System* (2004, Oxford & New York: OUP) at 275, my emphasis.

[523] *Ibid*, at 231

[524] This form of internal differentiation is, in fact, produced in terms of centre-periphery, with the centre being occupied by the courts and the periphery being formed by other relevant structures, namely the parliament, lawyers and clients. See R. Nobles & D. Schiff, "Introduction" in N. Luhmann, *Law As A Social System,* 1-52, *supra* note 522 at 31

themselves came into being as a response to an increase in complexity that had to be accommodated.

This increase in complexity can arguably be attributed to variations in autopoietic elements, namely communications, that are inconsistent with the normal operations of the system; in terms of specific areas of the law and their attendant specialist institutions, the communications resulting from the "interaction and exchange" occurring within those *legal epistemic communities* could be construed as giving rise to these variations.[525] In fact, variation of systemic elements is the first condition required for structural change or systemic evolution, the other two being the selection of the structure and the maintenance of the stability of the system.[526]

Alternatively, however, one could bypass the Luhmanian canon and look to Gunther Teubner's work for support in this regard. Teubner, along with Peter Korth, states that:

> The traditional differentiation in line with the political principle of territoriality into relatively autonomous legal orders is ... overlain by a *sectoral* differentiation principle: the differentiation of global law into transnational legal regimes, which define the external reach of their jurisdiction along *issue-specific* rather than territorial lines...[527]

For Teubner, this "thematic-functional differentiation",[528] which is also conceived as being legal system-internal, occurs *in addition to* the classical territorial form, giving rise to a situation of *double fragmentation*. While this argument differs from my own in that the focus there rests upon policy arenas at the transnational level, the essence of it can be rearticulated as supporting a subsequent differentiation within the legal system on the grounds of an increase in complexity *vis-a-vis* specialised areas of law and those particular issues that they regulate.

Another potential stumbling block for my argument as regards epistemic communities is the fact that Luhmann's systems theory removes all agency from individuals and conceptualises them as psychic systems where *consciousness*[529] as opposed to communication is the form of operation; indeed, it is as a result of its unusual treatment of the human individual that systems theory has come under such fierce criticism for being anti-individualistic and anti-humanistic.[530] Instead of the classic distinction of subject/object, Luhmann relies on the system/environment distinction and thus decentres humans,

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[525] This is not, of course, to suggest that this consequence is deliberate on the part of the individuals within the epistemic communities; there is neither agency nor steering, merely irritation that engenders subsequent communications: "Change comes about in a constant interplay between irritation and communication reacting to this stimulus, and individuals, even collectively, are not agents of this change." See A.F. Müller, *supra* note 520 at 175

[526] "...*variation* involves the *elements*, *selection* involves the *structures*, *stabilisation* involves the *unity of the system*, which reproduces itself autopoietically. All three components form a necessary context, and the improbability of evolution is ultimately due to the circumstance that a differentiated leverage of these components is *nonetheless possible*." See Luhmann, *supra* note 453 at 231, emphasis in original. The next chapter will return to this idea of system evolution.

[527] G. Teubner & P. Korth, "Two Kinds of Legal Pluralism: Collision of Laws in the Double Fragmentation of World Society", plenary lecture given in Amsterdam at the *Ius Commune* conference, 27 November 2008, at 6, my emphasis

[528] *Ibid* at 6

[529] N. Luhmann, *Social Systems*, *supra* note 453 at 218

[530] See, for example, Z. Bańkowski, "How Does It Feel to Be on Your Own? The Person in the Sight of Autopoiesis" in (1994) 7 *Ratio Juris* 2, 254-266

banishing them to the environment and removing any possibility of conceptualising society in anthropological terms.[531] Individuals within systems theory are conceptualised as having a dual role, a double identity, whereby they exist both as individual, psychic autopoietic systems in their own right *as well as* being points of attribution of communications upon which the social subsystems can rely. Indeed, as *semantic constructs,* individuals involved with the law – be they judges, lawyers, legal academics, clients or legislators – are indispensable to legal communication as they are the "actors" to which legal communication is attributed.[532]

The construction of epistemic communities, therefore, has no place within systems-theory as such, as they cannot be "seen" by the legal system other than the sources of legal communications. Nevertheless, I submit that there is no necessity for the individuals to be "seen" *as long as* the legal communications are equally as border-transcendent. In a reversal of the argument given above, where I argue for the internal fragmentation of the legal system in terms of Member State legal cultures on the basis of those communications being *contextualised* by and through those legal cultures, here I submit that it is in fact the non-contextual quality of the communications attributed to the members of these non-territorial interpretative frameworks that should be brought to the fore here. I say non-contextual for the sake of clarity, although it should perhaps be stated that while these communications cease to take their context from a Member State, they are re-contextualised at the European level in terms of the EU "legal culture".

The viability of conceptualising the EU as a European Union legal culture will be explored in the next and final chapter. In terms of this chapter, the next section will conclude my argument that these two separate forms of legal system-internal differentiation can be conceptualised as counterweights that maintain the critical equilibrium within the process of Europeanisation of law.

4. Equilibrium

To briefly summarise the preceding sections: these two segmentary forms of differentiation both occur *within* the legal system, with the territorially-determined fragmentation happening on a vertical basis and the differentiation pertaining to sectors of the law continuing the horizontal form of functional differentiation. This dual legal system-internal fragmentation is created by the process of Europeanisation of law, which introduces both a common legal space at the EU level and a multiplicity of legal cultures within that space, which also sparks the possibility of achieving a legal "unity in diversity" balance within the Europeanisation process. These double fragmentations, by virtue of their pulling in opposite directions, one on the side of diversity and the other on the side of unity, serve to produce a form of *equilibrium* within the process, one which maintains national, member State legal diversity while also giving rise to a limited form of unity across the EU legal space.[533]

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[531] G. Bechmann & N. Stehr, "The Legacy of Niklas Luhmann" in (2002) 39 *Society* 2, 67-75 at 71

[532] G. Teubner, "How The Law Thinks: Towards a Constructivist Epistemology of Law" in (1989) 23 *Law & Society Review* 5, 727-758 at 741

[533] The final chapter will argue that this EU legal space can be conceptualised as a European Union legal culture in terms of the double institutionalisation of European legal rules and Member State social norms, which serves to engender distinctively *European* social norms.

The notion of balance or equilibrium referred to throughout this investigation is, therefore, a sociological observation of the congruence of these two forces at *a specific temporal point* within the operation of the process. While a situation of *disequilibrium* would signal the coming into being of one of the extreme forms criticised earlier, namely uniformity or discontinuity, the equilibrium created by the counterbalancing of these two forces, each on the other, maintains the openness of the dynamic process of the Europeanisation of law.

Chapter 6: **Towards A European Union Legal Culture?**

"What I dream of is an art of balance"
- Henri Matisse[*]

"Order is not pressure which is imposed on society from outwith, but an equilibrium which is set up from within.
- Jose Ortega y Gasset[**]

1. The Process of the Europeanisation of Law

The double legal system-internal differentiation proposed in the preceding chapter is of vital importance to maintaining the legal *unitas in diversitate* balance that, in turn, maintains the critical openness of the Europeanisation of law process. There is an inherent circularity in this relationship: the situation of a multiplicity of legal orders interacting within a single overarching EU legal space that gives rise to the necessity somehow to accommodate them creates the neutral arena for the process of the Europeanisation of law, which can be described as a juridified process of social learning across these two levels, the domestic and the European. This, in turn, generates the need for a conceptual framework in order to ascertain: a) what is being "learnt" by each level as a result of this reciprocal interaction?; b) how does this interactive process occur?; and c) what are the identifiable results of this process, intentional or otherwise?

Leaving the first two questions aside for the moment, this last question can be pre-emptively answered, albeit abstractly, by placing EU legal "unity in diversity" in this gap – indeed, this principle operates both as a basis for and a default aim of the Europeanisation of law process, with the attendant caveat that the lack of an endpoint for this process also precludes the necessity of there being a concrete result. The operation of this reciprocal process results in more operations, each of which is fed back into the process, thus affecting the parameters within which the subsequent operations will occur. This capacity to learn, to evolve, is at the heart of the process, which is in no way affected by either its contingency or lack of *finalité* – after all, there is no threshold to learning, no zenith to evolution.

The arena of this investigation is demarcated by the interaction of three strands, these being the process of Europeanisation of law, the conundrum of *unitas in diversitate*, and the concept of legal culture. As has been discussed in the preceding chapters, a situation of legal *unitas in diversitate* is not one that is particular to the European legal, although it is obviously exacerbated by the *institutional* legal quality of both the Member State and European legal orders and their increased and continuing interaction by virtue of the ongoing process of Europeanisation of law. This institutional quality is vital in terms of delimiting the legal cultures of the Member States: for example, the unifying and homogenising influence of law within a territorially-bounded jurisdiction, replete with its own institutions capable of both making and interpreting the law within a specific socio-legal context is at the heart of the conceptualisation of legal culture - but has not yet been explored at the level of the EU. This final chapter will argue that the EU can, in fact, be

[*] Henri Matisse, 1869-1954, O Magazine, April 2003
[**] Jose Ortega y Gasset,1883-1955

described as a legal culture, but one that is in the process of becoming, in the same way as the legal cultures of its Member States did before it. However, this should not be understood as a claim that a European legal culture will supersede or replace those of the Member States; on the contrary, the conceptualisation I propose is one that maintains this balance of legal "unity in diversity" within the contested EU legal space while at the same time creating the conditions for the continued evolution of both levels of legal culture in an organic way.

a) A Glance Backwards

Each of the previous chapters has touched, in some way, shape or form, upon the historical development of both the European Union and its Member States, both cultural and legal, that has given rise to the current situation, and this has been deliberate in more ways than one. The Europeanisation of law has been discussed in terms of being both a process and the consequences of that process but, because the process is ongoing, there is a lack of concreteness or *finalité* to those consequences. It is in the constant negotiation and renegotiation, in trial and error, and in this learning from previous situations that the Europeanisation of law should be understood. What has gone before has not been lost but, rather, provides the basis for and informs that which follows – it may be discarded, retained or altered but, no matter what occurs, the past is always-already included in the process. Within this process, *memory* plays an important role; instead of projecting forward all the time, instead of the focus always being forward- looking and related to what can be achieved, a glance should be cast backwards to see exactly where we have come from and how we have arrived where we are. Throughout this investigation frequent examples have been given of historical development in order to project on from them, be it in the Legrandian sense where history influences and forms discrete interpretative frameworks within legal *mentalités*, or in the way that the aims and concerns of the European project can be seen to have shifted, spread and regrouped since its initial inception, but these historical occurrences must also be conceptualised as having a very real contribution to the operations and contours of the process, as well as providing for its *context*. To quote Karl Marx: "Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted for the past."[534]

A systems theoretical approach to the concept of memory appears to provide the optimum conception, while still facilitating an understanding of it as being system-specific. Luhmann, in his rare reference to the notion of "culture", actually refers to it as being the "memory" of a society.[535]As Luhmann says:

> Culture is nothing more that the memory of a society; the filter of forgetting / remembering and the utilisation of the past to set parameters on variety in the future… Culture does not understand itself as the best of all possibilities, but rather directs the possibilities for comparison and thus also obstructs the view of other possibilities. In other words, culture hinders thought about what one might do instead of what is traditional. The invention of a special concept of culture may be attributed to a situation in which society has become so complex – in which it must forget more and remember more and reflect on this – that

[534] K. Marx, *The Eighteenth Brumaire of Louis Bonaparte* (1963 / 1852, New York: International), quoted in S.S. Silbey, "After Legal Consciousness" in (2005) *Annual Review of Law and Social Science* 1, 323-68 at 330

[535] Culture, understood here as the "memory" of a society, is different from the *cultural*, which Luhmann equates to the *social*.

> it needs a sorting mechanism to meet these demands.[536]

In essence, the memory of a system is there to assist in its autonomous evolution, managing as it does to reduce the complexity of situations that the system is presented with at any given point by making reference to past operations in order to react more adequately to new communications as they arise. Social memory is created by and through its own functioning in terms of societal communications[537] – by remembering what it did before, the system can filter out any recurring disturbances and focus its attention on the more improbable ones, which may or may not provide opportunities for learning.[538] System memory, it should be noted, is in constant use – it should not be understood as a storage place for data that the system can dip into when it chooses – and hence cannot be equated with nostalgia. Rather, it scrutinises the ongoing operations of the system and compares them to past operations to ascertain whether they are consistent or not. The future is thus contained predominantly within parameters dictated by the past, but the system also retains the option of adapting to any new and non-repetitive observations; the future, so to speak, is already *mapped out*, despite not being concretely predetermined.

In addition to the obvious "remembering" function of system memory, there is also that of "forgetting", which is of equal magnitude; indeed, as Luhmann says, "the connection between these two time characteristics must be preserved unbroken; and the function of memory could indeed also be more exactly phrased as the double-function of remembering and forgetting".[539] As well as being required to maintain the consistency of the system, memory is also used to maintain the system's amenability to new irritations by making sure that it has jettisoned the earlier ones. If this did not occur then the system would get clogged up with old observations and be unreceptive to new ones, meaning that it would be unable to adapt. Put simply, for the system, "without forgetting there can be neither learning nor evolution".[540]

System memory, therefore, in its remembering and forgetting, can be understood as an ongoing awareness of its past, of past selections and past operations; it is "a set of formulas for relating contingencies".[541] This is what the concept of "culture" is reduced to in a systems-theoretical construction – Luhmann gives it no other credence – but what, then, of *tradition*? Luhmann's similarly sparse references to tradition are less than helpful in this regard, as he merely states that "tradition is now no longer implicit in what memory presents, but rather exists as a form of observation of culture"[542] and that "culture hinders thought about what one might do instead of what is traditional".[543] One possibility could be that, for Luhmann, tradition is simply an articulation of remembering, which as such presents itself as more closed than open; however, I must admit to finding these statements inconclusive, so this is mere speculation. Thankfully, Luhmann provides more assistance in terms of the co-incidence of system memory (culture) in terms of the internally differentiated legal system. The internal complexity of the legal system, discussed above in terms of its internal differentiation into both

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536 N. Luhmann, *Die Gesellschaft der Gesellschaft* (1997, Frankfurt/Main: Suhrkamp) at 588; (translation taken from Lee & Brosziewski, *supra* note 450 at 16,
537 *ibid* at 15
538 N. Luhmann, *Social Systems* (1995, Stanford: Stanford UP) at 370
539 N. Luhmann, *Die Gesellschaft der Gesellschaft,* Book 1, *supra* note 536 at 579, my translation
540 N. Luhmann, *ibid* at 579
541 Lee & Brosziewski, *supra* note 450 at 17
542 N. Luhmann, N. (1997) *supra* note 536 at 590, my translation
543 N. Luhmann, *ibid* at 588

jurisdiction and legal area, is also a form of sorting mechanism intended to accommodate societal complexity the best way possible, which in this sense involves both the socially-generated question of "which law?" and the system-relevant question of "which 'level'?" Here Luhmann states that it is:

> by means of the concept of culture that the orientation of identity to comparability is shifted and thus mobilised. From there it proceeds to a majority of societies, which one can compare in their regional and/or historical diversity.[544]

Memory, therefore, can be posited as being that which conditions potential systemic operations in light of those that have gone before it, and is thus the mechanism by which the contextual is maintained.[545] In this sense, it can be said to provide a *social* legitimacy for the ongoing process of system evolution, at each different level contained within it.

b) Legitimacy

The question of social legitimisation for a legal culture is of immense importance because of the interrelations of the legal and the social that give rise to an understanding of law in context and thus a specific legal culture. This also relates back to the first two questions posed at the outset of this chapter, namely, what is being learnt by the legal cultures involved in the process of the Europeanisation of law, and what are the results of the reciprocal process of interaction between the Member State legal cultures and that of the EU?

As was discussed in the first chapter, Europe is plagued by both a surplus and a deficit of culture *vis-à-vis* identity, with the first pertaining to the existence of a multiplicity of identity claims within the EU and to the strong *national* form, and the latter highlighting the gap between the EU institutions and the people, thus encapsulating the EU's lack of social validity due to the deficiency of a cultural underpinning comparable to that of the Member States. This lack of an established socio-cultural background that could confer social validity upon what is often perceived as being a dry, dusty collection of Treaty rules is problematic in its very circularity; indeed, not only is the EU able to draw upon a reservoir of social solidarity to galvanise support for its legal operations, but this appears to work in *reverse*, whereby "an attempt is made to create solidarity through law, by declaring common principles and rights in the hope that these will influence the legal systems of the Member States as an integrating force."[546] This top-down approach, such as that adopted by the hopeful framers of the European Civil Code and which can similarly be seen in the requirement of interpretation in conformity with Directives, are unlikely to bolster any real social validity within the EU – it cannot just be demanded; instead, what is required is a bottom-up generation of social validity through interaction and exchange. This next section will endeavour to explain the organic coming-into-being of an EU legal culture in terms of the reciprocal evolution of social norms and legal rules that occurs within the process of the Europeanisation of law.

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[544] N. Luhmann, *ibid* at 590, my translation

[545] "Memory is the locus where and the mechanism by which this synthesis of time and identity is brought about." See J. Assman, "Form As A Mnemonic Device: Cultural Texts & Cultural Memory", (2006) unpublished manuscript presented at the HEC Workshop on History & Memory at EUI, 26/05/06, at 1

[546] G. de Burca, "The Language of Rights & European Integration" in J. Shaw & G. More (eds) *New Legal Dynamics of the European Union* (1995, Oxford: Clarendon) 48-9

2. Towards a European Union Legal Culture?

There are two distinct strands that should be borne in mine here: first, the argument that the internal differentiation of the *Rechtssytem* in terms of both jurisdiction and legal area (or sector) that generates a situation of equilibrium within the process of the Europeanisation of law, which in turn maintains the critical openness of this process and, second, the non-legal, social, *environmental* influences that provide both context and contextual communications, and can be said to generate *social norms* within a society.

In terms of the former point on double fragmentation, both forms of segmentary internal differentiation play their part, although the influence of the latter unifying force is certainly more influential than the territorially-based diversifying one, which operates primarily to delimit the levels involved, namely those of the EU and the Member States. Conversely, the professional socialisation in operation in terms of sectors of the law can be said, as was argued in the preceding chapter, to result in the creation of border-transcendent legal epistemic communities that have a shared *legal consciousness* in terms of the specific area of law within which they operate. This legal consciousness does not exist at some amorphous, disconnected European level, however, but is always-already in existence at the level of each, respective Member State within which these legal professionals work, study, teach, live, vote and socialise; as Vauchez puts it, "…the European legal field is made up of agents whose characteristics, socialisation and logics of action are often structured *outside* this field."[547] This legal consciousness of a pan-European Union interpretative community, however, operates on the two "levels" stated earlier, namely the domestic and the European, and can hence be posited as giving rise to social norms at both of these levels.

In a similar vein, and to introduce the final strand, the creation of social norms cannot simply be attributed to these epistemic communities as the representatives of an *internal* legal culture but is also affected by non-legal professionals in their domestic, Member State settings, each of which represents a separate, wider legal culture. In addition to the "lawyer's law"[548] that forms the basis of these epistemic communities, therefore, the legal consciousness of the wider community should be included. The conception of legal consciousness suggested by Susan Silbey does not appear to be restricted to internal legal culture at all but, rather, is applied more generally to the legal culture understood as a whole. For Silbey:

> Consciousness is understood to be part of a reciprocal process in which the meanings given by individuals to their world become patterned, stabilised and objectified. These meanings, once institutionalised, become part of the material and discursive systems that limit and constrain future meaning-making.[549]

Consciousness, therefore, is directly linked to how law is perceived by those to which it applies, and is *constitutive* in the sense that social norms are affected and altered by variations in the legal consciousness, and that these in turn have an effect upon legal norms. In this sense, Silbey argues that legal consciousness has a *constitutive* capacity within the social; indeed, she considers the role of legal consciousness to be both equatable with

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[547] A. Vauchez, "Embedded Law. Towards a Political Sociology of the European Community of Law: Elements of a New Research Agenda" in (2007) *EUI Working Papers (RSCAS)* 23, at 14

[548] L. Friedman, The Legal System: A Social Science Perspective (1975, New York: Russell Sage Foundation) at 29

[549] S.S. Silbey, "Legal Culture & Legal Consciousness" in *International Encyclopedia of Social & Behavioural Sciences* (2001, New York: Elsevier, Pergamon Press) 8623-8629 at 8627

participation in social interaction[550] and inextricably intertwined with a collective construction of legality.[551] This *relational* conception of social norms and legal rules and their mutual co-evolution sits at the heart of my conceptualisation of legal culture, facilitating as it does an organic, bottom-up, contextually-specific evolution of law as well as providing a certain social legitimacy for the this process of legal-cultural adaptation.

a) A Relational Conception of Legal Culture

This conception of legal culture can be defined as a tension-laden reciprocal adaptation of legal rules and social norms (process) within a given legal space (unit).[552] Legal rules in this sense are the body of norms that have been institutionalised as law, while social norms refer to non-legal forms of social life and structuring – both legal rules and social norms are involved in separate but inter-dependent processes of evolution, and it is the mutual co-evolution of these that serves to constitute a legal culture. By virtue of being created by the interrelation of the "legal" and the "cultural", legal culture is both contextualised – in that its evolution has occurred within the framework of a particular jurisdiction with a unique socio-cultural pedigree and *mentalité* – and kept distinct from law and culture. It is this reciprocal relationship of legal rules and social norms that constitutes a legal culture, while also providing for its legitimation. Moreover, as a legal culture is created from the tension between legal rules and social norms, it is from an *inter*-legal order perspective more dynamic and from an *intra*-legal order perspective more porous than both deracinated formal law and autochthonous, embedded culturalism. This organic evolution of legal culture can be explained in terms of Paul Bohannon's notion of "double institutionalisation" of norms.[553]

The requirement of double institutionalisation is that, having originated in the "customs of non-legal institutions", in order to claim any social authority the law must be "overtly restated" through legal rules for the dedicated task of facilitating the operation of legal institutions. This is neither a stable nor permanent condition, however, because the interdependency of social norms and legal rules results in a continuous tension between them, which has effects at both institutional levels:

> [L]aw's capacity to 'do something about' social institutions creates a 'lack of phase' between legal rules and social norms while, at the same time, evolving social norms challenge what appears from [...] a societal perspective to be an inherent conservatism of law geared towards the stabilisation of normative expectations and the maintenance of the *status quo*.[554]

This "fertile" tension is only removed at the very instant of double institutionalisation where there is momentary congruence between social norms and legal rules, and thus the

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[550] S.S. Silbey, *ibid* at 8628

[551] S.S. Silbey, "After Legal Consciousness" *supra* note 534 at 334

[552] For a more comprehensive account of this argument, see D. Augenstein & J. Hendry, "The 'Fertile Dilemma of Law': Legal Integration and Legal Cultures in the European Union", (2009) *Tilburg Institute of Comparative & Transnational Law (TICOM) Working Papers* No. 2009/06

[553] P. Bohannon, "The Differing Realms of Law" in (1965) 67 *American Anthropologist* 33-42. It should be noted that the "double institutionalisation" thesis has already found its way into EU legal theory, although has so far only been applied to *constitutional* debates; see F. Snyder, "The Unfinished Constitution of the European Union" in J.H.H. Weiler & M. Wind (eds) *European Constitutionalism Beyond the State* (2003, Cambridge, CUP) 55-73

[554] D. Augenstein & J. Hendry, *supra* note 552 at 7

process of legal-cultural evolution is driven forward by the operation of these two separate but mutually-reinforcing adaptive processes in the legal and the social.

There are two components inherent to Bohannon's conceptualisation of double institutionalisation, which he also calls "secondary" legal institutionalisation[555]: the first, as noted above, that it is the essence of law to present this double institutionalisation of norms, but also that this should be effected by a "unicentric political unit".[556] Bohannon, writing in the United States in 1965, obviously conceives of this unit as being the nation state, replete with a (relatively) homogenous[557] body of social norms across a territorially-delimited jurisdiction with a strong claim to a unitary interpretative framework. This construction is applicable to the Member States of the EU, where the internal cohesion of a legal culture is greatest, but is arguably problematic when transposed to the level of the supranational EU jurisdiction. However, I submit that the institutionally-bounded and territorially-delimited structure of the EU level does provide for an (albeit limited) reconceptualisation of this process of double institutionalisation in this regard – one that draws on both forms of interpretative framework discussed earlier, namely the Member State one and the European Union one.

The "gap" between social norms and legal rules at the EU level is obviously greater than its Member State equivalents, as a result of the lack of an obvious cultural underpinning, although it is much more integrated than international society[558] which lacks any comparable structural framework. Nevertheless, the Europeanisation processes that have occurred already at both the legal and societal levels provide for a conceptualisation of an European Union legal culture that is separate from those of its Member States, but which exists *in addition to* – above and alongside – the Member State legal cultures that exist within the European legal space.

b) Distinctively European Social Norms?

I submit that it is the particular nature of the European Union structure that facilitates a *process* of reciprocal adaptation of legal rules and social norms to occur within its legal space. The interaction of European and national legal orders enables a mutual conditioning of European legal rules and national social norms: "EU legal rules affect member State social norms by conferring rights and obligations directly on private parties, thus acting upon and being enacted into the Member State legal orders with their distinctive socio-cultural pedigree".[559] While these differing Member State legal cultures can create diverse results by rearticulating these European legal rules in their own socio-cultural setting, there is a unifying factor at play here, namely their common reference to an overarching EU legal order. This, I submit, has a dual outcome: first, the reciprocal adaptation of social norms and legal rules undertaken by double institutionalisation means that European legal rules can generate a particularly *European* set of social norms across its jurisdiction, and second, as these "Europeanised" norms are legally re-institutionalised not only at the national level but also at the European level, it can be asserted that these social norms both have a bearing upon the evolution of law within the EU *and* serve to augment its social validity. This dual-level adaptation, by virtue of maintaining the distinctiveness of the levels while

[555] P. Bohannon, *ibid* at 38
[556] *Ibid* at 38
[557] See David Nelken's argument that formalised structures create intra-legal cultural homogeneity, as discussed in chapter 3 section 1.
[558] See Bohannon's *treble* institutionalisation thesis as regards international law; P. Bohannon, *supra* note 553
[559] Augenstein & Hendry, *supra* note 552, at 12

still operating organically from the bottom-up, provides an alternative conceptualisation of the legal *unitas in diversitate* balance argued for throughout this investigation.

This legal *unitas in diversitate* balance, of course, cannot be seen as having any real coherence; nevertheless, this should not necessarily be seen as a negative situation, as the stated aim was for *unity without uniformity and diversity without discontinuity*. A claim for coherence within the EU legal space skirts uncomfortably close to a claim for a uniform pan-EU application, which is the antithesis of what this thesis proposes. An aim here has been to present a "discussion of unity unhampered by the misleading noises of uniformity",[560] and so I propose a form of mere *consistency* instead of one of coherence. In terms of this legal *unitas in diversitate* balance, the mere coordination between Member State legal cultures within the EU may, over time, develop into more of a deep-level embedded consistency, but this could only occur as a result of further interaction and exchange within the Europeanisation of law process.

3. Some Concluding Remarks

The aim of this investigation has been to argue for a sociologically observable equilibrium between the competing forces of legal unity and legal diversity within the EU in order to conceptualise the contested process of the Europeanisation of law as a contingent, reciprocal one that has no endpoint in either uniformity or discontinuity. The point of departure was the concept of legal culture, which provides for an institutionally-bounded and territorially-delimited jurisdiction that has a unique socio-historical context, in terms of both the Member States of the European Union and the EU itself. These Member State legal cultures, within the overarching EU legal space, can be conceptualised as a segmentary form of legal system-internal differentiation on the basis of territory, whereby communications originating in and pertaining to a particular Member State are conditioned in terms of the legal-cultural context of that Member State. This form of fragmentation is a force of diversity within the Europeanisation process, which operates against a unifying force, understood here to be a similarly legal-system internal differentiation on the basis of areas of law and their related epistemic communities. The interpretative frameworks, which are constructed and maintained by interaction and exchange, are restricted to the jurisdiction of the EU but transcend their domestic settings and contexts, and thus have the effect of producing an EU legal consciousness. The dual levels of legal consciousness in existence, namely the European and the domestic, can both be considered as constitutive within the social in that they affect social norms, which are involved in a constant process of adaptation. This process is paralleled by that of a separate adaptation of legal rules, and these two processes exist in mutually-reinforcing operations of evolution. These multiple, intertwined processes all contribute to the greater process of Europeanisation of law, which consequently can be said to operate in a bottom-up, socially-embedded way. This middle way approach avoids the pitfalls of the two extreme schools of thought that have characterised the debate on the Europeanisation of law by operationalising the conundrum of *unitas in diversitate* in a way that both maintains the critical openness of the ongoing Europeanisation of law process and facilitates a form of organically-evolving social validity for that process, and hence the resultant legal structure of the European Union.

[560] E. Christodoulidis & R. Dukes, "On the Unity of European Labour Law" in S. Prechal & B. van Roermund (eds) *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (2008: Oxford, OUP), 397-422

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