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Chapter 7

The Double Fragmentation of Law:

Legal System-Internal Differentiation and the Process of Europeanization

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Introduction

In the introduction to this volume, Augenstein and Dawson state that 'many scholars today are concerned with the perceived differentiation and pluralisation of European law and its *acquis communautaire*'.[1] These concerns coalesce around the notion that, deprived of a *Grundnorm* and placed in a polycentric and pluralist constitutional setting, European Union law often seems to fall prey to instability and fragmentation. Similarly, it could be said that while law owes its elevated position within the European integration process to its (ubiquitous) agency on behalf of other function systems, such as politics and the economy, this has arguably come at the expense of its own internal coherence. I say arguably, although it is unlikely that any such argument would be forthcoming – much of the current literature in the field tends to concern itself with the 'irregularities' of law within European Union, pointing out a flaw here, an erosion of either form or influence there. By the same token, a common popular perspective on the EU integration process is that recently it has been faltering, suffering setback after setback in the form of, for example: the opt-outs from EMU and the limited recognition of freedom of movement for nationals of new accession States

[*] I am grateful to both Oliver Gerstenberg and Dagmar Schiek for their comments; any errors remain my own.

[1] See Augenstein and Dawson, *infra*, What Law for what Polity? Legal Integration in the European Union Revisited.

creating the situation of a visibly multi-speed Europe; the referenda-underwritten rejections of the Constitutional Treaty in 2005; and the reliable permanence of that hoary old chestnut, the democratic deficit.[2] Considering the intricate, multi-layered, often overlapping and somewhat chaotic structure[3] of the EU, however, it is hardly surprising that the law within its boundaries has become stretched to the point where its own character has been laid open to criticism. It is my contention, however, that these irregularities should not necessarily be perceived as overwhelmingly *negative* circumstances, particularly (although not exclusively) as the European legal integration process is an ongoing one.

In this chapter I intend to utilise insights drawn from the theory of autopoietic social systems in order to illustrate how strength can be located in these perceived weaknesses, that the outcome of the legal integration process can be flexibility instead of instability, and that fragmentation can be operationalised to facilitate a more contemporary realisation of law *vis-à-vis* integration in the European Union. This systems-theoretical approach recognizes that the path followed by European legal integration thus far has been a functional one, and proposes that European legal integration be reconceptualised as a form of social learning that is facilitated and indeed *driven* by ongoing processes of legal system-internal differentiation. This internal differentiation of the *Rechtssystem* occurs on the dual bases of jurisdiction

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[2] The political nature of these setbacks can be contrasted with the continuity of case law from the European Court of Justice (ECJ), all of which stands on the substantial shoulders of *Van Gend en Loos* (Case 26/62 [1963] ECR 1) and *Costa v. ENEL* (Case 6/64 [1964] ECR 585). As this chapter will argue, this *jurisprudential* stability stakes a plausible claim to be considered the main legal unifying force within the EU.

[3] This is no pejorative judgement in the sense of Allott's unbearable *Ungeheuer* (Allott: 2003) or Krisch's 'constitutional monstrosity' (Krisch: 2005), merely an observation that the EU lacks a well-ordered and coherence structure.

(territorial application) and legal field or 'sector' (for example, contract law, competition law, etc) – what I will refer to as 'double fragmentation'. As I aim to illustrate, this 'double fragmentation' thesis provides for an understanding of the legal integration process within the EU as one premised upon the maintenance of a unity/diversity balance.

Before providing these illustrations, however, it is necessary first of all to establish what is meant by the *legal* integration process within the EU, specifically in terms of what it does and does not include within its ambit. One of the first scholarly ports of call in this regard is usually the 1986 Integration through Law (ITL) project (Cappelletti, Seccombe and Weiler 1986), and in this my chapter is no different. However, and while it is certainly not an exaggeration to state that the Integration through Law project has been immensely formative over the past quarter century, its enduring influence can perhaps be measured more in terms of how it constructed and shaped the contemporary academic debate than in terms of its operation as a reliable forecaster of future developments. I will argue that the ITL project's major insight was what they recognised as their 'existential dilemma', namely the achievement of a unity/diversity balance, but that this insight was contaminated by the very narrative of *integration* within the EU. The rhetoric of integration *through* law added an inherently instrumentalist aspect to the project, which in turn led to the inclusion of a normative ideal motivated by the prevailing political attitudes and dominant ideologies of the time.[4] In terms of the *contemporary* EU, therefore, and within which it can arguably be said that integration has 'passed its high tide and is turning towards flexibility' (Nuotio 2004), it is

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[4] See also Matej Avbelj's contribution to this volume, *infra* chapter 2 that distinguishes between a policy and an academic conception of integration through law.

my contention that the current state of affairs is better served by a new narrative, namely that of the *Europeanization of law*.

The reasoning behind utilising this particular term 'Europeanization' is twofold. First, it is inherently neutral vis-à-vis any notion of amalgamation – integration, harmonization and convergence all retain the idea of an eventual endpoint, however far distantly projected that may be. It is this intrinsic lack of any specified ultimate aim or *finalité* that makes 'Europeanization' the optimum term to employ in attempting to conceptualize the contested and fragmented European legal project. Second, Europeanization of law can be said to concern itself not only with the 'principal legal effects of European integration' (Snyder 2000) but also with the ongoing *process* itself. The Europeanization of law process can be considered an interactive one, meaning that both the process and any results generated by it – be they intentional or unforeseen, occurring at either domestic or EU level – are *retained* within the operations of that process and continue to inform it.

This chapter will discuss the benefits of adopting the narrative 'Europeanization of law', and will subsequently rely upon these insights to argue that not only can this Europeanization be seen as embodying open-ended and juridified processes of social learning but also, as I mentioned earlier, that these processes can be described more exactly by drawing upon the epistemology of systems theory (Přibáň 2009), specifically as regards the legal system (*Rechtssystem*, understood in the systems-theoretical sense of the term) and its own system-internal differentiation. Prior to embarking on a discussion of double fragmentation and what I will refer to as the 'balance thesis', however, some attention should be paid at this juncture to the ITL instrumentalist approach, replacing as it did the original convergence thesis of the 1960s and 70s.

'Integration through Law' and Instrumentalism

The path of integration for the entity that was to become the European Union was not always such a contested one; in its earlier years the dominant line of thinking was that a gradual growing-together of the European Member States would eventually culminate in their replacement by a European (federal) State conceived in line with the Westphalian model. Prevalent during the 1960s and 70s, this essentially neo-functionalist approach to the integration project was often referred to as the 'Monnet Method', and operated from the assumption that integration processes in one sector would 'spill-over' into other sectors, specifically the political, where they would then influence and drive similar developments (Haas 1958, see also Fischer 2000). This unitary vision foresaw European development occurring by means of incremental change and cumulative effects, starting with simple economic interdependency through the operation of the common market but culminating in full political union. This (comparative) consensus was not to last, however; even by the late 1980s the EU landscape had already undergone substantial developments certainly unanticipated by its founding fathers, and by the early 1990s (post-Maastricht) it was striking the degree to which ideas of an 'ever closer Union' – once considered a viable socio-political reality – had receded. Appearing in its stead was the more nuanced aim of balancing 'unity in diversity' within the EU; indeed, despite its removal from the defunct 2004 Constitutional

Treaty and its 2009 Lisbon successor, the former motto 'united in diversity'[5] remains *de facto* the 'verbal logo' of the EU, featuring on all European Parliamentary documents since 2008.[6]

So where do the proponents of the Integration through Law project stand on this matter? As mentioned earlier, the introduction to the ITL project opens by stating that the 'existential dilemma' it faced was in reconciling, 'on the one hand, a respect for the individual unit, freedom of choice, pluralism and a diversity of action, and, on the other hand, the societal need for cooperation, integration, harmony and, at times, unity.' (Cappelletti, Seccombe and Weiler (1986:4). It could even be said that the role of law and the legal system in the realisation of this state of balance between the competing forces of unity and diversity, as well as the recognition of the interdependency and interconnectedness of law with the European polity and political system, formed the core of what has become the ITL maxim, namely that law is both the object and instrument or agent of integration (Cappelletti, Seccombe and Weiler 1986, Dehousse and Weiler 1990). Of course, the ITL proponents were well aware of the complexities inherent to the notion of European legal integration; not only was it already appreciated that the concept comprised two elements, namely both the process

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[5] The English translation of the motto *in varietate unitas* was originally given as 'unity in diversity' but this was written into the failed 2004 European Constitution (Art I-8) as 'united in diversity', and it is this version that has been maintained. See also Declaration 52 of the Consolidated EU Treaties.

[6] Interestingly, the preamble to the Lisbon Treaty takes a slightly different tack, preferring instead to refer to a '[desire] to deepen the solidarity between [their] peoples while respecting their history, their culture and their traditions.' Without putting too much emphasis on the semantics of a multi-lingual document, the complete omission of any reference to 'unity' appears a rather stark one; the notion of solidarity among people seems to be simultaneously more organic and abstract than the perhaps more formal or rigid idea of unity, in whichever form.

of integrating and the outcome of that process, but it was also recognized that ‘integration’ accommodated a conceptual *spectrum* that situated mere cooperation and full unification at its opposite ends.

I submit, however, that it is by means of this cooperation/unification spectrum that the instrumentality inherent to the ITL approach becomes more clearly apparent, the reason being that *any single point* on this spectrum could occupy the foremost position, be it unification, harmonization, convergence, and so on and so forth. Indeed, whichever of these is selected, it is necessarily a *selection*, one that was chosen from many possible options to become the ‘aim’ of the integration process, its normative ideal. This situation appears to arise as a result of the difficulty of applying any legal standardization to a concept that lacks a specific value – or at least one that can be objectively measured; in essence, the spectrum provides for a range of options that remain unavoidably indeterminate. Indeterminacy appears at the point of introduction of any social objective or aim of European integration; therefore, by instrumentalizing law in order to achieve any such aim, the law becomes complicit in what is essentially an ideological exercise.[7]

It is not the specific ideology *as such* that introduces indeterminacy; rather, the instrumentalism inherent to the very notion of integration through law engenders a certain ambiguity vis-à-vis the aim of the process, which in essence becomes a ‘social instrument, harnessed to achieve a wider societal objective’ (Cappelletti, Seccombe and Weiler 1986:42). This instrumentalist conception seems to have snuck in on the coattails of *Van Gend en Loos* Case 26/62) and *Costa* (Case 6/64). By virtue of its apparent commitment to the

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[7] Augenstein, *infra* chapter 5, pinpoints the creation of a European identity as the pivotal societal aim of the Integration through Law School.

jurisprudential stability created by the European Court of Justice (ECJ) and the continuity of its case law, the ITL project managed to yoke itself to the doctrines of direct effect and supremacy, thus inadvertently entangling itself with perhaps more of a 'convergence thesis' than initially intended or desired. Conceivably most ironic in this regard, however, is that the lauded jurisprudential cohesion engendered by the ECJ (Van Gerven 2008) can be seen as being *directly attributable* to a common ideological stance on the part of the ECJ judiciary – this is a point I will return to when discussing epistemic communities later in this chapter.

The result of this instrumentality is that the conceptualisation of integration becomes a more normative or, rather, ideologically-influenced one, but it could also be argued that the relationship here is one of circularity: the instrumental approach facilitates the inclusion of a normative ideal, but the necessity of selecting (from the cooperation/unification spectrum) what is to embody this said normative ideal introduces a degree of indeterminacy, which in turn serves to open the process up and generate some of the flexibility and fragmentations that have characterised the post-Maastricht European Union. Indeed, the dismissal of the notion of an 'ever closer Union' and the introduction of the *new aim* of 'unity in diversity', with the alteration of the sound-bite marking a clear shift in the integrationist ideology,[8] for want of a better term, had the effect of embedding indeterminacy at the heart of its normative ideal. As mentioned above, not only does this serve to exemplify the fluidity of 'integrationist' social objectives, but its position as the new placeholder has the effect of adding *yet another* layer of indeterminacy, namely the notion of maintaining a situation of

[8] Even if the machinations behind the scenes are not representative of this; for an argument outlining the instrumental usage of the 1992 TEU cultural policy as an integrative force, see Hendry 2008.

plurality within the European Union.[9] This new aim represented a fresh point on the cooperation/unification spectrum that was, strangely enough, far more representative of the ITL project's initial acknowledgment of the object/agent duality within the concept of integration. Indeed, while 'unity in diversity' appeared to be a far more suitable, nuanced and *balanced* normative ideal for the EU to have adopted, it was this adoption and then the subsequent recognition of the malleability of integration's social objective – its 'placeholder' character – that made the greatest contribution in terms of what are perceived as being the EU's contemporary irregularities and fragmentations.

Following the format of Dehousse and Weiler's object/agent distinction (1990), integration can in turn be posited as both the (meta-level) object (however unspecified) and agent (driving force behind) of this ultimate endpoint, this normative politico-social objective. Indeed, this decoupling of process and aim serves to make the duality of the term 'integration' even more readily apparent. In terms of my argument in favour of the narrative of 'Europeanization', this is also the means by which a critical openness is introduced into its ongoing process(es). More will be made of this point later, during the discussion on the narrative of *Europeanization* as an alternative to that of integration; for now the focus will shift to address allegations of fragmentation within the EU.

Axes of Difference and Differentiation

[9] The plurality referred to here, it should be said, is not the pluralism of legal anthropology but, rather, the existence and indeed maintenance of a multiplicity of legal orders, namely those of the Member States and the EU itself, within a single overarching legal space, that of the EU.

As mentioned above, these irregularities within European law and legal integration, and the other setbacks suffered by the EU have given rise to mutterings about a crisis. Nonetheless, this appears to overstate the matter. Irregularities and obstacles there may be; however, to perceive these setbacks as crises – moreover, as *existential crises* (Kühnhardt 2009) – is to misunderstand both the (legal) integration process and the European project itself. As Andrew Moravcsik observed (1998:56), within the EU these ‘intense demands for deepening, widening, and democratisation have elicited equally intense demands for fragmentation, flexibility and differentiation,’ and the resultant ‘growing pains’ are indeed nothing more than just that. It is in this spirit that I aim to conceptualize (and subsequently operationalise) fragmentation – specifically, the fragmentation that can be observed within the system of *law* in the EU. This argument takes its impetus from the theory of autopoietic social systems or, more succinctly, systems theory (e.g. Luhmann 1995, 1997, 2004 and Teubner 1993), the reasons being that the functional differentiation inherent to a systems-analysis not only facilitates a restricted focus upon the legal system, its environment and the communications relevant to it alone, but also provides for a particular understanding of what I call *double fragmentation*, in terms of legal system-internal differentiation (*Binnendifferenzierung*).

The main insight of the theory of autopoietic social systems stems from its recognition of differentiation on the basis of function, and the fact that it ‘better formulates the temporal, functional, and self-referential aspects of European integration and avoids the epistemological trap to identify the particular concept of polity, its organisational restraints, and institutional hierarchies within the general concept of society’ (Přibáň 2009). In essence, systems theory comes into its own when brought to bear on the many facets and foibles of EU integration, the path of which up to now can be charted as having followed a functional – not a constitutional– route (Von Bogdandy 2010).

While Niklas Luhmann (2000) considered differentiation on the basis of function to be the only viable structural form available to modernity, this is not necessarily the case. The functional 'turn' is seen as giving rise to society understood as a differentiated unity but, prior to this, society progressed through phases of limited differentiation on various bases. In contrast to the horizontal form exhibited by functional differentiation, these earlier stages of differentiation – segmentation, stratification, and centre/periphery (Luhmann 1997) – were predominantly vertical and restricted in their scope by simple geographical limitations. While it has been said that the emergence of the EU embodies a shift (*Verschiebung*) away from the segmentary and stratified forms of differentiation that typified the nation State towards an increased reliance on differentiation on the basis of *function* (Kjaer, 2008), it should not be assumed that the functional turn marked the end of these early structural forms. This notwithstanding, and although Luhmann himself acknowledged (2000) that 'relics' persist within modern society, he also maintained that these had to be both viewed in light of and explained as a consequence of functional differentiation. Modern systems theory, therefore, conceptualizes segmentation and stratification as being particular forms of *system-internal* differentiation, and nowhere is this more evident than in the contemporary EU. Its supranational character allows for a clear view of the function system of the law, the *Rechtssystem,* in terms of both jurisdiction (territorial application) and *sector* (specialisation).

Let me elaborate on this point. For centuries the internal differentiation of law followed the political logic of nation States, which is to say that legal differences corresponded to *national* legal orders, and thus territorially-determined jurisdictions. As an example of the segmentary form, the global legal system is internally-differentiated into comparatively similar units representative of national jurisdictions; furthermore, with segmentation occurring on a non-hierarchical basis, each of these units is considered to be equal,

understood here in the sense of sovereign and non-violable. Indeed, this provides for an understanding of law in context. However, considering that 27 of those nation States are now simultaneously also Member States of the EU – which, for the same reasons, arguably represents yet *another* legal order and territorial jurisdiction – there is an added layer of complexity introduced by necessary and unavoidable interactions and overlaps. This complexity, in time-honoured systems-theoretical fashion, then results in a subsequent differentiation once more on the basis of *function*, but this time in a yet more specialised form. As Gunther Teubner and Peter Korth (2008:6) state *vis-à-vis* the EU, 'the internal differentiation of law along national boundaries is now overlain by *sectoral fragmentation*'. It is these axes of differentiation and fragmentation on both sectoral and national grounds, which provide the framework for this argument.

Jurisdiction

In terms of this twofold legal-system-internal differentiation, the least problematic is that which occurs on the basis of jurisdiction, which is to say, the legal-contextual differentiation of 27 Member State legal systems within the overarching EU legal order. However, to be clear in terms of this systems-analysis, I would like to provide a short explanation as to how 'jurisdiction' is conceptualized here, most particularly in terms of its fundamentally geographical basis. I make specific mention of this because autopoiesis theory is most commonly utilised in order to provide descriptions of world society (*Weltgesellschaft*), this application being reliant on the idea that differentiation on the basis of function allows for the dismissal of geography, not only as the most important agent but as an agent at all (Schütz 1997). This argument turns on the idea that the systemic elements (communications) that pertain to territorial boundaries are communications of the *political* system alone and thus remain 'unseen' by the legal system; 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.

While this is a plausible argument, and one which does privilege the primary functional differentiation, it is my contention that just because the territorial boundaries can be viewed as political communications concerning the exercise of State sovereignty, this does not automatically prevent subsequent secondary communications being informed by concerns that have their source in the territorially-bounded Member States. In this regard, it is not too much of a stretch to argue that the territorial aspect of a nation State can be 'understood' by the overarching legal system in terms of that particular national legal order,[10] that particular legal context – indeed, to put this 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. The jurisdiction of the law of a Member State, the extent or 'reach' of its legal order, is intrinsically linked to its scope, which is to say, its authority and applicability – by this token I would argue that, while it is of course possible to disregard geographical factors as grounds for differentiation, insistence on a deliberate dismissal of geography as an agent (Schütz 1997) is not only wholly unnecessary but also downplays the important role it still plays within the European polity.

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[10] For the sake of clarity I am using the term 'system' to refer to the functionally-differentiated legal system (*Rechtssystem*) in the systems-theoretical sense of the term, whereas the term 'order' pertains to those 'levels' of subsequent system-internal differentiation, namely Member State legal orders or that of the EU.

I say Member State specifically here, as this is my focus – it could be said that EU Member states are overlain by the inclusive jurisdiction of the EU resulting from its supranational character. The multiplicity of jurisdictions *within* this EU jurisdiction facilitate the introduction of considerations of legal plurality, and indeed, legal plurality in *two* loci,[11] namely both within the Member States legal order *and* the EU legal order. While it could be argued that this legal plurality is merely another complicating factor in an already indeterminate integration process, I submit that it makes more sense to view it in light of the more nuanced normative ideal of (legal) 'unity in diversity'. My point here is: is it not preferable to *harness* that indeterminacy or, to put it another way, to see within intra-EU legal plurality the possibility of conceptualising a *legal* type of differentiated integration? This appears to be possible under a systems-theoretical construction, namely one which provides for a *selector-specific* understanding of a communication: not only is the spectrum of differentiated integration across various Member states readily accommodated, but the specific context of each Member State legal order is also infused with a particular degree of EU influence. Viewed as an ongoing process, moreover, this construction maintains a critical openness that encompasses much *although importantly not all* of the unity/diversity spectrum. In this regard it must be held to be a fundamentally diversifying force, however weak or strong that may be at any given point.

Sector

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[11] The terminological quandary here is to express an overarching inclusive jurisdiction (EU) without suggesting subsumption or hierarchy.

As the weft to the warp thread of jurisdiction, the other basis of legal-system-internal differentiation is perhaps less immediately apparent; it is not reflected by the apparently robust borders of national legal orders, but rather in legal academic and professional divisions of labour, whereby 'doctrinal analysis has to some extent been re-domiciled in its relevant substantive disciplines' (Walker 2005: 582). The *sectoral* axis, therefore, can be construed as pertaining to those legal specialisations that are reflected in and by professional legal epistemic communities in existence within the EU and operate across national-jurisdictional boundaries

Much of the literature on the concept of epistemic community comes from the field of political science.[12] This does not, however, mean that it cannot be reinterpreted from a legal perspective, nor does it prevent the concept being utilised with specific reference to legal professionals. For my purposes, 'epistemic communities' denote *network constellations* pertaining to specific legal fields, which are subsequently separated out or *differentiated* into *sectors* of the law, for example, public and private law, contract law, human rights law, labour law, and so on and so forth. The term network constellation is utilised deliberately to illustrate the amorphous nature of these epistemic communities, which are neither bounded nor restricted as regards participation, and which transcend Member State borders. It is my assertion that the cross-jurisdictional, sectoral[13] commonalities embodied by these epistemic

[12] I do not accept this political-scientific definition wholesale but rather rearticulate it *vis-à-vis* the law. If anything, my application is more in keeping with Thomas Kuhn's 'thought collective' (Kuhn 1970), which denotes a sociological group with a common style of thinking, than with Peter Haas (1992) four-point definition of epistemic community.

[13] Conceptualising the EU in terms of sectors is not a new approach – for example, John P. McCormick (2007) characterises the EU as a State composed of sectors or *Sektoralstaat*.

communities can constitute an alternative form of differentiation to the more readily-accepted territorial delimitation in the form of the Member states. This *unifying* form is simultaneously constructed and maintained by one over-arching territorial jurisdiction, namely the EU, yet actively countered by the mere existence of those 27 others from which its participants come.

It is easily apparent that individuals working in and with the law are necessarily connected with other individuals engaged with the same legal field. 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. Furthermore, this situation cannot be said to be one of exclusivity: on the contrary, an individual legal professional or academic could be simultaneously 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. In fact, many of the individual legal professions could be viewed as operating in sectorally-defined epistemic communities internal to their own Member State legal order *as well as* operating in EU-level epistemic communities.

As mentioned above, an epistemic community can be described as a constellation or network of knowledge-based experts (Haas 1992) namely those professional individuals who have a recognized mastery or proficiency within a specific field or area of law. Antoine Vauchez (2007) states, this could be articulated as a coincidence of specialisation and autonomisation. 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 and the nature of a given area's *embeddedness* within its

Member State context. To give an example, it is clear that areas such as environmental law, which have a less embedded character than, say, criminal law, are subject to more pan-European initiatives – 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,[14] while its importance to the economic system should also not be downplayed. Nevertheless, there is no necessary connection between the degree of 'Europeanization' 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 can be said to be central to the wider processes of integration of and through law within the EU, fulfilling a variety of roles and functions within European affairs as, for example: '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' (Vauchez 2007: 3). My point here is that the twofold role of the 'lawyer' within the EU facilitates the maintenance of an identity position that is simultaneously internal both to their own domestic legal order and to that of the EU. Although we should guard against overstating the force of this – the 'understanding' is of course merely sectoral and thus only partial – it does engender a certain unity across the network constellation; for example, it is not such a stretch to assert that Scottish and Italian criminal lawyers will have more of a shared mindset (Schäfer and Bańkowski 2000) and

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[14] See for example the Study Group on a European Civil Code/Research Group on EC Private Law (Acquis Group)'s 2009 *Principles, Definitions and Model Rules of European Private Law* Draft Common Frame of Reference (DCFR).

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. The engagement of these individuals with each other across territorial, spatial and linguistic boundaries exemplifies a shift from the purely territorial (jurisdictional) to the epistemic (sectoral). As Schäfer and Bańkowski (2003: 491) put it, the European Union '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'.

This type of fruitful exchange and learning within legal fields and across national boundaries by means of epistemic communities can, of course, also supersede the framework and/or boundaries of the EU. However, I would argue that, in order for the 'unifying force' to be in any way meaningful, that there has to be an additional institutional quality that underpins these sectorally-defined epistemic communities – it is the 'EU-ness', the particular character of these constellations, that is important in this regard.[15] Were this to be lacking, then there would be no difference between EU and non-EU epistemic communities, an observation that would serve to undermine the notion that the specifically EU ones have any 'unificatory' force (however weak) at all.

What, then, is it that provides this important normative underpinning? To merely point to geography and politics would clearly be insufficient – the former is circumstantial and variable, while the latter is similarly inconstant. The answer, I submit, lies in the

[15] On this point see also Daniel Augenstein's contributions to this volume, *infra* chapter 4

jurisprudential stability provided by the ECJ's continued commitment to and reliance upon its decisions in *Van Gend en Loos* (Case 26/62) and *Costa* (Case 6/64); this stability stems from the continuing importance of the doctrines established by these early cases. Indeed, as Vauchez says (2010: 2), it is as if:

> [EU legal] scholarship and ECJ case-law had essentially been about clarifying the scope of these two decisions and ascertaining their general acceptance throughout Member States' jurisdictions. Beyond the legal realm, it seems that the very history of the European construction lies in the progressive un-folding of these two cases' 'potentialities'.

The bedrock established by these cases, namely the principles of direct effect and supremacy, is important on three counts. First, that this jurisprudential stability is something that engenders commitment towards it; whether we can point to these as being shared fundamental *constitutional* principles as such is unclear, but they do have a weak normativity sufficient to be drawn upon in support of a unifying force.[16] Second, this stability should not be conflated with any form of closure, for the 'potentialities' referred to above are as rich as ever. This maintains a critical openness within the process of Europeanization, thus providing a degree of flexibility despite its normative underpinning. Finally, and from a systems-theoretical perspective, that these are ECJ decisions allows the analysis to remain *legal* system-internal.

The 'Balance Thesis', or the 'Europeanization' of law

Why is this important? More to the point, what do these observations bring to the table, particularly in terms of the indeterminacy and fragmentation of European legal integration as

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[16] On this point see also Maria Cahill's and Matej Avbelj's contributions to this volume, *infra* chapters 1 and 2.

discussed earlier? The answer lies in this sectoral differentiation. If it is conceptualized as operating antagonistically to the classic territorial differentiation on the basis of jurisdiction, namely a fundamentally *diversifying* force, then this differentiation in the form of sectorally-defined epistemic communities represents a *unifying* force. It is this interaction of conflicting forces that gives rise to a situation of dual legal system-internal differentiation or, rather, *double fragmentation*. The diversifying force is, of course, more readily apparent than the unifying one – the 27 Member State legal orders provide for this – but the normative underpinning offered by the shared fundamental EU legal principles embodied by the ECJ's *Van Gend en Loos* and *Costa* decisions cannot be underestimated.

The ongoing operation of these countervailing forces within the EU legal order serves not only to maintain the critical openness of the Europeanization of law process, but also to create equilibrium in terms of EU legal unity and legal diversity. Indeed, the beauty of this 'balance thesis' is that the *indeterminate* normative ideal, that of 'unity in diversity', is not only achieved but is *retained* as a goal, an ultimate and impossible endpoint never to be realised.[17] An important and appealing feature of the concept 'Europeanization' is that it connotes a process without proscribing or conditioning the outcome of that process – in essence, this alternative narrative not only avoids the instrumentalism inherent to Integration through Law but also manages to operationalize the indeterminacy within the European undertaking. In terms of the shift in narrative, the idea that a normatively and culturally integrated EU polity would ultimately be achieved or realised should be jettisoned and

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[17] This echoes Zenon Bañkowski and Emilios Christodoulidis' (1998: 342) utilization of the metaphor of an endless journey: 'And because this is an ongoing process, a continuing negotiation, we use the metaphor of a journey albeit, as we shall see, one without a destination.'

replaced by a more nuanced and practical one for the contemporary EU reality, namely that of unity in diversity; in this regard, the ITL project's original 'existential dilemma' of achieving a balance between unity and diversity, their *preferred* normative ideal, is brought to the fore. In providing a means by which such a balance could be achieved, therefore, this account of functional differentiation provides a viable systems-theoretical understanding of a complex problem, namely that of accommodating fragmentation.

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