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EDITORIAL

# Transnational Legal Unity Under Pressure: A Contextual Analysis of the European Union

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## I. Introduction

Legal unity can be characterised as an important feature of complex legal orders, which guarantees rule-of-law values such as equality before the law, legal certainty, and the prevention of the arbitrary exercise of public power. In a formal sense, legal unity can be understood as a notion which contributes to the establishment and continued existence of a peaceful social order. In a substantive sense, legal unity can be understood as a notion which underpins the realisation of specific outcomes for the benefit of societies or their individual members, e.g. outcomes relating to the increase of economic wealth for all, or to the equal treatment of individuals.[1] With regard to both understandings of the principle of legal unity, legislators and courts – as institutions on which public power has been conferred – have a duty to strive for consistency and coherence in the development and application of legal rules, while allowing space for legitimate differentiation.[2]

In a globalised world, the principle of legal unity takes on a new meaning and its realisation encounters new challenges. As the most integrated supranational legal order in the world at present, the European Union (EU) brings out these challenges very clearly. As a first challenge, complexity is added by the diversity between national legal doctrines and rules and between traditions of law-making and law development. Legal harmonisation and spontaneous legal convergence can foster legal unity, but both might neither be fully achievable nor desirable in the transnational context.[3] Second, different political, economic and moral values may underlie the different jurisdictions. This diversity might entail instances for legitimate differentiation, which ultimately could make the realisation of legal unity illusory.[4] Equally, renewed societal or political emphasis on national constitutional values – e.g. visible in 'Brexit', or in the rise of democratic illiberalism in Hungary and Poland – can result in an undoing of established transnational legal connections. Third, language and language proficiency influence the ability of law's draftsmen and judges to realise legal unity. The level of language skills, or the absence of a shared understanding of law, might hamper the quality of transnational legal communication.[5]

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[1] These definitions connect with the broad scope of scholarly perspectives and societal interests on legal unity which were identified in discussions with our colleagues at the Montaigne Centre. See Eddy Bauw, 'The Unity of Law I: Blogging about the Unity of Law? The Kick-off' *Blog of the Montaigne Centre for Rule of Law and Administration of Justice.* (17 November 2015) <http://blog.montaignecentre.com/index.php/231/blogging-about-the-coherence-of-law-the-kick-off-eddy-bauw/> accessed 11 May 2018; Rolf Ortlep, 'The Unity of Law II: A Step towards a Definition and Instruments that Can Optimize the Unity of Law' *Blog of the Montaigne Centre* (24 February 2016) <http://blog.montaignecentre.com/index.php/275/the-unity-of-law-2-a-step-towards-a-definition-and-instruments-that-can-optimize-the-unity-of-law-rolf-ortlep/#more-275> accessed 11 May 2018.

[2] For an overview of different accounts of coherence in the philosophy of law, see Julie Dickson, 'Interpretation and Coherence in Legal Reasoning' In: Edward N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), <https://plato.stanford.edu/archives/win2016/entries/legal-reas-interpret/> accessed 11 May 2018. See also Kiewiet in this special issue, section I.B.

[3] For further elaboration and illustration, see Mulder; Mak, Graaf and Jackson; Brouwer; and Van Dorp and Phoa in this special issue.

[4] In strong support of this thesis, see Pierre Legrand, 'European Legal Systems are not Converging' (1996) 45 International and Comparative Law Quarterly 52, 61–62. In a more moderate sense, see Geneviève Helleringer and Kai Purnhagen, 'On the Terms, Relevance and Impact of a European Legal Culture' In: Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture* (Beck/Hart Publishing/Nomos 2014) 7, who argue "that cultural pluralism itself might be a feature of European legal culture and that diversity is not something that is in opposition to, but rather constitutes a new and different understanding of European legal culture". In this special issue, see Mulder, section IV.; Mak, Graaf and Jackson, section III.; Brouwer, section V.

[5] Karen McAuliffe, 'Language and Law in the European Union: The Multilingual Jurisprudence of the ECJ' In: Lawrence M. Solan and Peter M. Tiersma (eds), *The Oxford Handbook of Law and Language* (OUP 2012). See further Van Dorp and Phoa in this special issue.

This special issue aims to enable readers to develop a better understanding of the notion of legal unity in a globalised legal context and of the possibilities and constraints for its realisation, focusing on the European legal integration as an emblematic case study. The articles in this issue address different aspects of legal unity in Europe and analyse these from a variety of 'law in context' perspectives, including comparative law, legal history, legal philosophy, constitutional theory, socio-legal analysis, and philosophy of language. This kaleidoscopic set-up allows for an in-depth discussion of specific topics, while bringing out connecting 'threads' on the special issue's overarching theme. In this way, the analyses clarify where pressures on transnational legal unity in the EU exist and where (or where not) these pressures may be relieved.

## II. The Articles

Jotte Mulder's article starts out from the question: how can the diversity between social-economic systems of Member States be unified within one internal market? The challenge for EU internal market law is to maintain unity of European law whilst allowing sufficient space for each Member State to endorse its own values. The difficulty of striking a balance is clearly manifested in the area of (economic) free movement law on the basis of which economic actors have a right to unfettered access to markets, while Member States' policy choices often restrict that access with socio-economic regulation. Such restrictions must be justified and here the Court of Justice of the EU (CJEU) has been confronted with the question: which choices of Member States should be allowed and on what basis? In doing so, the balance is sought at the intersection of unity (of European law) and diversity (of Member State interests). Mulder's contribution looks at this intersection in the CJEU's case law and asks whether we can derive consistent adjudicative methods with respect to this question. He develops an ideal-types typology of the different modes of reasoning which the CJEU has adopted to adjudicate cases at the intersection of unity and diversity. Based on his analysis, Mulder concludes that the CJEU manages to reconcile the uniform application of internal market law with the socio-economic diversity of the Member States by taking a 'good governance' based approach. If a Member State's system of protection is coherently and systematically part of an existing normative infrastructure that is tailored towards the level or protection that it seeks to protect, this system of protection is provided with a definite margin of discretion and unlikely to be struck down by EU law. The normative ideal that the Court pursues for the internal market may, therefore, very well be characterised as one of unity in diversity.

Elaine Mak, Niels Graaf and Erin Jackson analyse the framework for judicial cooperation in the EU and focus on the notion of 'judicial culture'. Recent discussions on judicial independence in Hungary and Poland underline that we are still quite far removed from the realisation of a shared European normative basis for judicial functioning, that is: a shared 'judicial culture'. At the same time, these discussions emphasise the importance of such a basis for the realisation of the ideal of the rule of law. As a stepping stone for future interdisciplinary legal research, Mak, Graaf and Jackson provide a theoretical analysis of the concept of judicial culture and three of its core dimensions: ethical, legal, and institutional. Their analysis demonstrates that by carefully establishing in which types of sources we can locate the respective dimensions, and by designing a methodology for analysing these sources, scholars can analyse judicial cultures in a more in-depth and systematic manner. In this way, specific conceptual 'lenses' become available for the collection of relevant information and empirical data, for the theoretical analysis and comparison of these results and eventually for a normative assessment of the possibility and desirability of alignment of judicial cultures. From this perspective, their analysis contributes to further insight into questions on legal unity and its realisation in a context of diverging social pressures.

René Brouwer takes a perspective with historical and philosophical distance, such that a better understanding of the development of legal unity in the EU can be obtained. In his article, starting out from the introduction of the notion of system in Western thought, he offers an analysis of the different ways 'system' has been taken up in the common and civil law traditions, the two main Western legal traditions, which underlie the legal systems of the Member States. Whereas in the continental 'civil law' tradition 'system' is used in relation to the substance of the law, in the English 'common law' tradition 'system' is rather used in relation to the functioning of the law, more particular in the sense of finding solutions to legal problems that are consistent with earlier ones. Brouwer explains these different uses from a historical-philosophical point of view. In the civil law tradition, the notion of system goes back to the exposition of substantive legal doctrine, which – under the influence of Stoic thought – was already developed by lawyers in the Roman Republic, and for the first time elevated to statute by the Byzantine emperor Justinian, whereas in the common law tradition the Byzantine-Roman organisation was not taken over, and system rather connotes with the manner in which conflicts can be resolved on a case-by-case manner, and hence has come to refer to the machinery of law. Brouwer suggests that these different meanings may pose a challenge where legal unity is sought between jurisdictions that belong to different traditions. The 'Brexit' poses a striking example of how this challenge can

play out in a specific political and societal context. The divide between meanings of 'system' appears to have become unsurmountable in the relation between the UK and the EU, where the different understandings of system in the English common law tradition and the continental civil law may have led to the opposite effect.

Jeroen Kiewiet offers an analysis of how theories on constitutional revision can help to understand crises that threaten legal unity. From the perspective of constitutional theory, he discusses the Catalonian crisis as a recent case study. Kiewiet starts out from a definition of 'legal unity' as the organisational as well as political claim of constitutions to provide unity within a certain legal order, which in the end comes close to the idea of a unified national state. He refers to the constitutional theories of Carl Schmitt and the lesser-known Hugo Krabbe to help increase our understanding of constitutional change and to connect these insights to the Catalonian case. Schmitt's claim is that constitutional law is indeterminate and thus in need of the sovereign's decision. In his analysis Kiewiet makes clear that Schmitt's argumentative scheme in which a distinction is made between friends and enemies in political conflict is unhelpful for addressing the Spanish crisis. Indeed, Schmitt moves beyond descriptive and explanatory goals to defend a normative rejection of liberal political decision-making. By contrast, Krabbe argues for the determinacy of constitutional law. According to Krabbe, constitutional law is finally embedded in 'legal consciousness', inherent to all human being, and which can be determined by majority rule. Even if this answer may not entirely convince, Kiewiet maintains that this theoretical perspective could nevertheless benefit cases such as the Catalonian constitutional crisis, if consequently claims of both the Catalan and Spanish Federal sides based on the idea of ultimate sovereignty over a demarcated territory were dropped.

Jacobien van Dorp and Pauline Phoa address the question: how to continue a meaningful judicial dialogue in EU law? They take the CJEU's CILFIT judgment (case 283/81) as a point of departure, and critically explore the practice of legal interpretation of EU law from a language philosophical perspective. In the CILFIT judgment, the Court drew attention to the "particular difficulties" to which the interpretation of EU law gives rise, namely the fact that "[EU] legislation is drafted in several languages", all of which are "equally authentic". Moreover, the Court recalled that "Community law uses different terminology which is particular to it. (…) legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States." With use of two different views on language, illustrated by Wittgenstein's later philosophy of language, Van Dorp and Phoa discuss the "difficulties" highlighted by the Court in the CILFIT judgment. This discussion brings them to the question: how can this judicial dialogue, which aspires to achieve unity in EU law, at the same time accommodate not just the diversity of national languages, but, more importantly, the diversity of national legal cultures? In other words, what should the CJEU be doing to take into account the different language versions (and underlying legal cultures) of EU law, and at the same time do something that is particularly European, and how should Member States respond to this particularity? In the conclusion Van Dorp and Phoa formulate an answer to this question in which they (begin to) spell out the structure of the translation process that the Court and Member States should undertake.

## Competing Interests

The author has no competing interests to declare.

## Author Information

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