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

Legal unity is considered an essential characteristic of complex legal orders, which guarantees rule-of-law values such as equality, legal certainty and the prevention of the arbitrary exercise of public power. On the one hand, legal unity can be defined as a principle which enables the establishment and continued existence of a peaceful social order. On the other hand, legal unity can also be defined as a principle 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. With regard to both meanings 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.

In a globalising legal context, the instrument 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 brings out these changes and challenges very clearly. First, 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. Second, national laws and legal traditions operate in different national jurisdictions, which may differ in their political, economic and moral values. This diversity might entail instances for legitimate differentiation, which ultimately could make the realisation of legal unity illusory. Moreover, 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. Finally, language and language proficiency influence the ability of law 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.

This special issue will enable readers to develop a better understanding of the meaning of legal unity in the 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, constitutional and legal theory, socio-legal analysis, and philosophy of language. The issue presents analyses of:

- the role of legal unity in ensuring the quality of transnational legal communication in Europe (Phoa and Van Dorp);
- the balance between unity and diversity in European judicial cooperation (Mak, Graaf, and Jackson) and in European socio-economic regulation (Mulder) in a context of political, economic and moral diversity;
- the role of constitutional principles in procedures of constitutional amendment, focusing on a comparison of the Netherlands and Germany (Kiewiet); and
models of systemisation in the civil law and common law traditions (Brouwer).

Project leader: Elaine Mak

Contributions:

Pauline Phoa and Jacobien van Dorp – Reaching unity by translating diversity: *Justice as Translation* for a meaningful judicial dialogue about EU law

Taking the Court of Justice of the EU’s (CJEU) CILFIT judgment (case 283/81) as a point of departure, this paper critically explores the practice of legal interpretation of EU law, and the role of translation – in the broad sense used by James Boyd White in ‘Justice as Translation’ – in the judicial dialogue between the CJEU and national courts. In this seminal 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.” If we take this statement in the CILFIT case as a kind of job description of the CJEU, and if we take it seriously, what does it mean? What should the CJEU be doing in order to take into account the different language versions of EU law, and at the same time do something that is particular European, and how should Member States respond to this particularity? By connecting a conception of reading and writing that we find in the works of James Boyd White with his more particular thoughts on the possibilities and impossibilities of translation and meaningful dialogue, this paper suggests a paradigm of ‘justice as translation’ for the EU judicial dialogue.

Elaine Mak, Niels Graaf, and Erin Jackson – The framework for judicial cooperation in the European Union: unpacking the ethical, legal and institutional dimensions of ‘judicial culture’

Judicial cooperation in the European Union (EU) is stimulated by the European Commission’s agenda under the Lisbon Treaty (e.g. judicial training) and by practices of ‘transnational borrowing’ between courts in member states. However, it remains unclear to what extent national judicial cultures, i.e. ideas and practices regarding judging and judicial organisation which have developed over time, can and should converge into a shared ‘European judicial culture’. This article presents a theoretical analysis of the concept of ‘judicial culture’, setting the scene for further studies of the possible alignment of judicial roles and practices in the evolving European context. Building on insights from legal-theoretical and socio-legal literature, the article focuses on three distinct aspects of judicial culture: 1) professional values for judges (ethical dimension); 2) judicial ideologies in the interpretation of legal rules and concepts for European cases (legal dimension); and 3) the building of judicial trust between courts and judges in Europe (institutional dimension). By carefully establishing in which types of sources we can locate these respective dimensions, and by designing a methodology which enables analysing these sources, this article provides a starting-point for research into judicial culture from a deeper and more focused perspective than available in legal scholarship until now.
Jotte Mulder – Legal unity in the European Union’s internal market: between unity and diversity

How can the diversity of Member States’ ‘social-economic systems’ be unified within one internal market? This is clearly one of the main and continuing challenges of European market integration and the unity of European law. The challenge for EU internal market law is to maintain unity of European law whilst allowing sufficient divergence from this unity for Member States’ variegating value systems. This difficult balance manifests clearly 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 have to be justified and here the Court is often confronted with the question: which Member States choices 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). Where this balance should fall remains the subject of much academic debate and contentious case law. This contribution looks at this intersection in the case law of the ECJ and asks whether we can derive consistent adjudicative methods with respect to this question. I will develop an ideal-types typology of the different modes of reasoning adopted by the CJEU in order to adjudicate ‘hard cases’. That is to say, cases that are right at the intersection between unity and diversity. In what way does the CJEU manage to reconcile (or not) the uniform application of internal market law with the socio-economic diversity of the Member States?

Jeroen Kiewiet – Principles for constitutional amendment and their implementation: a comparison of the Netherlands and Germany

For over a century numerous scholars in the field of constitutional law have lamented the rigidity of the Dutch constitution. In Germany, by contrast, the flexibility of the constitution has been problematized during the last couple of decades. In this paper I investigate which principles underlie the Dutch and German constitutional amendment procedures. In a first stage, I will offer a reflection on the relation between the written constitutional amendment norms and domestic principles of constitutional revision. In a second stage, I will investigate the relationship between the written (formal) constitutions (Grondwet in the Netherlands and Grundgesetz in Germany) and the material constitutions (i.e. the complete set of constitutional norms) in both the Netherlands and Germany. Finally, I will argue how the rigidity or flexibility of the constitutions in the Netherlands and Germany are related to their amendment procedures, and how these amendment procedures can be linked to the function of the written constitutions to provide legal unity within the constitutional orders of both the Netherlands and Germany. The results of the comparison between the Dutch and German constitutional amendment procedures will contribute to a theory of constitutional amendment procedures.

René Brouwer – Two approaches to legal unity: on the meaning of system in the common and civil law traditions

In this paper I offer an analysis of the different meanings of system in the two main Western legal traditions. In order to understand the differences between these traditions, the notion of system plays a pivotal role. In the English common law tradition system is used in relation to the functioning of the legal system, and as such connotates with consistency, in the sense of finding solutions to legal conflicts that are in conformity with earlier decisions. In continental jurisdictions system is used in relation to the
organisation of the legal rules. These rules are organised in an axiomatic manner, with
the more general rules put up front. These differences in meaning can best be explained
from a historical point of view, on the basis of which the fundamental point will be made
that history, not pastness, is a precondition for understanding the differences between
the jurisdictions that are based on these traditions. Understanding the different
meanings of system can thus contribute to a better understanding of the challenges that
the proponents of legal unity within Europe have to face, or else offer a further
explanation as to why Brexit has occurred.