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Towards a
European Legal Culture

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A common culture in European Legal Education? – A constitutional approach of applied pluralism –*

***Abstract:** European Legal Education can be described as a pluralistic cultural phenomenon. The diversity goes beyond legal pluralism and can also be explained on the basis of different educational cultures within the Union. To some extent, diversity results in a high degree of fragmentation, which turns out to be problematic due to the function Legal Education for a legal order: it is one of its main autopoiesis mechanisms. Following the trend observed in the field of comparative law that is shifting from seeking harmonization and unification to highlighting the importance of 'sustainable diversity',¹ policy in European Legal Education should be based rather on the connection between the different systems than their harmonization. Fragmentation effects are mainly of cognitive nature and can be minimized by creating connection links between educational systems in the form of bottom-up processes. The gradual development of a common culture in European Legal Education should result in the long term out of the combination of academic strategies and not imposed by top-down regulation infringing the EU competence order.*

keywords: Legal Education, Constitutionalism, Competences, Pluralism

In the context of discussing issues related to European legal culture, the first 1
problématique that arises is closely linked to the term of culture itself; the question primarily is which concept and definition of culture with regards to law is laid down and which special aspects of it are taken into consideration. Methods of legal interpretation, the regulating role of law within a given legal order, its contextual background as well as its basic principles and underlying values are the features that are mainly linked to legal culture. As far as legal education in particular is concerned, the dividing lines to culture become quite blurred, as both law and education are cultural phenomena themselves and it is often unclear if the peculiarities of the legal education system in a given state are better explained as part of its legal or its educational culture.

For the purposes of this chapter, a broad concept of culture is adopted, as this 2
makes it possible to examine law, culture and education from a common perspective, which will turn out to be –for European Legal Education- a constitutional one in its core. Through a constitutional approach on European Legal Education multiple aspects of the tension between diversity and unification can be enlightened, focusing both on the EU as an integration phenomenon as well as on vertical competence distribution problems within it. The question is thus put into the broader frame of the unique pluralistic nature of the EU legal order, underlying that all sectoral unifica-

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¹ R Cotterrell, 'Comparative Law and Legal Culture', in M Reimann and R Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (University Press, Oxford, 2006) 712.

tion processes have to take place in the frame of the legal categories and normative principles of the sui generis EU constitutional order.

- 3 From this perspective it will be evaluated whether the dilemma between factual integration needs on the one side and respect of values related to cultural and educational pluralism on the other can be resolved on the basis of the idea that these ends are not necessarily contradictory to each other when taking into account that cultural plurality does not simply divide but can also unite different forums as long as their interconnection through communication and cooperation links is ensured.

I. Law, Culture and Education

- 4 The relationship between law and culture has been a matter of thorough analysis mainly in the context of comparative law. Law is itself a cultural phenomenon,² while culture is reflected in positive law as a modus of social relationship regulation and balancing mechanism of values and interests. The contextual connection between law and culture is of that extend that legal science could even be described as a social, and thus cultural, “reflection science”.³ On the other hand, it is questionable what the relationship between law -as well as law as culture- and legal education is. An answer can be searched with turning to two general theories that describe the integrative social-systemic role of education: the Aristotelian analysis of the role of education in society as well as the system theory of Niklas Luhmann.

1. The oxymoron-solving role of education in Aristotelian political philosophy

- 5 In Aristotle’s political philosophy education, παιδεία,⁴ constitutes a central element of analysis, especially in the context of his teleology concept. According to Aristotle, everything has an inner finality and does not remain stable but is in a situation of constant evolution with the aim of approaching its inner telos (ἐντελέχεια). This also applies to a human being, who is determined by nature to be a ζῷον πολιτικόν, a social-political being, to live in societies and interact in social relationships. Interaction within a social-economic frame is thus not a mere behavior; it is considered to be part of the telos of human existence. Even personal happiness can only be reached through the well-being (εὐδαιμονία) of the polis that turns out to be a necessary social precondition for all personal achievements.⁵
- 6 Within this context, the role and function of education is crucial, as it is considered to be the main social mechanism for the integration of individuals into the social system. Keeping in mind the social-politically determined telos of human existence, education is a prerequisite for the *fulfillment of a natural end that nature itself*

² In the means of an understanding of law as culture, see N Mezey, ‘Law As Culture’ (2001) 13 *The Yale Journal of Law & the Humanities* 35; U Haltern, ‘Rechtswissenschaft als Europawissenschaft’, in: G Schuppert, I Pernice and U Haltern (eds.), *Europawissenschaft* (Nomos, Baden-Baden, 2005) 69.

³ For the German Term „Reflexionswissenschaft“ see U Haltern, *Europarecht* (2n ed. Mohr Siebeck, Tübingen, 2007) 13. For the question of the reflective nature of legal science in the field of public law see H-H Trute, ‘Staatsrechtslehre als Sozialwissenschaft?’ in H Schulze-Fielitz (ed.), *Staatsrechtslehre als Wissenschaft* (Duncker & Humblot, Berlin, 2007) 115 et seqq.

⁴ The term παιδεία does not only refer to the educational procedure as such, but to the achieved status of being educated as well.

⁵ For the interrelation of personal and general social εὐδαιμονία see Aristotle, *Politics*, Book Seven, Part II.

cannot provide. On the basis of this oxymoron and the fact that its resolution is provided only through the modus of education, Aristotle finally draws the consequence that it is necessary for a society to take care about the education system and related matters as well as that it should be the public authorities that are responsible for that.⁶

2. Education from the scope of social system theory

The central integrative role of education for social systems had thus been observed since classic ages and elementary social analysis. Nowadays, social analysis is mainly being conducted on the basis of modern sociology, with the theories of Niklas Luhmann being one of its founding pillars. According to his wide adopted social systems theory, every social phenomenon can be described as a system with specific ingredient elements that can be found in all systemic architectures. The main common and constant element is the mechanism of autopoiesis,⁷ which is defined as the mode of reproduction of any given system; it is the mode of the production of the components that produce it.

Those thoughts, transferred to the legal system as a social phenomenon, lead to the conclusion that legal education is (one of) its autopoiesis mechanism(s). While from a descriptive perspective the relationship between education and culture is dialectic – as culture is preserved and evolved on the basis of educational processes and education finds its contextual and methodological roots in culture – this relationship is different from a systemic perspective, where the functional aspect of autopoiesis steps into the front and lets us observe the obvious: as legal culture is something that can be learned⁸ and taught, legal education is in any given legal order in charge of ‘creating’ new lawyers, transmitting them methods of legal thinking and legal argumentation, and, thus, integrating them into the legal system. As a consequence of that, each legal order instrumentalizes its legal education system for the transmission of its own legal culture, thus securing its functioning and sustainability.

II. European Legal Education as a cultural mixture

The coexistence of different legal orders within the European Union per definitionem leads to a quite heterogeneous image of legal education. Apart from the legal argument that can explain this on the grounds competence obstacles for the harmonization competence of the Union, there are quite a few further explanations for this diversity, all of which have a dual-rooted historical reason: while legal education is structurally part of national *educational* systems, it is contextually linked to national *legal* systems, having historically followed the evolution of both fields as they were being formed in the frame of a pre-EU and non-unified multicultural European space. Thus, legal education as it is today can be considered as the result of the his-

⁶ Aristotle, *Politics*, Book Eight, Part II.

⁷ From gr. αὐτόζ + ποιέω-ώ, to self-produce. For the adaption of autopoiesis to social systems see N Luhmann, *Essays on Self-Reference* (University Press, Columbia, 1990). For a further view on the use of the autopoiesis-concept for the explanation of culture-related topics in EU Law, see P Kerns, ‘Culture and EU Law: The Exploration of an Interface’, in R Craufurd Smith (ed.), *Culture and European Union Law* (University Press, Oxford, 2004) 391.

⁸ J Smits, ‘Legal Culture as Mental Software, Or: How to Overcome National Legal Culture?’, (2007) *Maastricht Faculty of Law Working Paper*, No. 2, 5.

torical evolution process both of the legal order as of the educational system of each state and its national culture, in this regard constituting a cultural mixture.

1. Diversity in the understanding of legal education as a historical consequence

- 10 The high degree of diversity observed when comparing European states extends nearly to all aspects of legal education. Teaching culture and techniques, the role of the state and the responsibility distribution between autonomous universities and government as well as the structure of education for different legal professional paths are characterized by throughout diversity across all over Europe. For instance, the tradition of ‘top-down’ lectures with the lecturer holding a didactic monologue (‘lectura’) in front of more or less passive law students goes back to the beginnings of universities in continental Europe in the 11th and 12th century AD, while, on the other side, legal education in England has been more practice-oriented, taking place outside universities and being understood in a more ‘technical’ and practice-orientated sense.⁹ Moreover, the central role of the state and in particular of the ministries of justice in legal education in Germany was a tradition of Prussian times as well as of the understanding of the German concept of rule of law, Rechtsstaat,¹⁰ according to which the state has to guarantee for the high quality of education and skills of professionals involved in practicing law due to the importance of law for society. The uniqueness of the German model of legal education and its long tradition constitutes the most characteristic example of the rigid historical –and even normative- roots of educational culture in the field of law.

2. The EU law perspective: fragmentation

- 11 From the perspective of the European Union, that image of mainly nationally determined legal education causes a strong effect of fragmentation.¹¹ Although there has been an indirect influence of EU law through the case law on mobile students, the diploma recognition legislation that applies to some extent also for legal professions and the Diploma Supplement and European Qualifications Framework,¹² European Legal Education is still characterized by throughout heterogeneity in the understanding and design of almost every stage of Legal Training. This phenomenon leads to the observation, that although European Law constitutes today’s ius com-

⁹ For a comparison and explanation of the two systems and the implemented teaching methods see F Ranieri, ‘Juristen für Europa: Wahre und falsche Probleme in der derzeitigen Reformdiskussion zur deutschen Juristenausbildung’ (1997) *Juristenzeitung* 801 et seqq.

¹⁰ For an overview of the German legal educational system see P Huber, ‘Der ‘Bologna-Prozess’ und seine Bedeutung für die deutsche Juristenausbildung’, in P Huber (ed.), *Beiträge zur Juristenausbildung und Hochschulrecht, Veröffentlichung des Deutschen Juristen-Fakultätentages* Bd. 3, 2010, pp. 92-93. For a detailed analysis of its structures and its historical evolution see S Koriath, ‘Legal Education in Germany Today’, (2006) 24 *Wisconsin International Law Journal* 85, A Bucker and W Woodruff, ‘The Bologna Process and German Legal Education: Developing Professional Competence through Clinical Experiences’, (2008) 9 *German Law Journal* 575.

¹¹ B de Witte, ‘European Union Law: A Unified Academic Discipline?’, (2008) *EUI-WP RSCAS*, No. 34, 4.

¹² An analysis of the concept and the relevant procedures can be found on the official website of the European Commission, online available under http://ec.europa.eu/education/lifelong-learning-policy/ds_en.htm.

mune¹³ within the Union, it is taught more or less as a legal hybrid¹⁴ not only due to the fact that it is contextualized differently in each national legal order but also because it finally reaches the ‘budding’ European lawyer after having passed through different national educational systems.

Fragmentation effects are not simply of theoretical importance; they have practical consequences especially when observed on the paradigm of the decentralized system of judicial review of European Law. As judges of EU Member States are responsible for the application of EU Law and guarantee its effective and uniform implementation, they can be regarded as European judges although having been trained in a fragmented European Legal education system and having studied European Law as a legal hybrid, actually filtered by national educative and legal culture. Moreover, nationally trained lawyers face difficulties on the job market of other member states, as their qualifications are closely related to the educational system they received their training in; the free movement of labour in sector of legal professions factually becomes a challenge. 12

Those observations can be concluded by underlining that the EU legal order constitutes a legal order without an own legal education system. The question that arises at this point is to which extent this status is problematic and has to be resolved or if it constitutes a normative desideratum of the pluralistic nature of the EU legal order. From a legal point of view we could rephrase the question, asking whether a “top-down” harmonization of Legal Education with the adoption of a legislative act inspired by the Bologna Process and making its content binding on EU level and for EU member states is desired or even possible within the EU constitutional order. 13

III. A constitutional approach: taking competence distribution seriously

The issue has to be approached in the frame of the EU constitutional structure. In multilevel governance systems one of the main functioning pillars is identified in the competence distribution among the different levels, something that at the end becomes a problématique of constitutional quality due to the consequences it has both for power balance within the system as well as for its overall identity. Constitutional law is in this context not understood in a formalistic sense that links constitutionalism exclusively to traditional statehood but rather in a more functional sense; as EU primary law aims to order and limit public authority within the European Union in favor of its citizens,¹⁵ it fulfills one of the classic requirements of constitutional law and has thus a constitutional character.¹⁶ Additionally, it will be shown that compe- 14

¹³ For the characterization J Smits, ‘On Successful Legal Transplants in a Future *Ius Commune Europaeum*’, in: A Harding and E Öricü (eds.), *Comparative Law in the 21st Century* (Kluwer Academic Publishers, Dordrecht, 2002) 137; R Michaels, ‘Legal Culture’, in J Basedow, K Hopt and R Zimmermann (eds.) *Max Planck Encyclopedia of European Private Law* (University Press, Oxford, 2012).

¹⁴ de Witte (n. 10).

¹⁵ P Huber, *Europäisches und nationales Verfassungsrecht*, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtler 60 (2001), 194 (199).

¹⁶ A von Bogdandy, ‘Founding Principles’, in A von Bogdandy and J Bast (eds.), *Principles of European Constitutional Law* (2nd ed., C.H.Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2010) 13; A von Bogdandy, ‘Founding Principles of EU Law: A Theoretical and Doctrinal Sketch’, (2010) 16 *European Law Journal*, 96. For the constitutional nature of competence distribution within EU multilevel governance see S Weatherill, ‘The limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Courts’ Case Law has become a “Drafting Guide”’, (2011) 12 *German Law Journal* 847; R Schütze, *European Constitutional Law* (University Press, Cambridge, 2012), 149 et seq.

tence distribution within multilevel governance systems is closely connected with other constitutional principles and mainly with their democratic legitimacy.

1. The principle of Member States' educational autonomy

- 15 Analyzing the competence order as set down in primary law leads to the conclusion that the Union does not have a clear competence to harmonize law in the field of legal education;¹⁷ not only one cannot find a harmonization competence of the European level for educational matters, but it is explicitly mentioned in Article 165 (1) TFEU that the Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.
- 16 This explicit mentioning of the full respect of Member States' responsibility can be interpreted as the expression of the will of EU Member States to secure that the area of education and especially its contextual and organizational aspects will remain within the scope of their own regulative discretion, thus setting up an obstacle to competence creep phenomena or extensive interpretations of EU competences based on argumentation lines deriving from the effectiveness principle.¹⁸ The thus laid down principle of member states' educational autonomy is additionally secured with the explicit harmonizing prohibition in Article 165 (4) TFEU stating that "the European Parliament and the Council [...] shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States".
- 17 Yet, the ECJ has in the past accepted the adoption of EU legislation indirectly linked to the field of public health, where a similar harmonization prohibition exists. It could be argued that as long as this was held for possible on the grounds of the market-orientated scope of the adopted legislation that indirectly demanded a harmonization of a field not covered by EU competence, a harmonization of Legal Education would also be possible due to the fragmentation problems mentioned above. Thus, it is crucial to draw the limits of this case law on the one hand by analyzing general constitutional problems of competence interpretation leading to a bypass of explicit competence distribution clauses and on the other hand by underlining the peculiarities of the field of European Legal that set burdens to the transfer of the mentioned ECJ case law into the field of Legal Education. This analysis includes the general interpretation methods of the vertical competence order, the phenomenon of factual harmonization pressures taking place outside the classic EU legislative procedure as well as the relation between vertical competences and democratic legitimacy.

¹⁷ P. Huber, 'Die Rolle der EU-Organen in der juristischen Ausbildung', in P. Huber (ed.), *Beiträge zur Juristenausbildung und Hochschulrecht*, Veröffentlichung des Deutschen Juristen-Fakultätentages Bd.3, 2010, pp. 92-93 also published in *European Journal of Legal Education* 3/2 (2006), pp. 101ff., M. Ruffert, 'AEUV Art. 165', in: C. Calliess and M. Ruffert (eds.), *EUV/AEUV* (4th ed., München, CH Beck, 2011), para 22.

¹⁸ On commenting this constant policy mentality of member States, see B. de Witte, 'Introduction', in B. de Witte (ed.), *European Community Law of Education* (Nomos, Baden-Baden, 1989), 14-15.

2. Teleology, multidimensionality and competence interpretation

The EU competence order is characterized by a series of features deriving from the nature of the EU as a Federation of States:¹⁹ competence on EU level is not a general competence comparable to that of sovereign states and the “Kompetenz-Kompetenz” concept, but it is based on the principle of conferral set down in Art. 5 (2) TEU. “The Union only acts within the limits of the competences conferred upon it by the member states *in order to attain the objectives* set out therein”. Thus, EU legislative action is in principle not unlimited: it is limited both by the principle of conferral and by the scope of the competence titles conferred. Competences conferred to Union have an internal limit drawn by their scope and an external limit drawn by the competences not conferred, remaining on member state level. Competence limits become a matter of teleology and interpretation. **18**

In this context, the multidimensionality of legislative acts plays a crucial role: while a legislative act is aimed to regulate a given sector, certain measures included in it may indirectly affect fields that are not directly linked to its main telos but are regarded as a necessary prerequisite for its effective implementation. The ECJ has partially resolved this by demanding that there should be only one legal basis for each legislative act, which should provide objective factors amenable to judicial review.²⁰ Problems related to the limits of EU competences may arise out of this phenomenon of multidimensionality, when certain measures leading to the above mentioned indirect regulation are not covered by a conferred competence title although the telos of the whole legislative act is. **19**

The typical paradigm of a competence title enabling the EU to adopt multidimensional legislation is Art. 114 TFEU: while harmonization of member-state legislation is not as such a telos of the EU, it has an auxiliary function²¹ for the achievement of other objectives set down in the Treaties and especially the establishment and functioning of the internal market. Thus, a measure aiming to remove obstacles within the internal market may indirectly affect a field where there is not a conferred competence to the EU. This has actually happened in several occasions, with the most famous ones being the Tobacco Advertising cases: the EU aimed to open up the market for products which serve as the media for advertising of tobacco products and due to the fact that disparities between legislations of member states were noticed, it prohibited the advertising of tobacco products in a series of media. The ECJ held that those measures were valid because they were based on the (wide) scope of Art. 114 TFEU although indirectly having the quality of measures related to public health,²² a field where the EU does only have a supporting and cooperating competence and is obliged to fully respect the responsibilities of the Member States for the definition of their health policy.²³ Thus, according to the ECJ case law the impact of a legislative measure on another policy field does not constitute a criterion to deter- **20**

¹⁹ Schütze (n 15) 79.

²⁰ Case C-155/91, 17.3.1993 *Commission v. Council* [...] ECR ..., para 7.

²¹ S Leible and M Schröder, ‘Art. 114’, in R Streinz (ed.), *EUV/AEUV* (C.H. Beck, München, 2012) para 5 et seq.

²² Case C-380/03, 12. 12. 2006 *Germany v. Parliament and Council*, [...] ECR ..., para 39 with reference to further case law confirming this position.

²³ Art. 6 (2 a) and Art. 168 (7) TFEU.

mine competence, leading to the observation that in principle the EU regulatory competence is limited but in practice it can turn out to be truly broad.²⁴

- 21 Transferring these criteria to the field of European Legal Education, it could be argued that a legislative act based on Art. 114 TFEU could be adopted in order to promote the effectiveness of the internal market²⁵ including measures that would indirectly harmonize education systems of the member states: the “full respect of the responsibilities of member states” was not an obstacle when referring to public health, why should it be in the field of education? Nevertheless, the answer should clearly be negative for the following reasons deriving from competence interpretation.
- 22 First, there is a general competence interpretation reason for not permitting harmonization of the education sector: harmonization competences laid down in Art. 114 TFEU shall apply for achievement of the objectives set out in Art. 26 TFEU, where it is mentioned that the adoption of measures with the aim of establishing or ensuring the functioning of the internal market shall take place *in accordance with the relevant provisions of the Treaties*; thus, other values of the treaties must be taken into consideration when searching harmonization limits with cultural plurality being one of them.²⁶ Due to the above mentioned character of education and especially legal education as a cultural phenomenon, securing educational plurality as part of cultural plurality is a factor that has to be taken into account of competence interpretation and, finally, sets competence limits.
- 23 Secondly, the qualitative difference between public health and education legitimate the different consequences they have on harmonization of legislation related to the internal market: while public health must be considered when taking such measures in order to ensure a high level of health protection leading to the consequence that no measures should be taken that could harm health standards, the full respect of member states responsibility in the area of education has a different normative reason, namely to ensure plurality. Contrary to health standards that can be common in member states, plurality implies exactly differences between member states. Thus, while the respect of public health sets qualitative-scientific limits to the content of EU legislation, respect of education plurality sets limits to the adoption of common harmonizing measures as such. This is also reflected in the differences observed in the wording of Art. 165 and 168 TFEU: although it is stated in both that there is a full respect of member states responsibility, Art. 165 (4) TFEU goes one step further by explicitly underlining a special harmonization prohibition.²⁷
- 24 In conclusion, Art. 165 TFEU has the function of providing two explicit objective factors that are judicially reviewable and can not belong to an EU harmonization act, preventing exactly the multidimensionality-related phenomenon of extensive interpretation of Art. 114 TFEU in the field of education. Legislation that does not have harmonization of the educational sector as its ‘centre of gravity’²⁸ or even leads to that indirectly but generally falls into Union competences is possible. From this

²⁴ Weatherill (n 15), 839.

²⁵ With particular reference to existing structural disparities between education systems of the Member States that could hamper seeking access to a foreign labour market, see S Garben, ‘The Bologna Process: From a European Law Perspective’, (2010) 16 *European Law Journal* 194.

²⁶ Art. 2 and 3(3) TEU.

²⁷ The same applies accordingly for the explicit harmonization prohibition of national provisions on the donation or medical use of organs and blood in Art. 168 (7) TFEU.

²⁸ Case C-42/97, 23.2. 1999 *Parliament v. Council* [...] ECR ..., para 43.

point of view, the legitimacy of the ‘Lawyer Directive’,²⁹ the need for equal access to foreign EU students to educational systems³⁰ and the recognition of diplomas from other Member States³¹ towards the Member states’ educational autonomy can be explained as a side effect of the interpretive finality and multidimensionality of the EU competence order, with a harmonization of the Legal Education still being impossible.

3. Factual harmonization pressures

Moreover, factual harmonization pressures could serve as an argument for adopt- 25
ing EU legislation in the field of legal education: as member states are participating in the Bologna-Process taking place outside the EU,³² their education systems are harmonized without the participation of the European Parliament, thus leading to concerns related to democratic legitimacy. Similar problems arise in the frame of the Open Method of Cooperation: the soft-law nature of decisions and the impossibility of judicial review³³ results into a lower level of democratic legitimacy of such acts, as they may lead to a de facto harmonization while bypassing the ordinary legislative procedure, including the European Parliament.

Nevertheless, it would go a step too far in the power distribution and balance 26
within the European Multilevel System to recognize an EU harmonizing competence in areas where the Treaty provision is, as analyzed above, quite clear³⁴ with the argumentation that there is an external factual pressure to do so: such an approach could lead even to a contra legem interpretation due to factual needs. As the acts adopted outside the union method can be implemented on a voluntary basis by the States, it is up to them to “resist” the harmonization pressure or not and to recognize the eventual necessity of a unanimous competence transfer to the Union level by treaty amendment. This quite strict (positivistic) approach would at least ensure that a remedy of the democratic illegitimacy appearing as a side-effect of applied practices is not sought through a *legal* way of Treaty interpretation which could be itself illegitimate and could transform the political problem of participating at the Bologna-Process and the way of its adoption on state level to a legal problem on EU level.

²⁹ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

³⁰ Case C-147/03 DATE *Commission v. Austria* [...] ECR

³¹ I.e. the Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

³² For a thorough analysis see Garben (n 24) 202 et seq.

³³ Huber, *Die Rolle der EU-Organe in der juristischen Ausbildung*, in: Huber (ed.), *Beiträge zur Juristenausbildung und Hochschulrecht*, Veröffentlichung des Deutschen Juristen-Fakultätentages Bd. 3, 2010, 97.

³⁴ Although the competence order of the EU is characterized by open-textured Treaty provisions, the reality of EU competence has resulted from the interaction of various factors; see P Craig, *The Lisbon Treaty* (University Press, Oxford, 2010) 156. The orientation at the Treaty text for competence interpretation rather prioritizes the factor of Member States’ choice as to EU competence distribution, a view that is legitimated in the case of Art. 165 TFEU due to the explicit mentioning of *their* responsibility and the harmonization prohibition (which could justify its treatment even as an “acte clair”).

4. Vertical competence order and democratic legitimacy

- 27 At this stage of the examination a fundamental distinction regarding legitimacy must be analyzed: competence matters can infringe both legitimacy towards state sovereignty as well as democratic legitimacy. Legitimacy towards state sovereignty is ensured by the principle of conferral: EU action is legitimate when being restricted to the scope of the competences conferred and respecting that competences not conferred remain on state level. Thus, when acting outside the conferred competences, the EU may infringe state sovereignty as due to the primacy of EU law the sovereign state would be bound to acts “from the outside” without its consent.
- 28 On the other side, democratic legitimacy concerns the political participation of individuals, not of states, in the exercise of public power and in particular in the adoption of legislative acts they are bound by.³⁵ On EU level democratic legitimacy is ensured through the double-rooted participation by representation of EU citizens in the legislative procedure, as both their elected representatives of the EU parliament and their government in the Council participate in the adoption of EU legislation. Although on the first sight competence distribution is a matter related only to legitimacy towards the sovereign member states, a connection to the principle of democracy also exists: from a functional perspective, in democratic multilevel orders where the decisions on all levels must be democratically legitimized so that there is a plurality of democratic wills,³⁶ vertical competence distribution does not simply constitute a mode of power balance between governance levels but it also has the function of a ‘collision rule’ regulating on which level a decision has to be democratically legitimized and, thus, taken.
- 29 For the individuals competence rules indicate the political (voting) rights they need to exercise in order to participate in decision making and, thus, in ensuring the democratic legitimacy of the adopted public acts. Thus, if a decision is taken on EU level although the EU does not have the competence to do so, the decision automatically infringes democratic legitimacy regardless of whether the EU Parliament has participated in the relevant procedure, as simply the members of the EU parliament and representatives of the individuals bound by the decision have not been elected for that and act outside their mandate. Conclusively, EU harmonization measures in the field of education that infringes the prohibition Art. 165 TFEU can automatically raise concerns regarding democratic legitimacy even if the EU Parliament has participated in the respective legislative procedure.

5. Constitutional Pluralism as a paradigm for Legal Educational Pluralism

- 30 The overall challenge in the field of European Legal Education can be seen in overcoming the problems caused by fragmentation without harmonizing the structure and content of national legal education systems and respecting that these areas are exclusively regulated by the States. In this regard, the concept of pluralism in European Legal Education turns out to be a paradigm of European Constitutional Pluralism.

³⁵ For an analysis of the concept of the individual perspective of democracy see C Möllers, ‘Multi-Level Democracy’, (2011) 24 *Ratio Juris* 248 et seq. For democracy in terms of legal theory and its legal principle nature see S Unger, *Das Verfassungsprinzip der Demokratie* (Mohr Siebeck, Tübingen, 2008).

³⁶ D Halberstam, ‘Pluralism in Marbury and Van Gend’, in M Maduro and L Azoulai (eds.), *The Past and Future of EU Law* (Hart, Oxford, 2010) 32.

The concept of Constitutional Pluralism for the explanation of the European Union is quite broad and has been given a variety of meanings.³⁷ Apart from trying to provide explanations and resolutions for the sovereignty problématique, the claim of final authority and the distinction between monism and dualism,³⁸ it mainly suggests that the European constitutional area can be understood as a composite of constitutions³⁹ that is formed by partial constitutions, the Union constitutional law as well as the States constitutions.⁴⁰ The concept is characterized by the fact that the relationship between the partial constitutional orders is based on a principle of Tolerance,⁴¹ so that it is not always possible to give one the last word over the other; thus, in cases of conflicts it is possible that the resolution is transferred from the legal to the political area and thus become a matter of political discourse.⁴² 31

This view of constitutional pluralism also underlines a horizontal dimension,⁴³ suggesting that the relationships between the States constitutions should be based on similar cooperation and communication principles. Thus, the pluralism concept can be operationalized in order not only to descriptively explain but also to provide normative values and principles regarding how European legal education can be designed as a 'bottom up' process without being 'top-down' harmonized. The main aim of this is the construction of the prerequisites for the functioning of a horizontal system of mutual cooperation that in first instance needs to overcome fragmentation, which will turn out to be mainly caused by the *cognitive obstacles* within the current situation of European legal education. 32

IV. Defragmentation without harmonization

The pluralistic design of Legal Education has to combine elements that on the first sight seem to be contradictory to each other. Specifically, it has to be based on the normative values of European Constitutionalism combining cultural plurality without, at the same time, setting obstacles to deeper market integration. Moreover, it has to consider that European Legal Education constitutes the autopoiesis mechanism of European Law and, thus, should aim the minimization of the current status of extended fragmentation. 33

³⁷ A throughout overview of European Constitutional Pluralism is provided in M Avbelj and J Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart, Oxford, 2012).

³⁸ For an analysis of the different views and related problems see P Eleftheriadis, 'Pluralism and Integrity', (2009) *University of Oxford Legal Research Paper Series*, No. 43.

³⁹ After the German term 'Verfassungsverbund', introduced by I Pernice. For an overview of the concept see I Pernice, 'Verfassungsverbund', in C Franzius, F Mayer and J Neyer (eds.), *Strukturfragen der Europäischen Union. Recht und Politik für das Europäische Gemeinwesen* (Nomos, Baden-Baden, 2010) 102, I Pernice, 'The Treaty of Lisbon. Multilevel Constitutionalism in Action', (2009) 15 *Columbia Journal of European Law* 349.

⁴⁰ Huber, *Offene Staatlichkeit: Vergleich*, in: von Bogdandy, Huber, Villalón, *Ius Publicum Europaeum*, vol. 2 (2008), § 26, para 109.

⁴¹ J Weiler, 'Federalism and Constitutionalism: Europe's Sonderweg', in K Nicolaidis and R Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU* (University Press, Oxford, 2001) 54.

⁴² For the relationship between politics and law within constitutional pluralism see M Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N Walker (ed.), *Sovereignty in Transition* (Hart, Oxford, 2003) 535.

⁴³ I Pernice, 'La Rete Europea di Costituzionalità', (2010) 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 66.

1. The challenge of overcoming cognitive obstacles and the meaning of plurality

- 34 As already implied, the resolution of this challenge lies basically in surpassing horizontal *cognitive*⁴⁴ obstacles between different legal and educational cultures; the main strategic problems of the current –fragmented- situation root in the fact that Member States put efforts in Europeanizing their legal educational systems in a more or less passive way⁴⁵ through adaptations to the requirements of European Law but do not seem to invest the same policy efforts into their horizontal opening towards the educational systems of other Member States. The cognitive obstacles that result out of that can be summarized in a deficit of systematic knowledge as far as the culture of legal education in other Member States is concerned. Both the educational system and the legal culture of other States is mainly known on quite abstract level, making the combination of the above mentioned targets almost impossible to be achieved in practice. This problem is not simply an academic one and is not restricted to university or education level; it has consequences on the market of legal services within the EU as well as the free movement of legal professionals, as employers and clients in other Member States are not able to evaluate the legal qualifications and skills of an foreign EU lawyer.
- 35 Thus, within such a cognitive fragmented frame the desideratum of cultural plurality cannot be achieved mainly due to the fact that different legal cultures are just in a situation of parallel coexistence and not connected to each other. But plurality cannot mean isolation. The development of a European culture characterized by plurality has an overall *common* identity as well – a plural one. For the characterization of a culture as plural, there is a need of a minimum awareness about the basic characteristics and differences within it. Otherwise, it cannot be accepted that there is an overall pluralistic culture, but rather different coexisting isolated partial cultures.
- 36 The overcoming of these fragmentation phenomena through the creation of links between the legal educational systems would not only make their *connection without harmonization* possible, but it would enable the chance to reflect the evolution of European Legal Culture on educational level and, thus, establishing a genuine European and contextually pluralistic autopoiesis mechanism for EU Law.

2. Main strategies

- 37 The three main strategies and basic pillars of a horizontally connected model of European Education are in particular the improvement of the importance of European Law and Policy in Legal Education, deeper horizontal coordination as far as the ‘comparativity’ of curricula and grading systems is concerned, the intensification of student mobility as well as the expansion of transnational legal curricula and similar models of European legal studies.
- 38 *a) European Legal Method.* As far as the importance of European Law and Policy in Legal Education is concerned, the following phenomenon can be observed:

⁴⁴ On the importance of the cognitive aspect in comparative law as well see H Glenn, ‘Aims of Comparative Law’ in J Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2006) 59.

⁴⁵ Apart from the structural adjustments that are taking place de iure there is also a de facto contextual Europeanization of legal education as a result of the Europeanization of law M Maduro, ‘Legal Education and the Europeanization and Globalization of Law’, (2010) *Contraditório Policy Paper*, No. 1, 6.

European Policy and Legislative Acts are not taught and interpreted as such but usually indirectly as part of sectoral –Europeanized- national law, often without enabling law students to realize both the process of Europeanization and, most importantly, the philosophy and function of sectoral European Legislation. Moreover, EU Law as well as (European) Comparative Law are often taught as general subjects without detailed analysis of sectoral policies.

In this regard, a strategic shift in European Legal Education has to take this into account, aiming to develop even at undergraduate level a *European Legal methodology* based mainly on the teaching and interpretation of EU Legislation and its ratio, the enabling of European orientated interpretative method of EU and national law and especially of national norms that were adopted as a result of implementation of European legal acts as well as the extended comparative aspects of EU Law. Steps that go into this direction can be observed in legal research, both in private and in public law;⁴⁶ what has not yet been implemented to a satisfactory extend is the reflection of this trend in legal education. This shift would in the long run enrich European Legal thinking, supplementing the classic methods of legal interpretation with an intra-European comparative method,⁴⁷ thus, contributing to the overcoming of ‘methodological nationalism’⁴⁸ and to the development of a European Legal Method and, accordingly, the evolution European Legal Culture. 39

b) *Horizontal coordination.* While the development of a European Legal Method aims to mainly contribute to the overcoming of *contextual fragmentation* within the EU, horizontal coordination between Member States and Academic Institutions would contribute on a more or less administrative level to the overcoming of the above mentioned cognitive fragmentation that sets obstacles to the free movements of legal professionals within the single market. The awareness about foreign educational systems, curricula and degrees is not on a satisfying level; for instance, a law graduate holding a German ‘Staatsexamen’ could face difficulties on the job market of another member state when trying to demonstrate the comparability to an LL.B. and the other way around. Nevertheless, as analyzed above, the solution lies not in harmonizing legal studies, as such a step would not comply with the competence order and normative pluralistic values. What is rather needed is the expansion of horizontal cooperation and coordination between universities, educational bodies and other responsible authorities such as bar associations, finally resulting into long-term bottom-up integration in the field of European Legal Education. Strategically, it is crucial not to restrict coordination to the adoption of the common ‘names and numbers’; the value of a concept cannot be based on whether undergraduate studies are called Diploma in Law, Staatsexamen or Legume Baccalaureus. What matters is the establishment of practical criteria for the comparability between legal studies, their content and structure, achieved performance and gained knowledge. In this regard, 40

⁴⁶ Paradigmatic for public law von Bogdandy, Villalón, Huber (eds.), *Ius Publicum Europaeum*, vol. 1-2 and von Bogdandy, Cassese, Huber (eds.), *Ius Publicum Europaeum*, vol. 3-5, and for private law Karl Riesenhuber (ed.), *Europäische Methodenlehre*, second edition, 2010.

⁴⁷ Comparative Law has been characterized as the “fifth interpretive method of law” by P.Häberle, see A van Aaken, ‘Funktionale Rechtswissenschaftstheorie für die gesamte Rechtswissenschaft’, in M Jes-taedt and O Lepsius (eds.), *Rechtswissenschaftstheorie* (Mohr Siebeck, Tübingen, 2008) 86.

⁴⁸ A von Bogdandy, ‘Deutsche Rechtswissenschaft im europäischen Rechtsraum’, (2011) *Juristen-zeitung* 4, with reference to M Zürn, ‘Politik in der postnationalen Konstellation’, in C Landfried (ed.), *Politik in einer entgrenzten Welt* (Verlag Wissenschaft und Politik, Köln, 2001) 181.

especially minimum years of study, annual workload and class ranking should be considered.

- 41 *c) Academic mobility and transnational curricula.* Student and teaching staff mobility between educational systems within the European Union should be encouraged to an even higher extend. The main advantage gained apart from contacts with different legal and educational systems within the pluralistic European Space, is the relativization of national legal thinking and its critical observation from an outside perspective. In this regard, even the gradual evolvement of the part of studies in a different European jurisdiction as a mandatory part of legal studies would be a positive step.
- 42 This evolution is demonstrated at the highest extend by the expansion of the model of transnational legal studies through the establishment of dual⁴⁹ and transnational⁵⁰ European legal studies programs, a trend put forward also by leading universities and law faculties.

V. European Legal Education as a chance

- 43 All in all, European Legal Education can be described as a pluralistic cultural phenomenon. The diversity goes beyond *legal* pluralism and can also be explained on the basis of different *educational* cultures within the Union. To some extent, diversity results in a high degree of fragmentation, which turns out to be problematic due to the function Legal Education for a legal order: it is one of its main autopoiesis mechanisms.
- 44 Following the trend observed in the field of comparative law that is shifting from seeking harmonization and unification to highlighting the importance of ‘sustainable diversity’,⁵¹ policy in European Legal Education should based rather on the connection between the different systems than their harmonization. Fragmentation effects as are mainly of cognitive nature and can be minimized by creating connection links between educational systems in the form of bottom-up processes. The gradual development of a common culture in European Legal Education should result in the long term out of the combination of academic strategies and not imposed by top-down regulation infringing the EU competence order.
- 45 Nevertheless, and beyond legal analysis, European Legal Education can be regarded as a chance. While EU Law has a strong market character and the European Union has been approaching a more or less ‘market state’ concept⁵² with serious consequences for the philosophy of its policies and actions, European Legal Education is a field that cannot be regarded exclusively as a economic commodity⁵³ –especially under factual market-orientated harmonization pressures- and where the hypo-

⁴⁹ On an analysis of the positive effects of dual degrees on the example of the experience of the Maastricht Law School see A Heringa, ‘European Legal Education: the Maastricht Experience’, (2001) 29 *Penn State International Law Review* 81.

⁵⁰ On the mentioning of the importance of transnational curricula and their multiple aspects see J Smits, ‘European Legal Education, or: how to prepare students for global citizenship?’, (2011) *Maastricht European Private Law Institute Working Paper*, No. 02, 4 et seqq.

⁵¹ R Cotterrell, ‘Comparative Law and Legal Culture’, in M Reimann and R Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (University Press, Oxford, 2006) 712.

⁵² A Afilalo, D Patterson and K Purnhagen, ‘The Market State as Foundation of a European Legal Culture’, *in this volume*.

⁵³ S Garben, ‘The Bologna Process and the Lisbon Strategy: Commercialization of Higher Education through the Back Door?’, (2010) 6 *Croatian Yearbook of European Law and Policy* 209 et seqq.

thesis that markets cannot tell us who we are⁵⁴ (*at least not always*) can play a central role in developing European culture into a direction inspired by common values that are more (and deeper) than mere markets and, thus, more stable and sustainable than market behavior.

Moreover, the evolution of European Legal Education on the base of the horizontal connection and dialogue could not only serve as a contribution for the overcoming of what has been characterized as an integration taboo,⁵⁵ but would also enable the chance of a mentality shift from the inside to the outside both towards national legal culture and towards the role of the EU itself and EU Law and European Lawyers on the global stage. 46

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⁵⁴ U Haltern, 'On Finality', in: A von Bogdandy and J Bast (eds.), *Principles of European Constitutional Law*, (2nd ed., C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2010) 216.

⁵⁵ The characterization of the educational system as a taboo for European legislation by I Pernice, 'Motor or Brake for European Policies? Germany's New Role in the EU after the Lisbon-Judgment of Its Federal Constitutional Court', (2011) *WHI Working Paper*, No. 03.

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