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Constructing a European Society by Jurisdiction

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Abstract: *From a sociological point of view, European integration is specifically a process of transforming deeper structures of solidarity, legal order and justice away from the segmentally differentiated European family of nations and towards an emerging European society. This transformation is the subject matter to be explained (explanandum) in this article by a set of mutually supporting explanatory factors (explanans) with the example of jurisdiction by the European Court of Justice: (1) establishing formal legitimate power of European jurisdiction in order to complement and form the driving force of international labour division: preliminary reference, supremacy and direct effect of European law; (2) establishing a substantial conception of control in the field of legal discourse: free movement and non-discrimination; (3) enforcing a genuinely European legal order against national varieties of law by establishing a dominant European legal community; (4) making transnational sense of legal change by legitimating Europeanised law in terms of advancing justice as equality of opportunity across and within nations, as opposed to equality of results within nations accompanied by inequality of opportunity across nations.*

I Introduction: The Judicial Construction of European Labour Division

Research on European integration is largely in the hands of political science and legal scholarship. Sociology still has to find its proper place in this research field. What makes the difference of a genuinely sociological approach to European integration is its focus on the deeper structural changes coming about with this process. Of central interest is the change of the structure of solidarity and justice that is taking place. For reasons of disciplinary specialisation, the approaches to European integration prevailing in political science do not explicitly address the deeper transformation of solidarity, legal order and justice, coming about with the emergence of a 'European society' superimposing itself on the segmentally differentiated family of European nations.[2] Answering this question needs a genuinely sociological approach to European integration. This is exactly what this article attempts to do.

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[2] R. Münch, *Nation and Citizenship in the Global Age* (Palgrave, 2001); R. Münch, *Offene Räume. Soziale Integration diesseits und jenseits des Nationalstaats* (Suhrkamp, 2001).

A Forces Advancing the European Division of Labour

In looking for a genuinely sociological approach to explaining the emergence of a European society from a family of European nations in the process of European integration, it is helpful to draw on the basic ideas presented by Emile Durkheim in his classical study, *The Division of Labour in Society*.[3] According to Durkheim the driving force of social integration beyond the borders of so far relatively closed communities is cross-border labour division resulting from increasing specialisation. In terms of classical economic theory, cross-border labour division between two countries results in economic gains for both countries. According to Adam Smith goods and services will be produced where costs are lowest in a system of free trade, which is beneficial for all nations included in free trade.[4] David Ricardo has demonstrated that a country would profit from specialisation and cross-border trade, even if it was able to produce an imported good at lower costs.[5] This will be true as long as specialising in exporting one product while importing a second product results in higher gains than producing both products at home. It is implied that capital and labour can be invested in the most profitable branch of production.[6] In the world of classical and neo-classical economics there are, however, no transaction costs. This is exactly what is effective in the real world and what is of interest to the sociologist. For Durkheim, the transition from an existing level of labour division to a new, farther reaching and transborder level of labour division implies a U-turn from the security of tradition towards considerable insecurity, involving anomie, distributive conflicts and erosion of consensus on the meaning of justice. Therefore, resistance to such change is quite normal and has to be overcome if cross-border division of labour is to advance. It is this overcoming of resistance that has to be explained. In the real world of people facing the disadvantages of eroding traditions, advantages calculated by classical economic theory do not explain why people engage in increasing cross-border labour division. In Durkheim's eyes, it is first of all external constraint that leaves people no other option but to take the way of increasing specialisation and corresponding cross-border labour division. This external constraint is increasing material density, that is shrinking distance between people, which has come as a consequence of population growth or improved means of transport and communication.

Increasing material density intensifies competition on scarce resources. There are a number of alternatives to cope with such intensified competition such as war, emigration, increasing rates of suicide (or—for a limited time—improved productivity, as argued by Rueschemeyer), and specialisation with corresponding labour division. As various functional alternatives have proven to imply higher costs, specialisation and international labour division have a greater chance of selection and progress.[7] Durkheim was, however, well aware of the fact that the division of labour could only proceed along with a legal order representing the basic relationships of solidarity. The

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[3] E. Durkheim, *The Division of Labour in Society* (Free Press, 1964; French orig 1893).

[4] A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (University of Chicago Great Books, 1952; orig 1776).

[5] D. Ricardo, *On the Principles of Political Economy and Taxation* (Olms, 1977; orig 1817).

[6] C. van Marrewijk, *International Trade and the World Economy* (Oxford University Press, 2002).

[7] Durkheim, *op cit* n 3 *supra*, at 256–282; E. Durkheim, *The Rules of Sociological Method* (Free Press, 1958; French orig 1895), 93; D. Rueschemeyer, 'On Durkheim's Explanation of Division of Labor', (1982) 88 *American Journal of Sociology* 579.

latter provides for the trust between people without which no continuous economic exchange is possible without distraction into violent conflict. He also knew that this functional requirement would not produce the emergence of solidarity and legal order by itself. Functional necessity needs to be complemented by historical causation. Solidarity and legal order do not emerge by themselves from market transaction as spill-over effects, but need genuine construction by forces producing solidarity and legal order. In fact, displacement of national labour division and law by European labour division and law is harmful and by no means a direct advantage for everybody, so that resistance to such change is quite natural. This is what Durkheim means when saying that increasing labour division cannot be explained by growing happiness, which is contrary to Adam Smith and David Ricardo, who did not take transaction costs into account.[8] Starting from a situation of segmental differentiation into nation-states clinging to internal collective (mechanical) solidarity and national legal orders representing basically a justice of collectively shared equality of results (high level of status maintaining social security, low earnings dispersion), there must be pioneers, who break up national solidarity and the national legal order. This is the work of transnational élites founding and administering transnational institutions and organisations. Managers, scientists, politicians, civil servants and lawyers play this role. Transnational solidarity created by such élites is a kind of 'organic solidarity' of specialised and mutually dependent parts of a new, more encompassing whole, in Durkheim's terms. Going beyond Durkheim's notion of an organic 'whole', we had better introduce the notion of a network of mutually dependent parts that might be more or less densely woven and open to including new specialised parts.

Inasmuch as such institutions and organisations founded and administered by transnational élites become firmly established, they promote the further superimposition of transnational solidarity and law on national societies, thus provoking a conflict with forces representing the traditions of national solidarity and law. This conflict shifts step by step towards favouring the forces of transnationalisation, as much as the international division of labour proceeds under the protection of transnational institutions and organisations. It is therefore the tacit coalition between the self-catalysing progression of cross-border labour division and transnational élites, which puts the conflict between the forces of transnational order and the forces of national order increasingly on unequal terms, thus favouring the advancement of the transnationalisation of solidarity. This is the logic behind the increasing transnationalisation of the law. It is different to a spill-over effect insofar as it needs particular sources of the transnational construction of solidarity and law beyond market transaction and entails a fundamental conflict between transnational and national forces in shaping the real process of the transnationalisation of the law.

B The Consequences of European Labour Division: Changing Solidarity, Law and Justice

Following Durkheim we want to know more about this process of transnationalisation of solidarity and law. We want to learn how their nature is changing. According to Durkheim it is the change from mechanical to organic (or network) solidarity accompanied by a change of the legal order from repressive law focused on the

[8] Durkheim, *op cit* n 3 *supra*, at 233–255.

collective's right over the individual to restitutive law focused on the protection of the rights of the individual against infringements originating from the collective or from other individuals.[9] Taking up Durkheim's visionary view of an emerging European society—right before two world wars originating in the heart of Europe—the European legal order is the basis of the 'cult of the individual' reaching beyond the national traditions of expanding the rights of the individual. This Durkheimian view is currently invoked by the notion of the 'EU rights revolution'.[10] European law is a major force in advancing individual autonomy by emancipating the individual from traditionally established national constraints. In this way of strengthening the individual, national collectives are losing in homogeneity. They become internally more differentiated and pluralistic. Internal pluralisation, differentiation and individualisation break down differences between previously homogeneous cultures so that the nations become more similar to each other by way of internal differentiation.[11] This process helps again to advance transnational ties between individuals emancipated from national constraints. What is emerging in this process is a European society establishing a new type of solidarity and a new type of legal order focused far more on the cult of the individual than the national legal orders did before. A major part of this process is the functional differentiation of European law from national constraints and legal traditions. Compared to national law framed by cultural traditions and political constellations European law stands more on its own. It is more a product of legal experts and specialised in coordinating the rights of autonomous individuals. Because it develops in close connection with the market, it translates the model of market exchange between autonomous individuals into the law spreading from economic law to other areas of the law.

C Advancing European Solidarity, Law and Justice against National Traditions: The Work of the European Court of Justice

Neither functional spill-over[12] nor intergovernmental bargaining[13] help to understand and explain why cross-border trade and labour division and the construction of a legal order are advancing in the face of a situation that brings about a fundamental transformation of solidarity, legal order and justice for the average citizen so far protected by national solidarity, legal order and justice. It is very unlikely that such a harmful process would be advanced by functional spill-over from expanding trade to legislation and jurisdiction, because national resistance is what can be expected first of all. Because of that resistance it is also unlikely for this process to spread from purely intergovernmental bargaining. From the point of view of a genuinely sociological theory such a process of harmful institutional transformation depends on a whole set of favourable conditions. There must be a shift of legitimate power, of the definition of the situation

[9] Durkheim, *op cit* n 3 *supra*, at 138–173, 226–229.

[10] *Ibid*, at 24, 121, 280–281, 405–406; R. D. Kelemen, 'The EU Rights Revolution: Adversial Legalism and European Integration', in T. A. Börzel and R. A. Cichowski (eds), *The State of the European Union, Vol. 6: Law, Politics and Society* (Oxford University Press, 2003), 221.

[11] Durkheim, *op cit* n 3 *supra*, at 134–138, 300–301.

[12] E. B. Haas, *The Uniting of Europe: Political, Social and Economic Forces, 1950–1957* (Stanford University Press, 1958).

[13] A. Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', (1993) 31 *Journal of Common Market Studies* 473.

and of the construction of a legitimate and meaningful order from the national to the transnational level:

(1) Institutionalising formal European judicial power: formal institutional procedures of legislation and jurisdiction have to provide a firm grounding on which a transnational élite can realise its vision in everyday decision-making, favouring the transnational project.
(2) Establishing a substantial conception of control: a substantial leading idea and conception of control has to help the transnational élite to define the situation in such a way that conflicts will be settled in favour of the transnational project in a way that is accepted as legitimate by both sides in the conflict.
(3) Establishing a dominant European legal community and turning politics into juridical technique: the transnational élite has to apply legitimate power based on procedural rules in such a way that national resistance is overcome in a way that is accepted as legitimate by both sides in the conflict.
(4) Turning functional adjustment into constructing a legitimate order: the transnational legal order constructed by way of conflict settlement between the transnational élite and the forces of national traditions has to attain the status of a new order which makes sense and appears just as a whole and can therefore successfully claim legitimacy, thus transforming the traditionally given national legal orders and ideas of justice.

The following paragraphs will focus on European Court of Justice (ECJ) jurisdiction in the perspective of the outlined theoretical model derived from Durkheim's study on the division of labour. The ECJ's work will be assessed step by step according to the four outlined requirements of replacing national traditions by European law. The hypotheses specifying the requirements are not 'tested' in this study, they are rather presumed to be confirmed by common sociological knowledge. The study is no test of hypotheses; it is rather a systematically guided explanation of a *historical* transformation of solidarity, legal order and justice. On the one hand, its task is the sociological framing of the subject matter to be explained, that being the transformation of solidarity, legal order and justice (*explanandum*). On the other hand, its task is to supply a sociological explanation of this transformation based on a theoretical model spelled out in four hypotheses (*explanans*) (see Figure 1 (below)).

What is substantiated in the study on ECJ jurisdiction is evidence pointing towards the superimposition of transnational network solidarity, 'restitutive' law and justice as equality of opportunity on national mechanical solidarity, 'repressive' law and justice as collectively shared equality of results (*explanandum*). The evidence for that is the corresponding meaning of ECJ jurisdiction in individual cases. This meaning certainly has to be disclosed by an interpretation in the light of the assumed transformation. There is always the possibility of other interpretations and other cases contradicting the interpretation given in this study. What can be said in support of the interpretations advanced here is their compatibility with established juridical commentary and interpretation so that the sociological framing does not seem to be in conflict with established juridical knowledge.

It is a well established fact that the ECJ has played a crucial role in constructing a European legal order in technical terms, based on legal rationalism and formalism. Therefore, European law has largely evolved in close connection with the economic needs of market integration and much less in connection with political needs of market

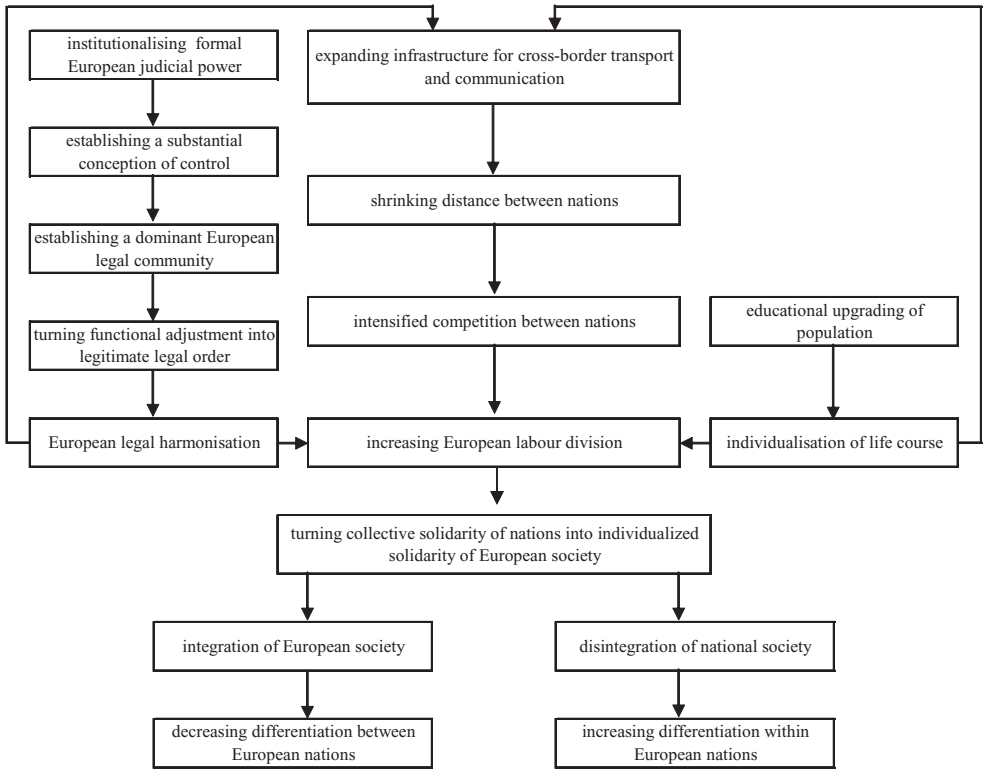

Figure 1. The Causes and Consequences of European Labour Division

regulation.[14] The aim of this article is to point out in sociological terms, how the ECJ's jurisdiction has contributed in the context of increasing European labour division to a fundamental change of solidarity and a corresponding paradigmatical change of the legal order in judicially constructing a European society penetrating increasingly the family of European nations.

[14] M. Cappelletti, M. Seccombe and J. Weiler (eds), *Integration Through Law* (de Gruyter, 1986); F. Snyder, *New Directions in European Community Law* (Weidenfeld & Nicholson, 1990); M. Shapiro, 'The European Court of Justice', in A. M. Sbragia (ed), *Euro-Politics. Institutions and Policymaking in the 'New' European Community* (Brookings Institution, 1992), 123; A.-M. Burley and W. Mattli, 'Europe before the Court: A Political Theory of Legal Integration', (1993) 47 *International Organisation* 41; A. Höland, 'Die Rechtssoziologie und der unbekannte Kontinent Europa', (1993) 14 *Zeitschrift für Rechtssoziologie* 177; V. Gessner, 'Global Legal Interaction and Legal Cultures', (1994) 7 *Ratio Juris* 132; Ch. Joerges, 'The Market without the State? States Without a Market? Two Essays on the Law of the European Economy', (1996) 2 *European Law Journal* 110; H. Schepel and R. Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe', (1997) 3 *European Law Journal* 165; R. Dehousse, *The European Court of Justice* (Macmillan, 1998); M. P. Maduro, *We The Court. The European Court of Justice and the European Economic Constitution* (Hart, 1998); A. Stone Sweet and J. A. Caporaso, 'From Free Trade to Supranational Polity: The European Court and Integration', in W. Sandholtz and A. Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford University Press, 1998), 92; G. de Búrca and J. H. H. Weiler (eds), *The European Court of Justice* (Oxford University Press, 2001); A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004).

II Institutionalising Formal European Judicial Power: Preliminary Reference, Direct Effect and Supremacy of European Law

This first step has to explain whether and why ECJ jurisdiction can rely on legitimate power in order to complement and shape the dynamic force of European labour division primarily advanced by shrinking distance and transnational élites promoting cross-border economic exchange. Without such legitimate power there would be no successful construction of a genuinely European legal order. The major assets empowering the ECJ are the institutional rules of preliminary reference, supremacy and direct effect of European law and the principles of judicial rationalism. These are the formal preconditions for constitutionalising the European legal order as a prerequisite of transforming national legal traditions by European jurisdiction.

Since 1965, procedures concerning violations of the Treaty as well as preliminary rulings according to Article 234 (ex 177) EC have increased year by year, with the preliminary rulings having gained clear dominance since the 1970s.[15] This offers first proof of the ECJ's continuously expanding activity in constructing a European legal order based on apparently legitimate and effective power. The ECJ's decisions in the preliminary reference procedure do not relieve the national courts of their judicial responsibility, yet they form an essential basis for jurisdiction to which the national courts keep as a rule.[16] The fact that the inferior national courts have to enter into a direct dialogue with the ECJ and do not have to go via higher national instances is of essential significance. The latter are even expressly deprived of their power, since the ECJ is solely responsible for interpreting European law. This procedure is to guarantee the uniform interpretation and implementation of European law. It is the resulting increase in power of the lower national courts alone as compared to the higher courts, which serves as a stimulus for them to use the tool of preliminary rulings. It is in their institutional interest to do so.[17] National courts may, however, decide a case on their own, without submitting it to the ECJ, if precedents exist in the court's case-law allowing for a clear and precise judgment, or if the relevant EC law is obvious enough to ensure a clear-cut decision. The latter is explained by the ECJ as *acte clair* strategy in *CILFIT*.[18] Nevertheless, it is the firm position of the ECJ that national courts act as its delegates in applying European law, even if they decide on their own.[19] In fact, the lower national courts have more and more frequently seized the chance of preliminary references and have thus raised the number of such procedures from just a few in the 1960s to an average of 50 per year during the 1970s, to an average of 100 during the 1980s and to 150 in the 1990s.[20]

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[15] Dehousse, *ibid*, at 31.

[16] M. Dauses, *Das Vorabentscheidungsverfahren der Europäischen Union* (Nomos, 1995); S. Sciarra, 'Integration Through Courts: Article 177 as a Pre-Federal Device', in S. Sciarra (ed), *Labour Law in the Courts: National Judges and the European Court of Justice* (Hart, 2001), 1.

[17] A.-M. Burley and W. Mattli, 'Europe before the Court: A Political Theory of Legal Integration', (1993) 47 *International Organisation* 62–64; K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press, 2001).

[18] Case 283/81, *CILFIT* [1982] ECR 3415.

[19] cf H. Rasmussen, 'The European Court's Acte Clair Strategy in CILFIT' (1984) 9 *European Law Review* 242; G. F. Mancini and D. T. Keeling, 'From CILFIT to ERT: the Constitutional Challenge Facing the European Court', (1991) 11 *Yearbook of European Law* 1–13.

[20] Dehousse, *op cit* n 14 *supra*, at 31; A. Stone Sweet and J. A. Caporaso, 'From Free Trade to Supranational Polity: The European Court and Integration', in Sandholtz and Stone Sweet, *op cit* n 14 *supra*, at 104; K. J. Alter, 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?', (2000) 54 *International Organization* 499–500.

Spill-over from economic transactions to the construction of a European legal order does not, however, occur automatically. The construction of a European legal order needs its own juridical sources, which are first of all legitimate power of EU legislation and also EU jurisdiction. As regards jurisdiction, the legitimate power of the ECJ is at stake. For the ECJ's ability to change national legal traditions by European jurisdiction, the growing constitutionalisation of the common legal order and establishment of a European rule of law has been of greatest importance.[21] The Treaty and the Community's established law form a legal order ranking above the law of the different Member States. The ECJ plays the role of a constitutional court deciding upon the compatibility of national law with the higher-ranking European law. The two principles guaranteeing this status of the European legal order are the principles of direct effect and of supremacy of European law.

All binding EC law is directly effective in the Member States in as much as it is regarded as clear, precise and unconditional enough to be judiciable in legal practice. According to the ECJ's case-law, treaty provisions, regulations and decisions as well as international agreements are directly effective, if they fulfil the requirement of judiciability. Directives are generally not directly effective. However, they have indirect effect, because Member State courts are expected to interpret domestic law so that it conforms to Community directives. Furtheron, directives may have incidental effect in legal proceedings between private litigants. Failing implementation of directives right in time implies state liability for damages resulting from that non-action as ruled by the ECJ in *Francovich and Bonifaci*.[22] The meaning of 'direct effect' varies between the broader notion of *EC law to be invoked before a Member State court* and the narrow notion of *EC law to confer rights on individuals to be enforced by Member State courts*. The ECJ laid the foundations for its doctrine of direct effect as early as in 1963 in the now famous case *Van Gend en Loos*[23] dealing with the question as to whether citizens of a member state may refer directly to the ban on an increase in tariffs as stipulated by Article 12 EC, and can institute legal proceedings at a national court. The case in which the Court went well beyond the state of implementation of treaty provisions in EC legislation is *Reyners*.[24] In this case the Court applied its method of teleological interpretation of the treaty to fill gaps by way of envisaging future implementation. While such implementation measures could be predicted in that case (freedom of establishment under Articles 43, 44 and 47 (ex 52, 54 and 57)) EC, such a prediction was much less possible in *Defrenne II*[25] (equal pay of men and women). Nevertheless, the Court's ruling in this case implied direct effect of Article 141 (ex 119) EC with enormous intervention in the domestic law of Member States.[26]

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[21] Dehousse, *op cit* n 14 *supra*, at 36–69; Maduro, *op cit* n 14 *supra*, at 7–34; J. H. H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999) 10-63; M. Wind, *Sovereignty and European Integration: Towards a Post-Hobbesian Order* (Palgrave, 2001); A. Arnull, 'The Rule of Law in the European Union', in A. Arnull and D. Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2002), 239.

[22] Cases 6/90 and 9/90, *Francovich and Bonifaci* [1991] ECR I-5357.

[23] Case 26/62, *Van Gend en Loos* [1963] ECR 1.

[24] Case 2/74, *Reyners* [1974] ECR 631.

[25] Case 43/75, *Defrenne II* [1976] ECR 455.

[26] cf P. P. Craig, 'Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law', (1992) 12 *Oxford Journal of Legal Studies* 453; J. Bengoetxea, *The Legal Reasoning of the European Court of Justice: Toward a European Jurisprudence* (Clarendon Press, 1993); Dauses, *op cit* n 16 *supra*, at 5–17, 43–52. P. Craig and G. de Búrca (eds), *EU Law: Text, Cases, and Materials* (Oxford University Press, 2003), 178–229.

The supremacy of European law over national law is also owed to an offensive interpretation of the Community's Treaty according to its spirit and objective—the creation of an integrated single market—and less according to the wording.[27] According to Article 10 (ex 5) EC the Member States are requested to take all necessary steps to meet the obligations resulting from the Treaty. In terms of the wording, however, this does not mean that in the case of conflict Community law will automatically receive primacy over national law. It might be left to the Member States to decide how they are going to live up to their obligation to accomplish the Community Treaty so that there is no automatic primacy of Community law over national law. It is precisely this argument that was carried out by the Italian government when a shareholder of a nationalised electricity company filed a law suit with reference to Community law to which Italian law did not conform. In the corresponding preliminary ruling the ECJ concluded, however, that—different to ordinary international law—the Community Treaty has created a legal system on its own.[28] It has become an integral part of national legal systems so that it can be applied by the national courts without using the detour via national legislation or higher national legal instances. Once again, the limitation of the Member States' sovereignty rights is emphasised in the framework of Community law. In a case handled later on,[29] the Court ruled explicitly that Community law would enjoy supremacy over both old and new national law in any case. This clearly highlighted the Community law's constitutional character. In a case of conflict between European and national law, national courts are obliged to apply European law and to ignore the national law. In the case *IN.CO.GE.'90* the Court explained that national courts are not expected to nullify national law—which would be beyond their competence—but nevertheless must not apply national law that is in conflict with European law.[30] With this phrasing of the subject matter, the Court avoids constitutional conflicts with national constitutional courts.

However, the Member States have not accepted the Court's supremacy doctrine easily. They prefer the interpretation that the supremacy of Community law only results from the explicit national agreement due to articles in a national constitution, such as the French Conseil d'Etat as well as the Cour de Cassation referring to Article 55 of the French constitution, and that even examination of European law by the national court of justice is required, such as the Italian court of constitution referring to Article 11 of the Italian constitution. In its Maastricht judgment, the German constitutional court links the supremacy of Community law to the agreement of the national parliament, which has the 'people's sovereignty' as its sole source of legitimation; it even reserves the right to assess the compatibility of European law with fundamental rights, since there is no equivalent for this on the European level. Nevertheless, it is prepared to accept European law as long as ('*solange*') the ECJ, above all, guarantees sufficient protection of the fundamental rights.[31] In the UK, the supremacy of Community law is derived from the British Parliament's European Communities Act 1972. In fact, these interpretations are constructions trying to leave a loophole for deviations from the ECJ's legal interpretation and to make the factually practiced

[27] Dauses, *op cit* n 16 *supra*, at 17–20.
[28] Case 6/64, *Costa v ENEL* [1964] ECR 585.
[29] Case 106/77, *Simmenthal* [1978] ECR 629.
[30] Cases 10–22/97, *IN.CO.GE.'90* [1998] ECR I-6307.
[31] Solange I judgment, BVerfG 37/1975, 29 May 1974; Solange II judgment, BVerfG 73/1987, 22 October 1986; Maastricht judgment, BVerfG 89/1994, 12 October 1993.

supremacy of Community law compatible with national patterns of legitimating law, more or less for their own reassurance. It is, however, a matter of fact that the ECJ's legal interpretation has made its way in practice and that in individual cases, we can definitely assume that European law enjoys supremacy over national law. This supremacy of European law stretches straight into national legal procedures. According to the principle of effectiveness (*effet utile*) applied by the ECJ, these should be formed in such a way that European law will immediately enter into effect without taking the detour of higher national legal bodies. A delay caused by national detours is to be avoided.[32] Nevertheless, two languages of that reality still exist side by side. There is the European Court's monistic language of supremacy, on the one hand, and the dualistic language of national constitutional courts seeing the legitimacy of EC law still depend on national constitutional provisions, on the other hand.[33]

The preliminary reference procedure has established the ECJ as a crucial force of advancing European economic integration. Direct effect and supremacy of European law have become powerful tools in the hands of the ECJ that have shifted juridical power from the national to the European level in all matters of market integration as well as other fields affected by that process. With the creation of the European single market the distance between potential competitors has shrunk. The resulting intensified competition has been put on the track of European-wide specialisation and corresponding European labour division, because European law as continuously advanced by the ECJ in preliminary rulings has provided the necessary legal framework. Removing barriers has intensified competition. Creating a legal framework for the single market has reduced uncertainty and has enabled economic actors to engage in exchange across national borders. The Court's judicial activism has not only complemented legislation, but has also given legal harmonisation through legislation a crucial push. In the theoretical perspective applied in this study ECJ jurisdiction has played two complementary roles: on the one hand, it has intensified competition on a European scale, on the other hand, it has provided directly (and indirectly by pushing legislation) the legal foundation on which such intensified competition has been turned into increasing specialisation and European labour division. This harmful process has advanced only, because the Treaty of Rome and the way it has been interpreted by the ECJ as formal institutional asset have shifted power to the side of market integration. These forces have been bundled in the collaboration of the ECJ, national courts and private litigants with an interest in making profit from breaking down (national) barriers to market access.

III Establishing a Substantial Conception of Control: Free Movement and Non-discrimination

In this second step, it has to be explained whether and why the ECJ has been able to establish a leading idea and conception of control for jurisdiction in the transnationalised field of judicial discourse. An item for such a conception of control is the rigorous application of the mutually linked ideas of free movement of goods, services, capital and persons and non-discrimination in any regard. Removing trade barriers means non-discrimination of foreign suppliers of goods, services, capital and labour. With this link to trade liberalisation, non-discrimination as the more general idea has received a

[32] Case 106/77, *Simmenthal* [1978] ECR 629; Case 213/89, *Factortame* [1990] ECR I-2433.

[33] cf M. Kumm, 'Who is the final Arbiter of Constitutionality in Europe?', (1999) 36 *Common Market Law Review* 251.

boost as the basic principle of justice, which could be more easily extended to other fields on this basis. This conception of control has replaced the traditional idea of collectively shared equality of privileged groups within the nation entailing discrimination of non-nationals, females and minorities of any kind. In this process tackling exclusion and promoting social cohesion have assumed a new meaning replacing traditional ideas of national welfare. By establishing such a leading idea and conception of control European jurisdiction is shaped in a *substantial* way to conform to substantial ideas of 'good' jurisdiction.

The pioneering judgment for enforcing the free movement of goods according to Article 28 (ex 30) EC was *Dassonville*.[34] The court specified its interpretation of Article 28 along with the qualifications according to Article 30 in *Cassis de Dijon*[35] and *Keck and Mithouard.*[36] The three cases stand for three phases of the Court's case-law on the free movement of goods with *Dassonville* representing the first phase of breaking down trade barriers in the 1970s; *Cassis de Dijon* the second phase of specifying the circumstances under which national regulations can be upheld, even if they have a negative effect on cross-border trade, in the 1980s; and *Keck and Mithouard* the third phase of stepping further towards allowing Member States regulations with negative trade effects under specified conditions in the 1990s.[37] Whereas Article 28 interdicts any regulation measure resembling a restriction of the volume (quota), Article 30 (ex 36) EC specifies the terms under which national governments are entitled to apply such measures, for instance, public morals, safety and health protection. In its *Dassonville* judgment, the Court explained in a very general way that national technical requirements are not permissible, if they act like quantitative import restrictions. In the *Cassis de Dijon* judgment, this interpretation of the law was confirmed, and it was also specified that such import restrictions would only conform with the Treaty, if they fulfilled *mandatory requirements*, that is if they were proven to be necessary and required by public interest such as for tax control, fairness, health, and consumer protection.[38] Compared to *Dassonville*, the *Cassis de Dijon* judgment explicitly acknowledges market regulations adopted by Member States under Article 30.

In the face of the very slowly growing harmonisation of product regulations on the European level, the Court introduced the principle of validity of regulations in a product's country of origin for all Member States. This implied a policy of mutual recognition of product standards by the Member States, which was adopted by the Commission in order to promote the completion of the single market by the end of 1992. By introducing this principle, the ECJ has established a strong counter-weight to the Member States' inclination to abusing state regulations according to Article 30. What is allowed by Article 30 has to be approved by the ECJ in the last instance and has to undergo a fierce review process.

Going beyond *Cassis de Dijon*, the Court advanced a considerable step further towards approving trade regulation by Member States in *Keck.* This development can be interpreted as a crucial change away from far-reaching trade liberalisation and

[34] Case 8/74, *Dassonville* [1974] ECR 837.

[35] Case 120/78, *Cassis de Dijon* [1979] ECR 649.

[36] Cases 267/91 and 268/91, *Keck and Mithouard* [1993] ECR I-6097; K. J. Alter and S. Meunier-Aitsahalia, 'Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision', (1994) 4 *Comparative Political Studies* 535.

[37] Stone Sweet, *op cit* n 14 *supra*, at 109–145.

[38] Craig and de Búrca (eds), *op cit* n 26 *supra*, at 659–677.

priority of the Community in matters of market regulation, and towards greater leeway for market regulation in general and regulation on the Member State level in particular. Shortly after *Keck and Mithouard*, this line of argumentation was consolidated in *Huenermund*[39] and *Leclerc-Siplec*.[40] According to *Keck*, Member State regulations are lawful in terms of Article 30, even if they might have negative effects on the volume of cross-border trade, if they do not refer to products directly but to selling arrangements only. The requirement for the legality of such regulations according to Article 30 is equal treatment of foreign and domestic goods. There must not be any discrimination of imported goods. Nevertheless, such measures have to meet the requirement of proportionality in relation to their objectives. With regard to products directly, *Keck* does not change the *Dassonville*/*Cassis de Dijon* framework. The major reason behind *Keck* was the increasing invocation of Article 28 by litigants in cases with no immediate link to intra-Community trade such as the British Sunday trading cases[41] and the French *video of films* cases.[42] These cases can be regarded as preparatory for *Keck*. Commentators say, however, that it is difficult to decide on what is only a selling arrangement and not part of the product itself. This holds particularly true for 'static' selling arrangements, which may be part of the product itself, as compared to 'dynamic' selling arrangements such as special strategies of sales promotion.[43]

Beyond the free movement of goods, the ECJ has ensured that cross-border market access for services no longer has to fail because of national particularities in terms of admission, according to Article 49 EC. Germany, for instance, had to open its market to foreign insurance companies even if they do not run an establishment in the country. Nevertheless, admission procedures can be considered legitimate in the interest of consumer protection. However, they have to respect the terms under which a company is operating in its own home country. This was the Court's position in *Commission v Federal Republic of Germany*.[44] In the wake of this judgment, the European regulation of the insurance market progressed further after a long period of paralysis. Health service has become a particularly impressive field of expanding European integration, which is contrary to all expectations on the basis of this formerly national policy domain. There is the Working Time Directive (WTD) (93/104) used by the ECJ to challenge Member State regulations in health service regarding the working time of trainees and junior professionals. *Sindicato de Médicos de Asistencia Pública*[45] and *Jaeger*[46] were particularly crucial in this context. Compliance with the Court's rulings imposes enormous costs on the Member States in terms of employing thousands of new doctors in order to run hospitals in accordance with the WTD. Furthermore, the court has helped patients to receive medical service across borders on the basis of their health insurance.[47]

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[39] Case 292/92, *Huenermund* [1993] ECR I-6787.

[40] Case 412/93, *Leclerc-Siplec* [1995] ECR I-179.

[41] Case 145/88, *Torfaen* [1989] ECR 3851; Case 306/88, *Rochdale* [1992] ECR I-6457; Case 304/90, *Reading* [1992] ECR I-6493.

[42] Case 60 and 61/84, *Cinéthèque* [1985] ECR 2605.

[43] cf S. Weatherill, 'After Keck: Some Thoughts on How to Clarify the Clarification', (1996) 33 *Common Market Law Review* 886.

[44] Case 205/84, *Commission v Federal Republic of Germany* [1986] ECR 3755.

[45] Case 303/98, *Sindicato de Médicos de Asistencia Pública* [2000] ECR I-7963.

[46] Case 151/02, *Jaeger* [2003] ECR I-8389.

[47] Case 158/96, *Kohll* [1998] ECR I-1931; Case 120/95, *Decker* [1998] ECR I-1831; G. Davies, 'Welfare as a Service', (2002) 29 *Legal Issues of European Integration* 27; S. L. Greer, 'Uninvited Europeanization: Neofunctionalism and the EU in Health Policy', (2006) 13 *Journal of European Public Policy* 134.

Following the faster growing free movement of goods, the free movement of persons has also increased steadily, though it has proceeded on a lower level. Currently, about 5% of EU citizens live in another Member State than their state of origin. The ECJ has ensured the free movement of persons along the lines of furthering market integration and removing barriers to the free exchange of production factors and to free competition. Whatever could hinder workers to work in a Member State other than their home country, has been abolished by the Court as far as it is compatible with maintaining legitimate rights preserved for nationals only, such as security relevant public employment. The crucial criterion is the status of a worker. That means one has to move as a worker and to make a contribution to market integration to come under the free movement principle, to have equal rights compared to nationals, and to have access to social rights in the country of actual residence. In this field of jurisdiction, the Court's rulings have moved from a stricter interpretation of the worker status towards a less strict interpretation, eventually including part-time workers, unemployed people, students having been employed or seeking employment, persons in training programmes and family members. The Court has also gone from a narrower definition towards a broader definition of benefits to be granted.[48] Up until 1990, economic activity was the precondition for free movement (Articls 39, 43 and 49 EC). With three Directives (90/364, 90/365 and 93/96), the Community has extended free movement to include students, economically inactive and retired persons. The ECJ paved the way for this extension of free movement in *Lair v Universität Hannover* and *Lawrie-Blum*. The Maastricht Treaty has made free movement a right of EU citizenship going considerably beyond the requirement of economic activity. Ever since Maastricht, the crucial requirement has been economic self-sufficiency so that the resident will not be a burden to the hosting Member State's welfare system. The ECJ began to treat free movement as a citizenship right beyond economic activity not earlier than in 2000 in *Ursula Elsen*,[49] lagging somewhat behind legislation in this respect.

Non-discrimination of non-nationals has become the cornerstone of the emerging European society, which acknowledges equal rights of nationals and non-nationals across national borders. In doing so, EU law and ECJ jurisdiction have in fact constructed a European citizenship, which has become consolidated by the introduction of EU citizenship in Articles 17–22 (ex 8, 8a–8e) EC. Many cases were handled under the free movement rules. Beyond that the ECJ ruled increasingly in the interest of non-discrimination of non-nationals also in cases where the free movement rules were not directly applicable.[50] The introduction of EU citizenship has strengthened the rights of EU citizens in Member States outside their home country.[51] The ECJ has made use of

[48] S. O'Leary, *The Evolving Concept of Community Citizenship* (Kluwer International, 1996); F. Weiss and F. Wooldridge, *Free Movement of Persons within the European Community* (Kluwer Law International, 2002); relevant cases for extending the group of persons covered by the principle of free movement include Case 36/74, *Walrave and Koch* [1974] ECR 1405, Case 207/78, *Ministère Publique v Even* [1979] ECR 2019, Case 53/81, *Levin v Staatssecretaris van Justitie* [1982] ECR 1035, Case 39/86, *Lair v Universität Hannover* [1988] ECR 3161, Case 66/85, *Lawrie-Blum* [1986] ECR 2121, Case 143/87, *Stanton v INASTI* [1988] ECR 3877, Case 168/91, *Konstandinidis* [1993] ECR I-1191 and Case 413/99, *Baumbast* [2002] ECR I-7091. Relevant cases for extending the kind of civil and social rights covered by the principle are Case 15/69, *Salvatore Ugliola* [1969] ECR 363 and Case 85/96, *Sala* [1998] ECR I-2691.

[49] Case 135/99, *Ursula Elsen* [2000] ECR I-10409.

[50] N. Reich, *Understanding EU Law: Objectives, Principles and Methods of Community Law* (in collaboration with Christopher Goddard, Ksenija Vasileva) (Intersentia, 2003), 180–181; G. Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International, 2003).

[51] A. Wiener, *European Citizenship Practice – Building Institutions of a Non-State* (Westview Press, 1998).

this tool to extend the groups of persons and subject matters to fall under the principle of non-discrimination.[52]

Along this line of non-discrimination, equal treatment of men and women is a second feature of a European society consisting of empowered individuals.[53] More recently discrimination in employment for reasons of age has been ruled out by the ECJ in *Mangold*.[54] Gender equality has been promoted by EU legislation and put into practice in the Member States by ECJ jurisdiction. This can particularly be demonstrated with the application of Article 141 (ex 119) EC requiring equal pay for equal work for men and women as well as the Equal Pay Directive 75/117, the Equal Treatment Directive 76/207 and the Equal Treatment in Social Security Directive 79/7. Equal treatment has become a major field in which ECJ jurisdiction has promoted the change of national legal practice away from historically established discrimination, above all as regards employment, working conditions, promotion or vocational training of men and women. In a whole series of judgments the ECJ has established non-discrimination as basic legal principle. It provides for equal access to opportunities of self-fulfilment for men and women. Equality of opportunity of autonomous individuals is the guideline of this legal reasoning. The legal practice in this field started with cases of direct discrimination, but it has been extended to ban any kind of indirect discrimination from social practice. The major breakthrough of making the obligation of the Member States to guarantee equal treatment of men and women a directly effective individual right came along the cases *Defrenne I–III*.[55] It was established in *Defrenne II*.

Continuing on this line not only direct, but also indirect discrimination came under attack. Indirect discrimination results, for instance, when regulations taken by a company affect women to a considerably higher degree than men in statistical terms, although no unequal treatment had been intended. This applies, for instance, to the restriction of benefits on part-time jobs as against full-time jobs, since women form the by far bigger part of part-time workforce. The breakthrough regarding this kind of indirect discrimination came with *Jenkins v Kingsgate (Clothing Productions)*.[56] Jenkins was a breakthrough in equal treatment like Dassonville in trade law, but it called for specification like *Cassis de Dijon*. This specification was attained in the case *Bilka-Kaufhaus v Weber von Hartz* presented by the German labour court according to Article 141 saying that any type of indirect gender-specific discrimination is inadmissible.[57]

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[52] S. Fries and J. Shaw, 'Citizenship of the Union: First Steps in the European Court of Justice', (1998) 4 *European Public Law* 533; K. Hailbronner, 'Die Unionsbürgerschaft und das Ende rationaler Jurisprudenz', (2004) 31 *Neue Juristische Wochenschrift* 2185; relevant cases are Case 186/87, *Cowan* [1989] ECR 195, Case 120/95, *Decker* [1998] ECR I-1831, Case 158/96, *Kohll* [1998] ECR I-1931, Case 85/96, *Martinez Sala* [1998] ECR I-2691, Case 274/96, *Bickel and Franz* [1998] ECR I-7637, Case 184/99, *Grzelczyk* [2001] ECR I-6193, Case 224/98, *D'Hoop* [2002] ECR I-6191, Case 413/99, *Baumbast* [2002] ECR I-7091, Case 200/02, *Chen* [2004] ECR I-9925, Case 209/03, *Bidar* [2005] ECR I-2119.

[53] C. Hoskyns, *Integrating Gender: Women, Law, and Politics in the European Union* (Verso, 1996); A. Dashwood and S. O'Leary, *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell, 1997); E. Ellis, 'The Recent Jurisprudence of the Court of Justice in the Field of Sex Equality', (2000) 37 *Common Market Law Review* 1403; Stone Sweet, *op cit* n 14 *supra*, at 146–197.

[54] Case 144/04, *Mangold* [2005] ECR I-9981.

[55] Case 80/70, *Defrenne I* [1971] ECR 445; Case 43/75, *Defrenne II* [1976] ECR 455; Case 149/77, *Defrenne III* [1978] ECR 1365.

[56] Case 96/80, *Jenkins v Kingsgate (Clothing Productions)* [1981] ECR 911.

[57] Case 170/84, *Bilka-Kaufhaus v Weber von Hartz* [1986] ECR 1607; W. Blomeyer, 'Europäischer Gerichtshof und deutsche Arbeitsgerichtsbarkeit im judiziellen Dialog', in W. Blomeyer and K. A. Schachtschneider (eds), *Die Europäische Union als Rechtsgemeinschaft* (Duncker & Humblot, 1995),

Free movement and non-discrimination as a substantial conception of control in the European judicial field of discourse have shifted power in favour of competitive companies and single individuals seeking the advantages of a European market without national barriers. Both principles give legitimation to a legal order for empowered economic actors, both companies and individuals. It is, therefore, not surprising that powerful and competitive actors are the pioneers advancing a process that does not only involve benefits, but also costs, particularly for such economic actors who are less powerful and competitive. Free movement and non-discrimination are the substantial legitimatory principles that enhance competition on a European scale, on the one hand, and that form the legal framework within which European labour division is advancing, on the other hand.

With free movement and non-discrimination as conception of control the ECJ has contributed to the beginnings of a shift of paradigm away from the welfare of national collectives and status groups and towards the inclusion of empowered single individuals in the equal access to opportunities of any kind independent of nationality, gender, age and ethnicity in an emerging European society transcending the historically established family of European nations. This is well established in trade law as the core of the Common Market; it is under way in constructing the Internal Market beyond trade law in labor law in particular; but it is only in its beginnings in private law.[58]

IV European Unity v National Varieties of Law: Establishing a Dominant European Legal Community and Turning Politics into Juridical Technique

In this third step it has to be explained whether and why the ECJ has been successful in enforcing a genuinely European legal order with a new sense of justice against the persistence of national variety, represented by national constitutional courts and national governments. The major forces in support of Europeanising the legal order are the legitimate power of the ECJ as addressed above, the legitimacy of the *acquis communautaire* making a reversal of Europeanisation very costly for national governments, the consistency requirements of judicial reasoning keeping divergence of ECJ jurisdiction from the established path within narrow limits, the support of the Europeanised legal order by transnational élites and the individualisation of life careers. What has particularly enabled the forces of European legal integration to overcome the resistance of national varieties of law, is the establishment of a dominant European legal community and the replacement of political struggle by juridical technique.

The ECJ's crucial role in constructing a European legal order along technical terms of jurisprudence with only little political interference has been largely supported by the firm establishment of a genuinely European legal field in Bourdieu's sense.[59] A European élite of academics, judges, officials, clerks and lawyers working for the big law firms is clearly in the dominant position of this field, while representatives of national law and jurisprudence are in the dominated or even largely marginalised position. This is demonstrated by Schepel and Wesseling's survey of three long-

55–62; N. Reich, *Bürgerrechte in der Europäischen Union* (Nomos, 1999), 212–232; Stone Sweet, *op cit* n 14 *supra*, at 160–162.

[58] H.-W. Micklitz, *The Politics of Judicial Co-operation in the EU* (Cambridge University Press, 2005).

[59] P. Bourdieu, 'La force du droit. Eléments pour une sociologie du champ juridique', (1986) 64 *Actes de la recherche en sciences sociales* 3.

established European law journals (*Common Market Law Review*, *Europarecht*, *Cahiers de Droit Européen*).[60]

A major prerequisite for the acceptance of the ECJ's extensive legal interpretation of the Treaty by the Community's other bodies, the Member States' governments and the national courts, above all the constitutional courts, which act as critical observers, has been its derivation from legal rationalism's basic principles, ie from the consequent application of professional standards, above all in the sense of the continental European academic interpretation method according to legal unity, spirit and objective of the Treaty. The development of lines of precedents to build up consistent frameworks for dealing with various kinds of cases has also been important. The Court's activity has consequently been of a technical nature and has therefore largely been kept away from political controversies. The Treaty's vagueness is added to this. It has more or less called for an extensively specifying legal interpretation to set the Treaty's spirit and objective in motion at all. Another role was played by the political paralysis from the mid-sixties until the mid-eighties, when little progress in integration through European legislation was attained. In this situation, the ECJ was called for to compensate for lacking harmonisation by legislation on the way of the Treaty's interpretation so as to remove the biggest obstacles to the integration project.

Whether the national governments are still the masters of the Treaty or whether the ECJ has been successful in establishing a European constitution and rule of law that cannot be turned around by the governments of the Member States is a much debated question in political and legal research.[61] In this sense the functional differentiation of European law is nothing but a permanent power struggle for the formation of the legal order in the multi-level system of the EU. For this power struggle, however, the ECJ possesses a sharp and effective weapon enabling it to interpret its role very extensively and to advance the functional differentiation of European law widely against the persisting national powers of inertia. Therefore, we may admit in any case that the functional differentiation of European law is rich in conflicts, precarious and always threatened by setbacks, for the course and direction of which, however, the ECJ's position in the structure of EU institutions, its application of the logic of legal rationalism and its legitimate definitional power (symbolic capital) as well as its support by a dominant European legal community are of crucial importance and are essentially responsible for the formation of the paradigm of a liberal order in the European multi-level system. This is the case even when the forces of persistence and inertia of the Member States resist it and may possibly achieve one or another victory in the power struggle. Added to this situation is the fact that the logic of legal rationalism is powered

[60] Schepel and Wesseling, *op cit* n 14 *supra*, at 165.

[61] G. Garrett, 'The Politics of Legal Integration in the European Union', (1995) 49 *International Organization* 171; W. Mattli and A.-M. Slaughter, 'Law and Politics in The European Union', (1995) 49 *International Organisation* 183; H. Rasmussen, *The European Court of Justice* (Gad Jura, 1998); A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds), *The European Court and National Courts—Doctrine and Jurisprudence: Legal Change in its Social Context* (Hart, 1998); G. Garrett, R. D. Kelemen, and H. Schultz, 'The European Court of Justice, National Governments and Legal Integration in the European Union', (1998) 52 *International Organisation* 149; D. Wincott, 'A Community of Law? "European" Law and Judicial Politics: The Court of Justice and Beyond', (2000) 35 *Government & Opposition* 3; D. Beach, *Between Law and Politics: The Relationship between the European Court of Justice and the EU Member States* (DJØF Publishing, 2001); M.A. Theodossiou, 'An Analysis of the Recent Response of the Community to Non-Compliance with Court of Justice Judgments: Article 228 (2) E.C.', (2002) 27 *European Law Review* 25.

by the boosts of individualisation resulting from growing transnational entanglement. Therefore, the Member States have limited power only, which is not sufficient for them to counteract fully the functional differentiation of European law and the constitution of the new paradigm of a liberal order in the European multi-level system.

It is the legal practice in preliminary rulings that also leads to the legalisation of the relationship between European jurisdiction and national governments. This development is demonstrated by national governments having increasingly made use of submitting observations to the ECJ in preliminary reference procedures since the 1990s, compared to the 1970s and 1980s. In doing so, they turn from the role of sovereign states to members of the EU as supranational unit. Certainly, they submit observations in order to exert influence in their interest on the development of Community case-law. However, they have to comply with the established rules of jurisdiction and have to apply judicial language and sound legal reasoning in order to be respected in the court procedure. The master of this procedure is the ECJ. In order to be effective in this process, Member State governments need to dispose of the necessary legal culture and armament. In this respect there is a great difference in making use of submitting observations between Member States, with France, the UK, Germany and Italy in the lead so that claims for equal equipment and access as well as greater transparency are being made.[62]

We can say that the greater respect for national market regulation, represented by decisions on cases like *Keck*, does not justify an argument for a fundamental change in the Court's guideline and conception of control devoted to the principles of free movement and non-discrimination. Thus, there is ample evidence speaking against intergovernmentalist claims arguing that the Member States are still the sovereign masters of the Treaty and the managing directors of the integration process.[63] The evidence supports more the neofunctionalist argument saying that supranational agencies and especially a 'trustee' like the ECJ have been able to construct an autonomous European legal framework, which has increasingly run out of reach of the national governments, and which is the very basis for transforming national legal traditions even against Member State resistance in the line of neofunctionalist reasoning.[64]

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[62] M.-P. F. Granger, 'When Governments go to Luxembourg: The Influence of Governments on the Court of Justice', (2004) 10 *European Law Journal* 3.

[63] A. Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community', (1991) 45 *International Organization* 19; A. Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', (1993) 31 *Journal of Common Market Studies* 473; A. Moravcsik, 'Liberal Intergovernmentalism and Integration: A Rejoinder', (1995) 33 *Journal of Common Market Studies* 611; A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press, 1998); G. Garrett, 'International Cooperation and Institutional Choice: The European Community's Internal Market', (1992) 46 *International Organization* 533; G. Garrett, 'The Politics of Legal Integration in the European Union', (1995) 49 *International Organization* 171; G. Garrett, R. D. Kelemen, and H. Schultz, 'The European Court of Justice, National Governments and Legal Integration in the European Union', (1998) 52 *International Organisation* 149; G. Tsebelis and G. Garrett, 'The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union', (2001) 55 *International Organization* 357.

[64] W. Sandholtz and A. Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford University Press, 1998); A. Stone Sweet, W. Sandholtz and N. Fligstein (eds), *The Institutionalisation of Europe* (Oxford University Press, 2001); N. Fligstein and A. Stone Sweet, 'Constructing Politics and Markets: An Institutionalist Account of European Integration', (2002) 107 *American Journal of Sociology* 1206; Stone Sweet, *op cit* n 14 *supra*; J.A. Caporaso and J. Jupille, 'The Second Image Overruled: European Law, Domestic Institutions, and State Sovereignty' (23 January 2005), available at http://www.fiu.edu/~jupillej/papers/SIO.pdf.6.03.2006.

Summarising the argument in this paragraph, we can say that the central role of the ECJ in the judicial construction of the European single market, borne by a dominant European legal community, has turned politics into juridical technique. This dominance of the juridical field over the political field has undermined intergovernmentalism. In this way, European forces of change have been empowered, namely the ECJ itself as well as pioneering private litigants. Correspondingly, national forces of resistance have been weakened, because such resistance would have appeared as politics at the wrong place, namely the place where juridical technique and legal reasoning matter instead of interests and political power.

V Making Sense of Legal Change: Turning Functional Adjustment into Constructing a Legitimate Order

In this fourth step it has to be explained whether and why the process of Europeanising the legal order outlined so far involves a fundamental transformation of solidarity, legal order and justice. The generally shared meaning behind individual cases of jurisdiction has to be revealed. It has to be demonstrated whether and why legal change advanced by ECJ jurisdiction makes sense in a broader framework of constructing a European society transcending the traditional European family of nations. Superimposing European 'network' solidarity, 'restitutive' law and justice as equality of opportunity on national 'mechanical' solidarity, 'repressive' law and collectively shared equality of results makes sense of a very harmful transformation process, provides legitimacy and helps to keep resistance within manageable limits.

Looking at the deeper meaning underlying the European legal order, we will recognise that—as compared to national law—it makes a step in the direction of a vocabulary, semantics and paradigm emphasising individual achievement, equality of opportunity, individual empowerment and fairness instead of status security, equality of results and collectively shared welfare. In this sense, the European legal order is also promoting a transformation of solidarity and justice. Of course, there is no guarantee whatsoever for factual development always following this direction. This process is a search for adequate problem solutions that can be stabilised in the longer term. If and in how far this process will succeed is a matter of the concrete development of law, which may deviate from it, but will then suffer from substantial adjustment problems and tensions, as it does not match the structural conditions of transnational social interaction. These adjustment problems and tensions are expressed by setbacks in transnational integration and a relapse to an intergovernmental conflict settlement instead of transnational cooperation. Looking at the European legal order that has developed so far from this point of view, we will widely recognise the formation of an order specialised in regulating interaction between autonomous individuals in the above outlined direction.

This promotion of a European society of empowered individuals by European integration unavoidably implies a latent conflict between the better skilled and equipped individuals making profit from the extended European space of action on the one hand, and the less skilled and equipped people on the other hand. This is well proven by the former's far greater support of European integration and the latter's clinging to national solidarity.[65]

[65] European Commission, Eurobarometer 60: Public Opinion in the European Union (2003).

The construction of a European society is the work of élites forming transnational networks and weakening the primacy of national solidarity. This dialectic of constructing a European society and deconstructing nations has especially been promoted by the ECJ. Apparently this transformation process invokes a deep and long-lasting conflict between the avant-garde of transnational integration and the less equipped and less mobile people who cling to traditional securities guaranteed by the nation state. The dialogue between the ECJ and national courts contributes to promoting the rise of a European identity claiming either priority over or at least secondary significance as against an exclusively national identity.

A field where the promotion of the normative model of a European society composed of knowledgeable individuals by European law is visible paradigmatically is the law focusing on consumer protection, for example the law regarding misleading, comparative and uninvited direct advertising.[66] This is demonstrated by ECJ jurisdiction regarding Articles 28, 30 and 49 EC on advertising cases as well as by European secondary law in Directives 84/450 and 97/55 on misleading and comparative advertising as interpreted by the ECJ. In European law, the average informed, attentive and understanding person has become the guideline for legislation and jurisdiction. Protecting persons who do not meet this average standard would imply greater barriers to trade and competition, which would counteract the Community's aim of promoting the single market. The German law on unfair competition (UWG) and legal practice have regarded an advertisement as misleading and therefore illegal, when a hasty, inattentive, uncritical and unreasonable consumer does not understand a spot. Thus, it aims at protecting the minority of weak consumers that can be estimated at 10%. The ECJ, however, has made use of quite a different image of the consumer. Interpreting the rather open European law, the Court has applied the image of an average consumer, who is informed on the average, attentive and reasonable. The Court aims at the typically empowered and knowledgeable consumer as a self-responsible market citizen.[67] In consumer law, it becomes very clear how much European law—with the ECJ as crucial interpreter—is reflecting and itself changing the structure of solidarity. While the German tradition of consumer law has aimed at protecting the weakest through collective solidarity represented by the state, European law in the hands of the ECJ counts on the empowered, knowledgeable individual and disregards the minority, which does not live up to the standards of a knowledgeable agent.

Vice-versa, we can say that the single market project needs at least normally empowered individuals to be eventually realised. This is the message of European law in jurisdiction as well as in legislation. It is in blatant contrast to the German tradition of protecting the weakest of the consumers as well as weaker suppliers, particularly middle-class entrepreneurs, against the market power of the big corporations. The UWG has long been considered a pillar of the German domestication of capitalism. However, under the rule of European law as well as the changing image of the consumer, empowered by broad educational upgrading, German jurisdiction and legislation has changed in the direction of the guideline of the average informed, attentive and

[66] A. Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Polity Press, 1984).

[67] Relevant cases include Case 470/93, *Mars* [1995] ECR I-1923, Case 210/96, *Gut Springenheide* [1998] ECR I-4657, Case 303/97, *Verbraucherschutzverein e.V. v. Sektkellerei Kessler* [1999] ECR I-513, Case 342/97, *Lloyd v Klijsen* [1999] ECR I-3819, Case 220/98, *Estée Lauder v Lancaster* [2000] ECR I-117, Case 99/01, *Linhart v Biffl* [2002] ECR I-9375, Case 44/01, *Pippig v Hartlauer* [2003] ECR I-3095, Case 239/02, *Douwe Egberts v Westrom Pharma* [2004] ECR I-7007.

reasonable person. The German higher Federal court (Bundesgerichtshof) has, however, moved in the same direction in its own jurisdiction since the 1990s. In Britain as well as in France, there has never been such far-reaching protection of 'weak' consumers and suppliers. In Britain, this would have contradicted the tradition of voluntarism with little governmental regulation of the market. While the 1970s and 1980s saw some movement in the direction of the stronger German philosophy of consumer protection in the Member states as well as on the European level, the liberal market philosophy is clearly prevailing now. This is how a society of empowered individuals is being inaugurated as a normative model in European law, in jurisdiction as well as legislation.[68]

Doubtlessly, European law strengthens the individual against his/her community of origin and, in the case of migration into another EU member country, also against the community of indigenous citizens of his or her country of residence. The ECJ has progressively ensured that individuals cannot be deprived of their rights established by Community law, by national legislation or administration, neither in their country of origin nor in the country of actual residence.[69] European law forms society from the viewpoint of the market citizen who uses his/her liberties on the market to realise his/her own ideas of value, ideals of life and interests. The market citizen exploiting his/her liberties on the market, is also the cell from which originates a legal citizen developing a feeling of what is right or what is wrong in legal terms in the extended European space and liberating himself/herself from national blindness, above all the kind of blindness including some form of discrimination when it comes to market access.

It appears logical that on the way to generalisation, the sense that all kinds of discrimination are unlawful is growing.[70] Race, nationality, religion, gender, age and other features are banned from the list of legitimate criteria in regulating access to market, employment, education, public discourse and the like. As compared to national legal traditions, European law goes one step further in this direction of strengthening the individual and his/her personality by liberating him/her from collective constraints. In this sense, the European legal order advances institutionalised individualism and the 'cult of the individual' to a new level beyond the limits existing in the nation state.[71] The ECJ is a focal site of this cult. Free movement, non-discrimination and self-realisation of the individual is the focus of the new paradigm promoted by the European legal order. In this way it corresponds to the individualisation of living conditions resulting from the ever more finely tuned international division of labour and the correspondingly growing network solidarity. Both sides—law and social structure—complement and support each other. This is made obvious, for instance, in the dwindling force of morally founded regulations of alcohol

[68] J. Schwarze (ed), *Werbung und Werbeverbote im Lichte des europäischen Gemeinschaftsrechts* (Nomos Verlag, 1999).

[69] This has been established in Case 9/74, *Casagrande v Landeshauptstadt München* [1974] ECR 773 and confirmed in Case 85/96, *Maria Martinez Sala v Freistaat Bayern* [1998] ECR I-2691 and Case 184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; see C. Jacqueson, 'Union Citizenship and the Court of Justice: Something New under the Sun? Towards Social Citizenship', (2002) 27 *European Law Review* 260.

[70] M. Bell and L. Waddington, 'Reflecting on Inequalities in European Equality Law', (2003) 28 *European Law Review* 349.

[71] T. Parsons and W. A. White, 'The Link Between Character and Society', in T. Parsons, *Social Structure and Personality* (Free Press, 1964); Durkheim, *op cit* n 3 *supra*.

consumption in the Scandinavian countries and of abortion in Ireland in the wake of joining the EU.[72]

This does not mean, however, that the ECJ judges have fully succeeded in constructing a meaningful and legitimate European legal order. According to Micklitz, there is a disproportion above all between the ECJ's objective of providing for horizontal integration in the sense of looking for the equal application of Community law in each member state and the national courts' interest in vertical integration in the sense of making European law and national law consistent.[73] The ECJ leaves this task to the national courts. The result is a still existing gap between advancing horizontal integration promoted by the ECJ, which proceeds though occasionally somewhere in the clouds, and vertical integration, which remains weak.

What has emerged with the central role of the ECJ in advancing the European integration process, is a kind of 'judicial democracy' in the sense of Tocqueville's classical analysis of the peculiar traits of democracy in America.[74] This is a kind of democracy that does not remedy the widely lamented 'democratic deficit' of the EU, because such complaints take representative democracy as a yardstick. In this type of democracy, power centers on the parliament of representatives regularly elected by the people, in this case by the ideal construction of Europeans as one people. Anyway, this is only an ideal construction that does not even meet the reality of pluralism within nation states. Therefore, under conditions of increased pluralism in the European multilevel system it is much more realistic to conceive of democracy as a complex set of institutions, which help to keep political, administrative and legal decision-making transparent, accessible and open to revision; likewise, they ensure that people in powerful positions are responsible for their actions. A system of checks and balances is more capable of managing the complexity of such a pluralistic system than a fully fledged representative democracy. Such checks and balances are also important for models of deliberative supranationalism, which otherwise would tend towards the rule of wise experts out of touch with the real world.[75]

Miguel Poiares Maduro has interpreted the evolution of the Court's rulings from *Dassonville* to *Cassis de Dijon* to *Keck* as opening up avenues for developing an economic constitution for the European single market along the lines of European traditions, which differ in their stronger political regulation of the economy from the tradition of a liberal economy as represented paradigmatically by the USA.[76] While *Dassonville* has opened the door for establishing a market economy with no political regulation beyond the political devices of guaranteeing equal opportunity and free competition, *Cassis de Dijon* has demonstrated that the liberties of the market might end where fundamental requirements of public order and the protection of the consumer would be undermined. If the Community or the Member States arrived at such a conclusion and it was approved by the Court with regard to its mandatory character, its non-discriminatory nature and its proportionality in regards to its objective such a measure of regulation would be acceptable. After *Keck*, there is even greater space for

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[72] P. Kurzer, *Markets and Moral Regulation. Cultural Change in the European Union* (Cambridge University Press, 2001).

[73] Micklitz, *op cit* n 58, *supra*.

[74] A. de Tocqueville, *Democracy in America*, 2 vols (Alfred Knopf, 1945), vol. 1, 98.

[75] Ch. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', (1997) 3 *European Law Journal* 272.

[76] Maduro, *op cit* n 14 *supra.*

political regulation. There are three models of an economic constitution: a liberal model, a centralised model of regulation on the community level and a decentralised model of regulation on the national level. The decentralised model is particularly attractive in the face of limited chances of concentrating regulative power on the Community level. This is a logically sound argument. However, in empirical terms we have to take into account the structural changes of solidarity brought about by the legal integration of the European single market along with other factors of Europeanisation and globalisation. These structural changes of solidarity set limits on the effective as well as legitimate choice for the economic constitution of the European single market both on the Community level and on the national level. These structural changes of solidarity are in favour of an economic constitution that focuses more on equality of opportunity and individual achievement than on far-reaching equality of living standards, collective achievement and comprehensive protection of the individual by the state. European law empowers the individual, thus it promotes the change of social order towards greater emphasis on the inclusion of the individual into society through activation instead of protection. And it empowers particularly competitive companies to build European economic powers while the organisation of industrialists as well as trade unions is increasingly weakened by this process. Such an activated society turns into a market what has been under state control before. It inevitably creates the problem of dividing society into more or less active individuals and of marginalising those individuals who cannot be activated. Greater inequality within national societies is the consequence of this structural change. It is the disintegrative side of increasing European integration predominantly advanced by mobile élites. Legal integration is part and parcel of this process. There is no European integration without national disintegration. This is what a sociological analysis has to contribute to point out the limited chances of realising empirically different models of an economic constitution for the European single market.

In a nutshell, the ECJ has turned 'naturalistic' functional adjustment of the legal order to shrinking distance and the advancement of European labour division into a meaningful and legitimate order. This is a legal order made for competitive economic actors. It is more appropriate for the market citizen of liberalism than for the political citizen of republicanism, or for the social citizen of welfare states in the social democratic or conservative sense. The ECJ has been a driving force of shrinking distance across national borders as well as the central instance that has turned this naturalistic process into a meaningful procedure aiming at the construction of a new legitimate order. The construction of that order is still an ongoing and much debated process. ECJ jurisdiction has, however, made a fundamental contribution to setting it on a track along a clearly discernible direction.

VI Conclusion

Our analysis of the position and role of the ECJ and its jurisdiction has shown that we will arrive at a more comprehensive and deeper understanding of European integration, if we explain this process with the help of a theoretical approach derived from Emile Durkheim's study on the division of labour in society. The process entails a permanent conflict between European forces of change and national forces of persistence, European developmental dynamics and national developmental paths, for the result of which the distribution of power is crucial. However, not simply power is relevant, but also the kind of power resources available to the relevant actors. It has

turned out that due to its unique position in the EU's structure of institutions, the ECJ assumes a crucial role in this power struggle, which it has been able to fulfill very effectively with the help of the definitional power (symbolic capital) available to it. The settling of the power struggle, however, does not tell us anything about the deeper meaning of the order created in this process. In a move to understand the meaning of this order, we have to grasp the process as functional differentiation of European law from national collective constraints and national legal traditions, as a social construction of legal experts according to the logic of legal rationalism and free movement as well as non-discrimination as substantial conception of control. We also have to explain that process as an adjustment of the law to the structural conditions of transnational social intercourse and the accompanying individualisation of the conditions of life. Any explanation of European integration based on part of this whole process only will be insufficient. Our goal cannot be a mere causal explanation of European integration in a positivistic sense. We also have to try and obtain an adequate understanding of the emerging new paradigm of social order within the European multi-level system in a hermeneutic sense. What we see in this broader view is an emerging European society of autonomous individuals superimposing itself upon the traditionally existing Europe of nations. Individualisation as promoted by the European rights revolution is the vehicle of overcoming Europe's segmentary differentiation into nations and of producing a new transnational European society composed of empowered individuals and a plurality of self-organising associations of autonomous individuals. This does not mean that the family of nations will be completely replaced by the European society of empowered individuals, however the latter is increasingly superimposing itself upon the former. The corresponding tensions will fuel conflicts on Europeanisation versus preserving national collective solidarity for still a long time to come.

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