Conceptual Frameworks for Exploring the Connection Between Law and European Integration

Integration Through Law and Legal Culture

Domenica Dreyer-Plum[*†]

Abstract

This chapter explores the concept of *integration through law* within the context of European integration, highlighting its significance as a foundational element of the European Union (EU) as a legal community. It traces the evolution of EU law from its early years, characterised by treaties and case law, to its current role in shaping a complex legal culture that embodies principles such as democracy and the rule of law. The analysis emphasises how early judicial decisions by the Court of Justice of the EU established key doctrines like direct effect and supremacy, which transformed individual citizens into subjects of Community law and reinforced a distinct legal order separate from international law. Additionally, it examines the gradual shift from integration through adjudication to integration through lawmaking, particularly with regard to the internal market and fundamental freedoms.

The chapter furthermore introduces the concept of legal culture as an analytical framework that combines descriptive, analytical, and normative dimensions to better understand the rich landscape of European law. By focusing on aspects such as legal methodology, argumentation theory, and legitimacy, this approach reveals how legal norms are intertwined with social practices and political contexts. Ultimately, it is argued that while *integration through law* has been instrumental in advancing European unity,

* Dr. Domenica Dreyer-Plum, Senior Researcher, Institute of Political Science, Political Systems, RWTH Aachen University and Senior Fellow, Center for Advanced Security, Strategic and Integration Studies, University of Bonn.

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it must be complemented by an understanding of legal culture to address contemporary challenges related to democratic legitimacy amidst increasing polarisation. This comprehensive perspective aims to enrich scholarly discourse on European integration by bridging gaps between legal studies and political science while providing insights into both 'written and living law' within the EU framework.

1. Introduction: The Legal Backbone of European Integration Processes

The European Union (EU) is a well-established legal community. In addition to nearly 75 years of treaty history, the body of law includes a wide range of secondary legislation and extensive case law. Looking back at the early years and remembering that the EU started as an international organisation similar to the Council of Europe or the OECD, the transformation of the past decades into a political system is all the more remarkable.

Many projects that failed during the unification process in the 1950s, 1960s and 1970s (European Defence Community, European Political Community, the failed transition to majority voting which led to the subsequent empty chair crisis in the 1960s, Werner Plan for a common currency in 1970) were turned into integration successes in the 1980s and 1990s (Qualified Majority Voting, European Political Cooperation, Monetary Union).

Further interactions between success and regression have been observed since then, including the successful eastward enlargement in the 2000s, which has since revealed the fragility of democracy and rule of law processes: the reversibility of political achievements is inherent in liberal political orders and can be abused – to the detriment of the member states concerned as well as the EU, which no longer sees itself merely as a market, but as a community of values. Since the Lisbon Treaty (2009) at the latest, all Member States are also legally obliged to respect fundamental values such as respect for human dignity, freedom, democracy, equality, and the rule of law in their political systems (Art. 2 TEU).

Explaining this transformation essentially leads back to the specific institutional arrangement of the European Economic Community (EEC), which, with the High Authority, had an autonomous supranational institution and thus marked a significant difference to other international organisations. In addition, the Court of Justice of the EU proved to be an undisputed key player in the early years, declaring the legal community

to be a new legal system within the international order and thus creating a new legal space that stood out from classical international law.[1] With the principles of (1) the direct effect of European law, (2) the primacy of European law and (3) the inadmissibility for Member State courts to reject European law, which subsequently emerged through case law, the Court manifested the authority of European law vis-à-vis the member states.[2]

In this context, it is important to look at how and where EU law is essentially created: With the inconspicuous Single European Act (1987), the integration process shifted from *integration through adjudication* in the face of the powerful Court of Justice of the EU in the 1960s and 1970s[3] to *integration through legislation,*[4] with lasting consequences for the democratic legitimacy of European lawmaking.[5] With the insertion of Art. 100a into the EEC Treaty, the Member States intended to facilitate harmonisation measures that were necessary to establish the effective free movement of goods. The need for this harmonisation followed directly from individual landmark decisions of the Court of Justice.[6] The overarching objective continued to be oriented towards economic interests: to achieve the four fundamental freedoms of the internal market. The internal market has always been the "heart chamber"[7] of the European Union. Here, it has full sovereignty in cooperation with the Member States: as soon as the Commission, Parliament and Council act together as European legislators, an irrevocable "change in the holder of sovereignty in central areas of state rule" is brought about.[8]

The law of the legal community continuously manifests itself like a "constitutional sedimentation"[9]: Through the interplay of (1) exclusive com-

1 W. Phelan, 'The revolutionary doctrines of European law and the legal philosophy of Robert Lecourt' (2016) EUI, LAW, Working Paper.

2 K. K. Patel and H. C. Röhl, *Transformation durch Recht: Geschichte und Jurisprudenz europäischer Integration 1985–1992* (Mohr Siebeck, 2020), 66–67.

3 E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *The American Journal of International Law*; A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004); J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal*, 2403.

4 J. H. H. Weiler, see n. 4, 2465; K. K. Patel and H. C. Röhl, see n. 2, 75.

5 K. K. Patel and H. C. Röhl, see n. 2, 75.

6 K. K. Patel and H. C. Röhl, see n. 2, 40–49.

7 K. K. Patel, *Europäische Integration: Geschichte und Gegenwart* (C.H. Beck, 2022), 64.

8 K. K. Patel and H. C. Röhl, see n. 2, 61.

9 T. Eijsbouts, 'Constitutional Sedimentation' (1996) *Legal Issues of Economic Integration*, 51.

petence for the functioning and competition rules of the internal market (Art. 3 para. 1 lit b), (2) the effective shaping of the internal market through secondary law,[10] and the fact that (3) this law is directly applicable and cannot be rejected by Member State courts,[11] but is reinforced by the (4) Court of Justice of the EU with regard to the interpretation of the Treaties in case law practice.[12]

The internal market and the fundamental freedoms have become the nucleus of European integration progress, as the freedoms are interwoven with other sensitive policy areas that have been 'Europeanised' in the course of treaty developments, including, for example, the implementation of the free movement of persons in the Schengen area and the establishment of the monetary area. In addition, the case law of the Court of Justice in relation to the internal market has come to be increasingly used to address political and social issues – such as the right to strike, anti-discrimination and gender equality issues – with legal consequences for all EU member states.[13] It is not uncommon for the Court of Justice of the EU to arrive at an interpretation of norms that is characterised by observers as politically formative.[14]

This chapter contributes to the understanding of *integration through law* by examining its origins and normative shortcomings while developing the concept of legal culture to highlight the political and legal dimensions, such as legitimacy and democracy. Furthermore, it positions legal culture as a tool to address both 'written and living law', thereby offering a more comprehensive approach to analysing the internal market, case law, and the mechanisms of integration through law. In order to do so, we first

10 F. C. Mayer, 'Die EU als Rechtsgemeinschaft' (2017) *Neue Juristische Wochenschrift,* 3631, 3635.

11 K. K. Patel and H. C. Röhl, see n. 2, 67.

12 M. Höpner and S. K. Schmidt, 'Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review' (2020) 22 *The Cambridge Yearbook of European Legal Studies*, 182, 187.

13 M. Höpner, 'Usurpation statt Delegation. Wie der EuGH die Binnenmarktintegration radikalisiert und warum er politischer Kontrolle bedarf' (2008) *MPIfG Discussion Paper*; D. Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie* (C.H. Beck, 2016); S. K. Schmidt *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press, 2018); M. Höpner and S. K. Schmidt, see n. 12.

14 M. Höpner and S. K. Schmidt, see n. 12, 190–191; M. Höreth, *Die Selbstautorisierung des Agenten: der Europäische Gerichtshof im Vergleich zum U.S. Supreme Court* (Nomos, 2008).

look at the formative years of *integration through law* based on the Court's jurisprudence.

2. "Integration Through Law" – a Theory Approach that Captures Judicialisation

Integration through law is a theory approach that focuses on the significance of the European Court of Justice as an actor and creator of the legal community of the European Union as we know it today. Based on a large-scale research project comparing federally organised *integration through law* in the USA and the EU, the theoretical movement of *integration through law* emerged at the European University Institute in Florence.[15] This theory approach provides a particularly informative perspective that is unique among theories of integration in its emphasis on the nature and character of European law.

The theory approach focuses on analysing the role of law and legal institutions in the process of European integration.[16] In this general reasoning, several decisions of the Court of Justice proved to be central not only for the self-understanding of the European legal community, but also for the shape of a legal community that differs from other international organisations rooted in international law. Indeed, particular decisions on tariffs (*van Gend en Loos*)[17] and energy privatisation (*Costa*)[18] resulted in individual rights for citizens and companies within this legal system which national courts must protect.[19]

In the case *van Gend en Loos*, the Court had to evaluate whether customs duty imposed by the Netherlands on goods imported from Germany violated European Community law. The case was brought forward by the Dutch transport company *van Gend en Loos* and addressed the essence of the newly established tariffs union. The Court confirmed the reasoning of

15 M. Cappelletti, M. Seccombe and J. H. H. Weiler, *Integration through law: Europe and the American federal experience* (Walter de Gruyter, 1986).

16 U. Haltern, 'Integration durch Recht' in H. Bieling and M. Lerch (eds), *Theorien der europäischen Integration* (Springer VS, 2012), 339.

17 Case 26/62 *NV Algemene Transport-en Expeditie Onderneming Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 12.

18 Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

19 E. Stein, see n. 3, 10; similar: A. Peters, *Elemente einer Verfassung Europas* (Duncker and Humblot, 2001).

van Gend en Loos by arguing that individuals (and companies) can invoke European law in national courts. In its own words, the Court argued:

> "[T]he states have acknowledged that community law has an authority which can be invoked by their nationals before [national] courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields [...]."[20]

Following this interpretation, the treaties of the European Communities differ from international treaties because they do not regard states but the community – consisting of individuals – as the subjects of the treaty, according to the argumentation in *van Gend en Loos*.[21] On the one hand, this means that European treaties constitute a source of law distinct from international treaties. On the other hand, the judges derived the direct application (*direct effect*) of European law from this, which also results in a predetermination of the principle of the supremacy of European law.[22] Accordingly, Community law applies directly and can establish subjective rights.[23] Direct applicability means that the rules of primary and secondary Community law are binding, provided that they are sufficiently clear and precise and do not require any further implementing acts. They then not only bind the Communities and their Member States but also establish direct subjective rights.[24]

The essential innovation lies in the fact that individual citizens are subjects of Community law, whereas international treaties have so far only recognised states as subjects of treaties.[25] The decision therefore classifies

20 Case 26/62, see n. 17.

21 G. de Baere, *Constitutional principles of EU external relations* (Oxford University Press, 2008), 35.

22 E. Stein, see n. 3, 10; M. Rasmussen, 'Law Meets History: Interpreting the Van Gend en Loos Judgment' in F. Nicola and B. Davies (eds), *EU Law Stories* (Cambridge University Press, 2017), 103, 111–117; L. Azoulai, 'The 'Retained Powers' Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 *European Journal of Legal Studies*, 178, 188–194.

23 E. Stein, see n. 3, 10; U. Haltern, *Europarecht und das Politische* (Mohr Siebeck, 2005), 283.

24 A. Vauchez, '"Integration-through-Law": Contribution to a Socio-History of EU Political Commonsense' (2008) EUI Working Papers RSCAS 12.

25 W. Phelan, 'Goodbye to All That: Commission v. Luxembourg & Belgium and European Community Law's Break with the Enforcement Mechanisms of General International Law' in F. Nicola and B. Davies (eds), *EU Law Stories* (Cambridge University Press, 2017), 121, 131.

as "constitutional foundation" of the European legal community.[26] The law applies not only in a vertical relationship between state and citizen, but also in the horizontal relationship between citizen and citizen and ultimately also in the relationship between citizen and state, because citizens can sue the Member States before their national courts and thus watch over the "integrity of the Community order"[27]. The states are thus deprived of the possibility of determining for themselves which rights and obligations arise for citizens from European Community law.[28]

Thus, from those rather narrow decisions related to tariffs and energy privatisation emerged the general concepts of supremacy and direct effect of European law. These precedents consequently paved the way for a more integrated European legal framework. It is precisely the dynamics and magnitude of these decisions that are emphasised by the *integration through law* approach on integration through *judicialisation*. Accordingly, the latter process winds up shaping a legal community with stricter and more binding rules in comparison to other young European international organisations established at the same time, such as the Organisation for European Economic Co-operation (OEEC) or the Council of Europe (CoE).

At the same time, the theory approach of *integration through law* is not limited to the European Court of Justice but considers the institutional conditions at particular times and the interplay between the Court and other institutions over time.[29] Since the Luxembourg Compromise of 1966, the Member States had had the option of vetoing a Council decision (the main legislative power in the system at the time) if their national interests were affected. Joseph Weiler argues that the Member States were able to accept the decisions of the Court of Justice precisely because of the possibility of preventing legislative decisions through a veto.[30] The intergovernmental and consensual dialogue in the Council as a legislative competence thus contrasted with the Court of Justice, which dogmatically interprets treaty law supranationally. Similar importance is attributed to the case *Costa v ENEL*. In that case, the Italian citizen Flaminio Costa challenged the nationalisation of the electricity sector. Being a shareholder of the electricity supplier ENEL, Costa argued that the nationalisation of ENEL would

26 G. de Baere, see n. 21, 34.
27 U. Haltern, see n. 23, 284.
28 U. Haltern, see n. 23, 284.
29 J. H. H. Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 *Yearbook of European Law*, 267, 267.
30 J. H. H. Weiler, see n. 29, 267.

violate European community law. The European Court of Justice confirmed this reasoning and elaborated that European law takes precedence over (conflicting) national laws, thereby asserting the principle of supremacy of European law.

Accordingly, norms of Community law take precedence over norms from the body of law of the Member States irrespective of the date of enactment of Community law, and irrespective of the position in the hierarchy of norms[31] even secondary law can thus take precedence over national constitutional law.[32] European law is not only on a par with the law of the Member States, it is even higher than national law. This principle of primacy was established as precedent in the *Costa v ENEL* decision.[33] This case therefore likewise counts as a case that gives weight to the authority of European Community law and binds the drafters of the treaties – the Member States – to comply with the obligations resulting from the legal community they have created. The innovative approach – or: "what appears constitutional"[34] – in the Court's jurisprudence is the fact that the Court "requires national judges to treat EC law as if it were a source of law that is superior to, and autonomous from, national statutes, and capable of being applied, directly, within the national legal order, by national judges."[35]

The direct application of *van Gend en Loos* and the primacy principle of *Costa v ENEL* together have a constraining effect on national legislators and restrict the Member States' room to manoeuvre to the extent that they may not take any decisions or regulations that would diverge from European law.[36] This limitation of the Member States' scope for action is further restricted by the fact that the Court of Justice assesses, on the basis of the objectives of the Treaties, whether Member State regulations run counter to the objectives of Community law. If this is compounded by the fact that regional and national courts must ignore national law independently of the legislatures of their home states if a conflict with European law arises, regional and national courts are made the guardians of European law, which in turn observe the principles of direct application and primacy. *Antoine Vauchez* calls this the "emerging constitutional doctrine of EC

31 G. de Baere, see n. 21, 36.
32 U. Haltern, see n. 23, 284.
33 Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.
34 A. Stone Sweet, *Governing with Judges* (Oxford University Press, 2000), 161.
35 A. Stone Sweet, see n. 34, 161.
36 U. Haltern, see n. 23, 284.

Treaties" which enabled the understanding of a "coherent and self-sufficient 'legal order' granted with direct effect and supremacy over national bodies of legislation"[37].

While it is commonly agreed that Community law indeed creates a separate system from the national law of the Member States, the separation from international law is controversial.[38] It has come into effect because "the Court declared it separate"[39]. This is critical,

> "[…] because European integration is about transferring standards from numerous national legal systems to the European level through a central authority by means of original European law. According to this concept, the authority of European law is secured by the primacy of Community/Union law."[40]

Hence, European law received a supreme status in order to prevent norm collisions between European and national law of the participating Member States. To ensure the effect of European law, national courts were additionally required to guarantee for the application of European law through national jurisprudence.[41] This is ultimately the reason, why the scholarly literature from the perspective of *integration through law* view the interdependent jurisprudence on both national and European level as decisive for the European legal community in its evolution toward a multilevel system with European supremacy.

Accordingly, the Treaties of Rome can be conceived as laying a formal and general legal groundwork, while the landmark decisions of the Court of Justice in the early 1960s breathe life into the Treaties (*van Gend en Loos; Costa v ENEL*). Indeed, a handful of fundamental decisions can be used to trace how structural principles of European law have been developed

37 A. Vauchez, 'Methodological Europeanism at the Cradle: Methodological Entrepreneurs, the Acquis and the Making of Europe's Cognitive Equipment' (2014) NYU School of Law, Jean Monnet Working Paper 2014/23, 9.

38 T. C. Hartley, *Constitutional Problems of the European Union* (Hart Publishing, 1999), 138–139.

39 T. C. Hartley, see n. 38, 138–139.

40 F. Schorkopf, 'Rechtsgeschichte der europäischen Integration: Ein Themengebiet für Grundlagenforschung in der Rechtswissenschaft' (2014) 69 *JuristenZeitung*, 421, 424 (translation by the author).

41 W. Phelan, see n. 25, 131.

through judge-made law which paved the way for the later European Union.[42]

Of course, the Court's action would not have been possible without the Treaties, which both instituted the Court and defined the Community's objectives. However, such an argument aims rather to capture the birth of the legal community as an independent entity and to show at what point the European Economic Community diverges from the continuous development to the European Coal and Steel Community. The decisions of the Court of Justice thus mark the first break in the history of integration: one of the supranational, independent, autonomous institutions defines the legal community and its legal culture.

Ulrich Haltern sees the decisions of the Court of Justice as a central contribution to *constitutionalisation through law*, which has helped Community law to become a clearly supranational legal order, in which the Court of Justice has played a significant role through the "gradual construction of this legal edifice"[43]. Therefore, the Court of Justice's activities are also at the core of the theory according to which one can legitimately speak of *integration through law*.[44]

What is certain is that the Court of Justice could not be sure of the approval of the Member States.[45] But in fact the case law has been accepted and respected by the Member States, despite formal opposition. *Alec Stone Sweet's* analysis makes extensive reference to examples of dissent: Belgium, Germany, Luxembourg and the Netherlands protested the doctrine of direct effect declared by the Court in the *van Gend en Loos* case; Italy against the doctrine of primacy in the *Costa* and *Simmenthal* cases; the UK's rejection of the principle of direct effect in the *van Duyn* case.[46]

42 A. von Bogdandy and J. Bast, 'Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge' in A. von Bogdandy and J. Bast (eds), *Europäisches Verfassungsrecht* (Springer, 2009), 24; M. Höpner, see n. 13, 7–17; M. Rasmussen, see n. 22, 111–117; W. Phelan, see n. 25, 130–133; A. McNaughton, 'Acts of Creation: The ERTA Decision as Foundation Stone of the EU Legal System' in F. Nicola and B. Davies (eds), *EU Law Stories* (Cambridge University Press, 2017), 147–152; L. Azoulai, see n. 22, 188–194.

43 U. Haltern, see n. 23, 283.

44 U. Haltern, see n. 23, 283

45 C. Joerges, 'Das Recht im Prozeß der europäischen Integration: ein Plädoyer für die Beachtung des Rechts durch die Politikwissenschaft und ihre Beteiligung an rechtlichen Diskursen' in M. Jachtenfuchs and B. Kohler-Koch (eds), *Europäische Integration* (Leske und Budrich, 1995), 80; E. Stein, see n. 3, 25.

46 A. Stone Sweet, see n. 34, 161.

Furthermore, France resisted the principle of primacy until the 1980s.[47] The Federal Constitutional Court of the Federal Republic of Germany is until today in a dispute with the ECJ over the question of who has the final say in legal matters.[48]

Despite the authority gained by those early decisions, the "heyday of the ECJ" has come to an end in the 1980s.[49] While the Court's decisions in the 1960s and 1970s were used as a support for the integration process at that time,[50] both jurisprudence and integration processes have become more contested. *Loïc Azoulai* explains the acceptance of the case law by the fact that in the 1960s and 1970s, long-term benefits were still expected for the participating economies and citizens. However, a sceptical attitude increasingly developed as EU law penetrated into sensitive areas such as civil rights and social welfare through cross-connections of the internal market.[51] *Christian Joerges* therefore also makes a critical assessment in this line of thought, according to which law has risen above intergovernmental politics by its own means and enforced its validity against sovereign Member States.[52] There is a lack of an "alternative legal theory inspired by cultural theory"[53], which would also do justice to the "deep structure" of law and "is the condition of its normativity"[54]. This is because questions of identity, origin and future are inherent in law,[55] the answers to which are a

47 A. Stone Sweet, see n. 34, 169.

48 U. Haltern, 'Europarecht und ich' in O. Lepsius and others (eds), *Jahrbuch des Öffentlichen Rechts der Gegenwart* (Mohr Siebeck, 2020), 469; D. Grimm, 'Jetzt war es so weit' *Frankfurter Allgemeine Zeitung* (Frankfurt 18 May 2020), 9; A. Nußberger, 'Die Crux des letzten Wortes' *Frankfurter Allgemeine Zeitung* (Frankfurt 20 May 2020), 6; P. Kirchhof, 'Chance für Europa' *Frankfurter Allgemeine Zeitung* (Frankfurt 20 May 2020), 6.

49 K. K. Patel and H. C. Röhl, see n. 2, 23.

50 L. Azoulai, 'Solitude, désoeuvrement et conscience critique / Solitude, Community, and Critique. Motives for a Reshaping of EU Legal Studies (Translated by Cadenza Academic Translations)' (2015) 50 *Politique européenne* 82, III.

51 L. Azoulai, see n. 50, X.

52 C. Joerges, 'Das Recht im Prozeß der Konstitutionalisierung Europas' (2001) EUI Working Papers LAW.

53 U. Haltern, see n. 16, 353.

54 U. Haltern, see n. 16, 354.

55 P. W. Kahn, *The reign of law: Marbury v. Madison and the construction of America* (Yale University Press, 1997); P. W. Kahn, *The cultural study of law: reconstructing legal scholarship* (University of Chicago, 1999); P. Legendre, *Das politische Begehren Gottes: Studie über die Montagen des Staates und des Rechts* (Turia and Kant, 2012); U. Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination' (2003) 9 *European Law Journal*, 14.

task for the European legal community,[56] but are hardly taken into account in the theoretical approach of *integration through law*.

While the dialogue on the law of the Community was conducted between legal and political science until the 1970s and 1980s, this exchange has largely been lost since the 1990s.[57] During this period, the law-making of the European Communities increased exponentially and gained considerably in complexity, which is why law was simplistically reduced to a "technical-serving role" in the integration process, especially in political science.[58] The case law of the Court of Justice still receives less attention in political science in contrast to the legislating institutions. While the Court of Justice is recognised as an engine of integration by political scientists, it is not reflected in the attention paid to the dynamics of judicialisation within the EU.[59] In the following section, legal approaches and political science approaches are reconnected to examine European law through the lens of *integration through law*, emphasising the connection between legal culture and political culture as a means to reinforce the rule of law and democratic legitimacy which ultimately highlights the critical importance of dialogue between legal studies and political science.

3. Integration Through Law and European Law

European integration relies on law and its application. While the law is often underestimated as a technical instrument, it is actually the backbone of European integration. The grand political science theories of European integration (intergovernmentalism, neofunctionalism, multi-level governance) do not consider the law or legal instruments as a significant variable in theoretic assumptions on integration processes.[60] Although all theory approaches implicitly accept that the law is an integral element of

56 U. Haltern, see n. 16, 354.
57 U. Haltern, see n. 16, 339.
58 U. Haltern, see n. 16, 339; J. H. H. Weiler, 'Community, Member-States and European Integration' (1982) 21 *Journal of Common Market Studies*, 39, 39–40.
59 A. Slaughter, A. Stone Sweet and J. H. H. Weiler, *The European Court and National Courts: Doctrine & Jurisprudence: Legal Change in its Social Context* (Bloomsbury, 1998); M. Höreth, see n. 14; A. Stone Sweet, see n. 3; S. K. Schmidt, see n. 13.
60 B. Rosamond, *Theories of European Integration* (Bloomsbury, 2000); A. Wiener, T. Börzel and T. Risse (eds), *European Integration Theory* (Oxford University Press, 2019); A. Grimmel and C. Jakobeit (eds), *Politische Theorien der Europäischen Integration* (Springer, 2009).

the continuous process of European integration, only *integration through law* emphasises the relevance of law, particularly of jurisprudence.[61] Most of this scholarship has a strong emphasis on case law.[62] This is not surprising given that the theory approach *integration through law* in its focus on the role of law and legal institutions in the process of European integration is mainly informed by ECJ case law.[63] However, *integration through law* cannot capture the complete essence of the legal system since it mostly focuses on detailed facets of law.[64] Therefore, this theory approach has been criticised for having an under-theorised concept of law especially on account of missing a culturally founded and grounded concept of law.[65]

It would be analytically meaningful to capture the multidimensional processes of (dis)integration and the interdependencies between the national and European legal systems.[66] Quite in contrast, *integration* seems like a misleading one-directional concept which focuses on top-down processes from the European to the Member State level.[67] It seems that the reciprocal effects of law, integration boosts as well as trends of disintegration are all part of the legal development of the European community.[68] Hence, the term *integration* is already problematic since it hints to an understanding of an ever closer European legal community. While *integration through law* is still important both for our understanding of the emergence of the legal community and for the specific legal structural conditions of the

61 U. Haltern, see n. 16, 353.

62 E. Stein, see n. 3; A. Slaughter, A. Stone Sweet and J. H. H. Weiler, see n. 59; A. Stone Sweet, see n. 34; A. Stone Sweet, see n. 3; M. P. Maduro and L. Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010); N. Fernanda and B. Davies, *EU Law Stories* (Cambridge University Press, 2017).

63 A. von Bogdandy and J. Bast, see n. 42, 24; M. Höpner, see n. 13, 7–17; M. Rasmussen, see n. 22, 111–117; W. Phelan, see n. 25, 130–133; A. McNaughton, see n. 42, 147–152; L. Azoulai, see n. 22, 188–194.

64 U. Haltern, see n. 16, 346.

65 L. Azoulai, '"Integration through Law" and us' (2016) 14 *International Journal of Constitutional Law*, 449, 460; U. Haltern, see n. 16, 353; C. Joerges, 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration' (1996) 2 *European Law Journal*, 105; M. Everson and C. Joerges, 'Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-Law Constitutionalism' (2012) 18 *European Law Journal*, 644, 645.

66 M. Ioannidis, 'Europe's new transformations: How the EU economic constitution changed during the Eurozone crisis' (2016) 53 *Common Market Law Review*, 1237.

67 A. von Bogdandy, 'Was ist Europarecht?' (2017) 72 *Juristenzeitung*, 589, 593.

68 A. von Bogdandy, see n. 67, 593; similar: M. Ioannidis, see n. 66, 1237.

European Union, it does not capture the many facets and working variables of integration processes applicable nowadays and certainly over time.

While the law has been used increasingly as an instrument of integration, the political power of the European Union has not developed on par. Regulation has become the key instrument of European politics through which European (treaty) objectives are translated into legal obligations of the Member States (to apply European law), supported by the adjudication and not least the sanctioning authority of the Court of Justice (infringement procedures). This has ultimately challenged European law as an *instrument*, but – what's even more important: it challenges the legitimating power of law.[69] The "steering capacity" of law is limited if it cannot establish a lasting connection with politics.[70]

Political limits of *integration through law* concern the whole process from the basic understanding of the concept of law to lawmaking and judicial control: European law depends on implementation by Member States given that the European Union has a limited scope of administrative resources or competences and the Court of Justice only limited power for control.[71] The European Union effectively relies on legislative, executive, administrative and judicial structures of its Member States. This vertical dimension is built into the system of the European Union: The European sphere depends on the individual national political and judicial infrastructures. Non-implementation and issues of non-compliance are naturally part of the system since implementation is inherently imperfect in comparison to political intent. Yet, law remains the key instrument of integration and the origin for "the effectiveness of European law"[72]. In this line of reasoning, the self-commitment by Member States cannot be underestimated as expression of the law's legitimation[73]: the binding force of European law is *de jure* and *de facto* connected to the commitment of the Member States. *Integration through law* thus depends on this commitment of the Member States despite inevitable imperfection of implementation.[74]

69 M. Everson and C. Joerges, see n. 65, 645.
70 M. Everson and C. Joerges, see n. 65, 644.
71 C. Joerges, see n. 65, 118.
72 C. Joerges, see n. 65, 118.
73 M. van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 *International and Comparative Law Quarterly*, 495, 514.
74 C. Joerges, see n. 65, 118.

4. Introducing the Concept of Legal Culture

Scholarly attention rarely focuses on the meaning of law in itself and therefore hardly ever addresses the significance that can be attributed to *law* in the European integration process.[75] Of course it is difficult to grasp the essence of law since "the truth of law lies always beyond the law itself"[76]. *Haltern* partially addresses this gap, expounding on the concept of law with reference to *Paul Kahn's* cultural theory of law, understanding the law as "social practice, a way of being in the world"[77]. In this understanding, rule of law is a practice that "maintain[s] a set of beliefs about the self and community, time and space, authority and representation."[78] From this premise follows thus an expansion from a rather mechanistic to a richer ideational view of law.

In a seminal paper on legal cultures, *Mark van Hoecke* and *Mark Warrington* use this term to combine the formalistic understanding of "law as rules" with "attitudes towards law" and the significance of "law as an instrument to create social cohesion", taking into account the embeddedness of law in society and cultural social practice.[79] The social practice is what they coin the "juridical way of life" that substantially influences the essence of a legal system.[80] For comparative law scholar *Lawrence Friedman*, legal culture is "an essential intervening variable" for social change.[81] In this line of reasoning, the law is "not a collection of doctrines, rules, terms and phrases. It is not a dictionary, but a culture; and it has to be approached as such."[82] Rather, this contextualist approach requires the recognition that law is enacted and lived within processes of social change. This perspective allows for a comprehensive approach that takes into account the historical, socio-economic, psychological and ideological context of a legal system.[83] Such an active concept of law connects it both to a constitutional reading

75 Exceptional: C. Joerges, see n. 65; U. Haltern, see n. 55.
76 U. Haltern, see n. 55, 26.
77 U. Haltern, see n. 55, 17; P. W. Kahn, see n. 55a; P. W. Kahn, see n. 55b;
78 U. Haltern, see n. 55, 17.
79 M. van Hoecke and M. Warrington, see n. 73, 502.
80 M. van Hoecke and M. Warrington, see n. 73, 532.
81 L. M. Friedman, 'The Concept of Legal Culture: A Reply' in D. Nelken (ed), *Comparing legal cultures* (Ashgate, 1997), 34.
82 L. M. Friedman, 'Some Thoughts on Comparative Legal Culture' in D. S. Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Duncker and Humblot, 1990), 49–50.
83 M. van Hoecke and M. Warrington, see n. 73, 496.

(structures, set of beliefs, context) and to the processes of lawmaking as expression and practice of rule of law which can reveal more about the character of a legal system.

Legal culture can thus be conceived as a theoretical, conceptual and methodological approach to grasping the richness of European law in a structured way. The aim is to find out how the legal style of the EU has developed in contract law ('written law') as well as through legislation and case law ('living law'). Each category is examined three-dimensionally according to descriptive, analytical and normative premises of legal culture.[84] The descriptive component refers to an interplay of constitutional law, statutes, procedural law and institutional structures as well as ongoing case law.[85] These elements form structures for the further development of the EU's legal culture,[86] which is why treaty history is a central prerequisite for shaping a political and legalistic culture. There is an interaction between the foundations (constitution) and learning processes (adaptation of the system through legislation and application of the law) in the sense of a "living law".[87] The analytical component for capturing legal culture is based on a system of five paradigms.[88] The concept of law, legal sources, legal method, argumentation theory, legitimation of law and the underlying general ideology are analysed as follows:[89]

1) *Concept of law*: What is law? What is the relationship between law and other social norms?
2) *Sources of law*: Who has the authority – under what conditions – to make law? What hierarchies exist between sources of law? How are conflicts of norms resolved? Are there sources of law outside of legal texts?

84 D. Nelken, 'Puzzling Out Legal Culture. A Comment on Blankenburg' in D. Nelken (ed), *Comparing legal cultures* (Ashgate, 1997), 69; E. Blankenburg, 'Rechtskultur' in M. Greiffenhagen, S. Greiffenhagen and K. Neller (eds), *Handwörterbuch zur politischen Kultur der Bundesrepublik Deutschland* (Westdeutscher Verlag, 2002), 502–503.

85 E. Blankenburg, see n. 84, 502; C. Tomuschat, 'Die Entwicklung der Rechtspolitik und Rechtskultur unter besonderer Berücksichtigung der Urteile der europäischen Gerichte und des Bundesverfassungsgerichts', in W. Weidenfeld and W. Wessels (eds), *Jahrbuch der Europäischen Integration* (Nomos, 2015), 43.

86 J. Weiler, 'Deciphering the Political and Legal DNA of European Integration. An Exploratory Essay' in J. Dickson and P. Z. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press, 2012), 138.

87 L. M. Friedman, see n. 81, 36.

88 M. van Hoecke and M. Warrington, see n. 73, 514–515.

89 M. van Hoecke and M. Warrington, see n. 73, 514–515.

3) *Legal methodology*: How is law developed/made and how is it decided in legal disputes? This largely concerns the question: How is the law interpreted? What methods are used, what freedoms and duties do judges have in interpreting the law? What style is used? (statutes, judicial decisions)
4) *Argumentation theory*: What style of argumentation is used? Which arguments and argumentation strategies are accepted? Is the argumentation exclusively legal, or do other dimensions play a role (social, economic, religious, political, ideological)?
5) *Legitimisation of the law*: Where does the law derive its binding effect from? Is it an exclusively formal legitimisation or (also) an ideological legitimisation (moral/religious values)? What gives the system binding force?

Legal culture also contains a normative dimension when it refers to the legacy of ideas and values, as well as expectations of and attitudes towards law and legal institutions.[90] Attitudes and expectations are linked in various ways to ideas of legitimisation and finality, which at the same time provide meaning for the integration process and are an elementary component for the recognition of the legal system. However, the installed legal institutions also reflect expectations and attitudes towards the law.[91] To this end, strategies of power demarcation and the rule of law, which become visible in the successive constitutional development including dynamics of contestation, are considered.[92] This results in the normative consideration of an underlying common foundation: 'Fundamentally shared ideology' as shared basic values, fundamental conception of the role of law in society and the active or passive role of lawyers. This also entails a common understanding of what is considered a legal problem.

5. Legal Culture and Normativity in the European Union

Legal culture in the European context is shaped by several guiding categories, including treaties, secondary law, and jurisprudence, which provide

90 E. Blankenburg, see n. 84, 503; R. Michaels, 'Rechtskultur' in J. Basedow, K. J. Hopt and R. Zimmermann (eds), *Handwörterbuch des Europäischen Privatrechts* (Mohr Siebeck, 2009), 1255.
91 A. Sarat, 'Studying American Legal Culture' (1977) 11 *Law and Society Review*, 427.
92 T. Eijsbouts, see n. 9.

a framework for understanding the legal landscape. Additionally, the interaction between EU institutions and the relationship between European and national levels play a crucial role in this legal cultural formation. A general understanding of the binding force of law significantly influences how EU law is perceived, reinforcing its important position within the system. As the EU system becomes increasingly heterogeneous, it tends to adopt a more legalistic and formalistic character, further emphasising the role of law in governance.

Viewing legal culture as an analytical tool to access and study the law on European level means combining descriptive, analytical and normative components. First, the descriptive category captures the interplay of law, institutional structures and the framework that legal institutions provide. The *acquis communautaire* of the European Union refers to the legal framework achieved in the past seventy years of European integration. Second, the analytical perspective focuses on functions of law and jurisprudence, legal conception, sources and methods of law as well as arguments and legitimation for law and its institutions.[93] The legal system of the European Union is built in a way that it expects implementation into national legal systems from the Member States. The sanctioning authority of the European Commission and the Court of Justice are limited. Compliance depends largely on the Member States. In this line of reasoning, the self-commitment by Member States cannot be underestimated as expression of the law's legitimation[94]: the binding force of European law is *de jure* and *de facto* connected to the self-commitment and implementation of the Member States. Turning to the third component of legal culture, the normative component connects the law to the legacy and heritage of ideas and values as well as expectations and attitudes towards law and legal institutions.[95]

The responsibility for upholding principles of law lies essentially with the actors and institutions endowed with political powers, but also with the media and with the voters as the sovereign's source of legitimisation. The law – as becomes particularly clear here – does not inherently carry the good. Law as justice needs a mandate that must stem from the political process[96] and can be susceptible to injustice precisely for this reason, if

93 M. van Hoecke and M. Warrington, see n. 73, 514–515.
94 M. van Hoecke and M. Warrington, see n. 73, 514.
95 E. Blankenburg, see n. 84, 502; D. Nelken, see n. 84, 70;
96 E. R. Lautsch, *Integration durch Recht* (Mohr Siebeck, 2023), 189.

the common good is missed or violated by particular interests.[97] This is because normative narratives are clearly associated with law, even if the law of a legal system does not provide any moral characteristics in its own right.[98] Associatively, law is often linked to the constitutionally guaranteed separation of powers and checks and balances, which includes a recognition of fundamental civil liberties of citizens in relation to the state.[99] A number of other components – such as access to justice, legal certainty instead of arbitrariness, equality, the exercise of power with moderation, conflict resolution patterns, fair procedures[100] – require further definitions and demarcations. It is often only in the event of conflict – for example during judicial review, i.e. a major strand of *integration through law* – that the content (values) of a norm is actually defined, i.e. further restricted, expanded or otherwise specified and thus determined whether a norm is compatible with overarching values.[101]

In a similar vein, *Mattias Kumm* draws a connection between rule of law as key republican principle that guides the national and European officials in their practices of government, emphasising that republican constitutionalism is a concept shared by the European Union and its Member States.[102] Hence, there is a close connection between constitutional principles of the European polity (basic values such as human rights, democracy, rule of law) and the meaning of the law as it is translated in rule of law practices.

The significance of a community's values is in constant motion, as pertinently captured by Jacques Derrida with the concept of "iterations".[103] Those iterations are processes which reproduce a concept, but always with variation which results from the interplay with social and political contexts.[104] Democratic iterations, as conceived by *Seyla Benhabib*, convey the "complex processes of public argument, deliberation, and exchange

97 L. Green, 'Book Review: Law's Rule – The Rule of Law: Ideal or Ideology, by A. C. Hutchinson and P. Monahan (eds)' (1987) 24 *Osgoode Hall Law Journal*, 1023, 1024.
98 E. R. Lautsch, see n. 96, 174.
99 T. H. Bingham, *The rule of law* (Penguin, 2011), 37–109.
100 T. H. Bingham, see n. 99, 37–109.
101 D. Grimm, 'Recht und Politik' (1969) 9 *Juristische Schulung*, 501, 508.
102 M. Kumm, 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly so Called' (2006) 54 *The American Journal of Comparative Law*, 505, 507.
103 J. Derrida, 'Signature, Event, Context' in P. Kamuf (ed), *Derrida Reader: Between the Blinds* (Columbia University Press, 1991), 90; see also: S. Benhabib, *The Rights of Others* (Cambridge University Press, 2004), 179.
104 J. Derrida, see n. 103, 90; S. Benhabib, see n. 103, 179.

through which universalist rights claims and principles are contested and contextualized, invoked and revoked, posited and positioned"[105]. This takes place in 'strong' institutional bodies such as the legislative, judiciary and executive as well as in 'weak' society associations and media.[106] Embedded in this broad theoretical approach, legal culture implicates several dimensions to inquire the operating range of European law and to transcend the narrow understanding of *integration through law* and similar formats. It provides a clear framework to analyse not only the general concept of law but also *lively processes of law* resulting in social change, in the sense of *Lawrence Friedman*.[107] The analytical framework can be applied to different periods of European integration and for different policy fields. Considering that the structure of the European Union is dominated partly by supranational and partly by intergovernmental structures, the categories provide an analytical tool to capture a nuanced understanding of the legal culture of the European Union, which may differ both diachronically and synchronically, e.g. over time and across policy fields. In this way, the analytical approach to studying European law with a *legal culture framework* advances our understanding of *integration through law* by capturing various dimensions of law that are constitutive for the European legal community: it is not limited to judicialisation but still considers judicialisation as an important aspect of 'living law'. The combination of a consideration of 'written and living law' together with normative aspects of the general concept of law allows for a broader approach to understanding the legal history and current state of the European Union, i.e. to include processes of juridification through legislation as well as case law with regard to method, argumentation and legitimisation. In principle, the access through legal culture allows for greater openness and thus promises to produce more holistic results that enable a differentiated characterisation of the European legal community and its normativity.

6. Conclusion

Integration through law was originally conceptualised with a legal supranationalism that was accompanied by political bargaining processes. Since the

105 S. Benhabib, see n. 103, 179.
106 S. Benhabib, see n. 103, 179.
107 L. M. Friedman, see n. 82, 49–50.

1980s, a dynamic integration process has developed in the EU, in which the relationship between law and politics has been continuously re-institutionalised. In this process, the political dimension has become weaker, while legal techniques were used to compensate for the political weakness of the EU. *Integration through law* emphasises processes of both judicialisation and juridification and their significance for the legal system. The legal focus on the political meaning of case law with view to European integration processes provides for rich understanding and has significant explanatory power for the development of the shape of the European Community in the first two decades of its existence as well as the foundational structures persisting today in the European legal community. It lacks however the explanatory power for the transitionary phase towards a political union that transpired when the Maastricht Treaty came into effect, which was further reinforced by the Lisbon Treaty and the 'living law' under those treaties. It is at this juncture that legal culture allows for the study of several legal dimensions.

In contrast, legal culture through its systematic and categorical method can provide an effective tool to capture, define and thus confront normative challenges such as democratic legitimacy. Especially in times of polycrisis and polarisation, it becomes even more important to be able to assess the underlying legitimating structures and narratives of argumentation backing the democratic legitimacy of legal processes in the European Union. In this sense, legal culture serves as a conceptual tool that facilitates the study of legal and political processes related to *integration through law* – including but not limited to judicialisation and juridicification. Beyond that, it is applicable across various policy fields and broader contexts, encompassing 'written law' (treaties, secondary legislation) as well as 'living law' (application of law and jurisprudence). It captures fundamental aspects of law – such as legal methodology, legal argumentation, and legitimacy – while emphasising a crucial normative component that distinguishes it from the more procedural focus of *integration through law*: Through its inquiry into the basic concept of law, accepted argumentation and legitimation of the law, methods of law and the shared ideology stemming from the practice and experiences of the European legal community.