Convergence and divergence in European public law.

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Perspectives on Convergence Within the Theatre of European Integration

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Introduction

There is a nice anecdote about a conversation between Samuel Beckett and James Joyce, who were friends in Paris in the 1930's: "Beckett was addicted to silences, and so was Joyce; they engaged in conversations which consisted often in silences directed towards each other, both suffused with sadness, Beckett mostly for the world, Joyce mostly for himself".[2] There are, after all, many different possible types of conversation; casual chats between friends, formal discussions in professional contexts, exchanges between priest and confessor or therapist and client, shouts in noisy cafes or whispers in hushed cathedrals, on telephones with no sight, in sign language with no words, and so forth. All of these, though, imply some exclusionary and closed dimension; there is a finite number of people who can take part in a(n effective) conversation, otherwise it ceases to be classed as such. The subject matter, whether static or fluid, is determined only by those taking part and while others may enter the conversation they do so only with the "permission" of the original participants. Furthermore, whatever the nature of the conversation it could also be said that in most, the body language, that is the imperceptible and unarticulated, non-verbal communication is more significant than the words (or signs) used.

The motif of "constitutional conversations" was chosen for this section of this collection in order to try and convey the extent to which constitutional law in Europe is affected by the constant dialogue between different levels of national, transnational and supranational polities. We had adopted the term "constitutional conversations" as signifying the various constructive ways in which national constitutional law and emergent EC/EU constitutional law are constantly being formed and re-formed under each other's influence. The idea was to explore how those constitutional conversations bring about degrees of convergence or divergence in constitutional law. This metaphor was intended to try and convey a sense of how in the complex judicial and political spaces, between national, transnational and supranational levels, constitutional conflict, compromise and consensus are negotiated leading to a level or levels of convergence in constitutional law in Europe. Bruno de Witte concentrates on the core of EC/EU constitutionalism by examining the processes of JGC negotiations, and the methods by which Member State preferences and

[1] With many thanks to Neil Walker for comments on an earlier draft.

[2] R. Ellmann, *James Joyce* (Oxford: Oxford University Press, 1959) p. 661.

interests are mediated and converge in what he terms political conversations. National governments meet in intergovernmental formation to feel for footholds in the steep pathway that is the future of supranational integration. The chapter by Deirdre Curtin and Ige Dekker observes the process of convergence from a different perspective; their examination of the principles of loyalty and mutual recognition as underlying institutional unity in the EU demonstrates the subtle ways in which national laws are pressurised to converge under the influence of EU law. Both of these contributions go far beyond the usual focus of dialogue-based analysis, namely the ECJ-national court relationship. Though quite different in their separate approaches, the two chapters both throw light on the levels and methods of constitutional exchange within the EU polity. Both also address indirectly the extent to which these exchanges produce or are responsible for convergence within areas of European constitutional law. For de Witte, the high table of treaty negotiation is where future convergence is conceived, whereas for Curtin and Dekker it is the unstructured manner in which convergence flows from the operation of mutual recognition that is critically analysed.

Against this background, in this chapter, I suggest that the "conversation" metaphor may not be broad enough to encapsulate the complex nature of convergence within "the messy constitutional tapestry"[3] of the EU. Looking at particular instances of convergence, from a positive perspective, I see them as occurring within a system of plural and intermingling constitutional confluence within the European public law space, in a manner that is more akin symbolically to a theatre of voices rather than a confined conversation. De Witte argues in his chapter that the IGC is "the closest thing to a constitutional conversation in Europe"; the analysis here suggests that the plurality of constitutional voices are expressed on a wider stage, which includes the IGC but which also draws in a much larger number of participants - the audience, if you like. I chose this theatrical metaphor to convey some sense of the intricacy, complexity and dynamism of the way in which constitutional-type convergence is spontaneously generated in Europe.[4] The image of a theatre of voices allows us to imagine and see how parts can be played by many, with many different "plots" or scenarios being developed simultaneously and not necessarily in any organised or focused manner. Many of the chapters in this collection lend substance to this image of a plurality of public law developments within the European legal order (Walker, de Búrca, Curtin and Dekker, Nic Shuibhne). Integration seen as a theatre of voices suggests the possibility of multiple scenarios, actors at many different levels, limited hierarchies, potential for open participation and a grouping of people governed by mutual interdependence, willingly accepted. With the overall framework of participation in European public law viewed thus as an active, open one, I consider how various voices have been expressed within it, leading to what for the purpose of this collection is termed "convergence".

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[3] P. Craig, "Constitutions, Constitutionalism, and the European Union" (2001} 7 *ELJ* 125 at 146.

[4] This is inspired in particular by the tradition of the "radical" French theatre, from Jarry, Artaud and Giradoux through to Peter Brook.

There are three broader, background themes that inform my discussion of convergence. First, a brief word on terminology: what I understand and mean by the use of that term for the purpose of the argument here is that, within the realm of national and supranational public law of the EU, there is an ongoing process whereby those laws are mutually influenced, which has resulted in shared or common principles. The Curtin and Dekker chapter reveals that such convergence does not always respect principles of democracy and accountability, and the Legrand and Harlow chapters consider such elements of convergence to be undesirable and untenable from many perspectives. However, the approach in this chapter, while not ignoring the negative consequences, focuses on instances of convergence that can contribute to the legal order of the EU (including national legal orders) in a constructive and forward-looking way.

Secondly, this discussion of convergence attempts to delve beneath the seemingly rather fossilised, inhuman face[5] of legal integration, and suggest the involvement and participation of actors at many different levels in the transnational judicial space. This leads me to suggest that there are, behind the curtain of the Treaties and the more formal operation of the EC/EU legal order, informal and sometimes imperceptible ways in which shared views, values and aspirations (a *mentalité*) are being formed. In other words, reading between the lines of the ordered,[6] "hard text" of the process of (legal) integration, there is an evolving sense of a European common good that can be said to represent an emergent European (legal) culture.

Thirdly, in order to draw out this system of plural convergence, I discuss recent cases and opinions from the ECJ. This jurisprudence seeks to demonstrate that, viewed through the lens of (positive) convergence, the relationship between the EU and the Member States (and other actors) is one of mutual respect and equality. By this I mean that convergence is not necessarily predicated on European Union institutional railroading of national values or culture or laws,[7] but involves the EU judicial space absorbing national influences and building upon them rather than diluting them, respecting the national or local input. In identifying different variations of convergence within European public law, I argue that such instances contribute to and are an essential part of the foundations of a system of constitutional pluralism that is not (yet) tangible or easily defined, but which is operative and working in unformed ways. In other words, the theatre of voices within the European constitutional space is very active without having a formal structured framework (normally but not necessarily a written constitution) to control it. I see the way in which convergence operates, with non-exclusive participation, with subtle recognition of common European principles, as a primitive early constitutionalism.[8] There are increasingly frequent calls for a written constitution for Europe and though

[5] See I. Ward, "Beyond Constitutionalism: The search for a European Political Imagination" (2001) 7 *ELJ* 24.
[6] P. Legrand, ch. 12 in this volume.
[7] Although see Curtin and Dekker, ch. 4 in this volume for examples of this, and also P. Legrand for the contrary argument.
[8] See N. Walker, "Constitutionalism in a New Key", in G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Aspects* (Oxford: Hart, 2001) and also, "The Idea of Constitutional Pluralism" (2002 *MLR*, forthcoming), arguing against a threshold definition which essentialises European constitutionalism.

these have largely specific political agendas, any committed project for such a document would need to be fully informed by the constitutional history and heritage of the Union. When the history books write of the formation of that constitution, it will not be sufficient to mention the constitutional landmarks, the biased political support and say, thus was a constitution formed. For it to survive, it will be the fact there was underlying, often ignored and unarticulated support in the form of an allegiance to what the peoples of Europe shared which assured this. What is significant is that convergence is not viewed as an imposed, top-down process; it is precisely a consequence of European legal culture, or common conceptions and shared values. Constitutionalism is a fragmentary and varied process. It is also a divisive process, with tensions between the search for core principles and the trend towards establishing diversity and flexibility as having fundamental status.[9] Convergence is part of this process and there is no end point to such a process of convergence.[10] It is one of the constitutionalising forces that Neil Walker discusses.[11] These obviously include the well-known constitutional beacons (such as *Van Gend* and *Costa*), but they also embrace the "small" cases in which the common and often unarticulated is given voice. In looking at some of the instances of convergence here, I see a system of constitutional interactions and relationships operative both beneath and above the more formal and overt ones that are well recognised. They are part of the culture of constitutionalism in Europe, the underlying spirit of a European legal culture.[12] I see the convergent elements that I discuss here as an inherent part of constitutional practice within European law, as one of the many sources of the emerging constitution. They contribute to the gradual growth of an as yet unknown, unseen, and hard to imagine, constitutional formation of the future.[13]

These three themes - "positive" convergence, leading to a European culture, as part of early constitutionalism - form a broad theoretical framework for the analysis of the cases below. Beforehand, I consider some of the arguments raised against convergence.

Arguments against convergence

Gunther Tuebner, in his analysis of the transplanting of good faith into British law by means of an EC Directive, argues that "foreign rules are irritants not only in relation to the domestic legal discourse itself but also in relation to the social discourse to which law is, under certain circumstances, closely coupled … [and

[9] See further, G. de Búrca and J. Scott (eds.), *The European Constitution: between Uniformity and Flexibility* (Oxford: Hart, 2000).
[10] Comment by Z. Bankowski, Symposium on European Public Law, Convergence or Divergence, Aberdeen, May 2000 and see further, Z. Bankowski and E. Christodoulidis, "The European Union as an essentially contested project" in Z. Bankowski and A. Scott (eds.), *The European Union and its Order* (Oxford: Blackwell, 2000) at p. 17.
[11] Ch. 13, below, note 37.
[12] The sort of common good referred to for example in the Preamble to the Irish Constitution 1937; see J.M. Kelly, *The Irish Constitution* (Dublin: Butterworths, 1980).
[13] *Ibid*., p. 19 for a discussion of the gradual formation of the Irish Constitution.

that] the result of such a complex and turbulent process is rarely a convergence of the participating legal orders but rather the creation of new cleavages …".[14] He, like the others considered in this section, regards or deals with transplantation as a one-way process, from outside in, into an established legal order. So, if we consider the question "are European legal systems converging?",[15] it implies we are trying to see to what extent the established individual European national legal systems have been or can be brought closer through the process of absorption or transplantation of influences and rules from each other. It is this view of (possible) convergence that has attracted most contrary argument. The negative consequences and/or impossibility ("transferred rules can only serve as an irritation" … etc.) of national legal systems successfully converging or effectively receiving outside or "foreign" legal rules is the focus of much of the debate. A different perspective on convergence, namely the manifestation and expression of shared values and principles, means it can be seen instead as a horizontal dynamic, both between Member States and from Member State-to-EU. In other words, the locus of the convergence is not necessarily national legal orders but the wider EC legal order itself. Within the debate on the (im)possibility of convergence are arguments which, if inverted and viewed from another perspective, can expose it as a positive process - a consequence of a nascent legal culture or new ways of communicating and understanding through and with legal norms, which is brought about by integration.[16] This is not to deny the obvious tensions that are caused as national legal orders either receive or resist outside rules in the necessary transformation they must undergo as part of the European legal order; there will be irritation and divergence as an inevitable part of this complex process. "European constitutionalism is inherently unstable"[17] and it is natural that suggestions of convergence will be met with opposition. But in the wider and longer-term view of integration, degrees of convergence, whether organic and participatory, or involuntary and forced, are part of the creative conflict that results from the dialogue between legal orders in the EU.

Among the strongest of the voices against convergence is Pierre Legrand, whose work on this subject is well known.[18] In his chapter in this collection, he along with Carol Harlow rails against what they both see as a kind of convergent fundamentalism, sponsored and endorsed by order-seeking EC lawyers in search of coherence at all costs. But convergence does not flow only from the agents of a legal order, but also from those who take active, day-to-day part in it. Secondly, I see the rather crude coupling of the local v the trans/supranational as in itself an artificially ordered view of the nature of the EC/EU legal order. Yet there is in fact much in both the Legrand and Harlow contributions that lends implicit support to a view of convergence in European public law that is not damaging to the national legal system and national cultures.

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[14] G. Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences" (1998) 61 *MLR* 11.
[15] See further, P. Legrand, *Fragments on Law-as-Culture* (Deventer: WEJ Tjeenk Willink, 1999).
[16] See J. Habermas, "Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'" (1995) 3 *ELJ* at 305.
[17] See further, L. Catá Backer, "Forging Federal Systems within a Matrix of Contained Conflict" (1998) Jean Monnet Papers, Harvard Law School: http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-4-.html.
[18] See further, *supra* n.15.

Legrand sees the claims to convergence as leading to the covering up of the living process of society,[19] but convergence processes can be said to the contrary to give life to these processes. Convergence and the "textuality"[20] of the EC legal order are not necessarily at odds with each other, but rather are each part of a more complex, interweaving of processes,[21] the implications of which can bring legal systems closer to each other without inevitable challenge. Ultimately, Legrand has a pessimistic and insular view of the potential of any convergence process, limited as it is to the absorption of influences from other legal systems. The key to understanding this view, and the alternative one, is perspective; Legrand views the national legal system and its "*loiness*" or distinctiveness from inside, looking out at and requiring protection from foreign influences. However, convergence within the fertile plurality of the EU legal order does not have to be limited to this one-way dynamic; national or local level values, cultures and laws also transplant to other legal systems, including that of the EU. In his evocation of loose but resilient cultural units,[22] Legrand implicitly denies the possibilities of this alternative perspective, as if European integration had not brought about any change whatsoever in the outlook of citizens' views on issues concerning the nature and operation of law,[23] whether national or supranational.[24] Just as much as he sees "Frenchness" behind French *lois*, there is no reason to believe that there is not an element of Europeanness behind ECJ decisions or Council Directives as an expression of an emergent "supranational sensibility". The narrow "convergence or not" lens is one way of trying to convey some of the essence of the nature of this sensibility. Yet Pierre Legrand himself nicely describes national sensibility in terms which could just as aptly be used to capture the sense of an evolving equivalent - a collective identity at supranational level: "less conscious, less formulated attitudes, habits and feelings, or even unconscious assumptions, bearings and commitments", which are difficult to verbalise.[25] Ultimately, his argument works only if you accept that national (legal) cultures will eternally look inwards rather than outwards; a static view of European cultures, in other words. But in the theatre of integration, the culture dynamic is not unidirectional and it is not only the main actors (Member States, EU institutions) who have the potential to influence the action.

Carol Harlow's fundamental objection to viewing convergence of European public law in a positive light is based on the need to protect the local from universalising imperatives. In this she shares a certain amount of perspective with Curtin and Dekker, and their analysis of the implications of mutual recognition for national principles. But it is quite hard to see precisely what is the source of the threat to Harlow's "local".

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[19] P. Legrand, ch. 12.
[20] *Ibid*.
[21] See also the Walker and de Búrca chs. in this collection on this point.
[22] P. Legrand, ch. 12.
[23] See further, J.L. Gibson and G.A. Caldeira, "The Legal Cultures of Europe" (1996) 30 *Law and Society Review* 55.
[24] In *How Europeans See Themselves* (Luxembourg: European Commission, 2000), the "worries of Europeans" rank "loss of traditional values" rather low (13 % worried) as compared to the environment (63%) or unemployment and crime (p. 41). Furthermore, in a survey of young Europeans, the loss of cultural diversity is also ranked very low compared to other "meanings" of European integration; 13% as opposed to 34% seeing the EU as representing "a better future" (p. 55).
[25] P. Legrand, p. 234, note 37 citing R. Williams.

She presents a vision of passive consent to elite action, and specifically rails against Civil Codes and similar harmonising initiatives. Here, as in the case of the Legrand argument, I see the objections to convergence founded upon a somewhat constrained vision; European citizens do act within the European judicial space, they are not a passive, ignorant force. Sure, they do so in limited circumstances but, despite the borders, despite the persistence of the local as their most immediate trope, they share problems and also attitudes, beliefs and values with respect to law.[26] The problems, and therefore the solutions, cross borders and so the local cannot always provide judicial solace as it might once have. Grainne de Búrca draws attention to this also in her chapter.[27] Finally, much of the Harlow argument draws attention to the overactivist ECJ and its role in the attempts to force convergence. Yet, an interesting element of arguments based on the role of the court and its over-inventive interpretations of the Treaty is that the latter have never been challenged before the Court itself. Parties involved in EC litigation have never sought to invoke the "illegality" of direct effect or supremacy or even Member State liability. These fundamental principles have gone unchallenged since their original expression by the ECJ. If that Court is seen by some as forcing "universalising imperatives", why have they not been questioned? Certainly, the fact that these principles have gone unchallenged is not an unqualified endorsement of closer integration and Union, but it is a forceful argument for the threshold legitimacy of European legal culture. Harlow herself draws attention to the need for a legal system to be respected yet the unchallenged authority of the ECJ to pronounce fundamental principles points to a legal institution that is very much respected. If the ECJ is seen in some quarters as an instrument of illegitimate convergence, then it is not apparent that this view is so widespread.[28]

Deirdre Curtin and Ige Dekker take a different approach to the dangers of convergence trend in their chapter.[29] Their piece shows how the (unified) EU legal order is bringing about convergence in subtle and unstructured ways. With the focus of most of the other contributions being on the EC legal order, this chapter takes us further along the convergence/divergence debate in examining the ways in which it might be emerging from the EU (rather than merely EC) legal order. The main emphasis of their paper is on the vertical relationship between the EU order and the Member States and this is illustrated in two ways, both of which go to confirming in their view the reality of EU as legal order. Their development of a validity/application theory demonstrates how the EU order *per se* penetrates the Member State orders, while their analysis of the principle of loyalty exposes the ways in which national laws are affected (and are converging) as a result of allegiance to this principle. They are here expanding upon "a Utrecht approach" to

[26] Gibson and Caldeira, *supra*, n.23, p. 58.
[27] de Búrca, ch. 8, this collection.
[28] In *How Europeans See Themselves* (Luxembourg, 2000) the Court of Justice is "trusted" more than the Council of Ministers or the Commission, with 45% of respondents tending to trust the ECJ. It is the second most trusted institution after the European Parliament. The more recently published, *Perceptions of the European Union* (European Commission, 2001), highlights however that "lack of knowledge" about the institutions [in general] is startling, with often total ignorance of institutional mechanisms. The Court of Justice is, nonetheless, recognised more than the Council of Ministers, which is not generally known (p. 9).
[29] Ch. 4.

the nature of the evolving EU legal order observed from the perspective of theory, treaty provisions and legal practices.[30] The developing institutional unity of the EU is seen as gradually emerging from EU and Member States being intertwined, through the operation of both legal principles and legal practices.

The way in which they introduce the element of convergence stems from their discussion of loyalty and the importance of mutual recognition within interlocking legal systems. Each order recognises the other's autonomy and difference, but does so within mutually applicable limits. They assert that loyalty is evolving into a general principle of EU law, which can be seen from treaties and legal practices of the Union - Article 11 and Article 43 TEU, for example. The consequence of the operation of this loyalty to each other's legal systems presupposes homogeneity in terms of basic constitutional values, itself a process in continuous evolution. Thus, extrapolating, the suggestion is that convergence within the realm of constitutional law is being brought about because of the loyalty principle in EU law. Furthermore, EU rules now allow interference by the EU in Member State democracy and fundamental rights. This occurs in the context of sanctions, Article 7 TEU, and also external relations and asylum. Because of the operation of mutual recognition, even when this does not involve the transfer of regulatory powers to European level it does restrict the freedom of action of Member State authorities and obliges them to apply rules from another Member State. This is an example of how convergence in European legal systems can be brought about because of the (negative) influence of EC/EU law. The directive on third-country nationals and the area of European Union criminal law are given as examples of the negative consequence of interlocked legal systems. Curtin and Dekker point out that it is imperative that citizens be given guarantees to counterbalance this operation of loyalty and its convergent effects. They discuss the Dutch *Metten* case, in which the national court gave priority to EU rules over national standards, bound by the principle of loyalty. This would accord well with both Harlow and Legrand, fears for the protection of local laws and legal culture against EU imperatives; EC/EU law can have convergent effects that are damaging to well-established national principles. As Curtin and Dekker point out in a piece which strongly emphasises the need to increase citizenship understanding within the EU polity, such forced convergence can only have the effect of alienating citizens even further.

There are other sources voicing support for this general view of EC law as alienating and as intruding upon the local and upon national legal cultures. Ian Ward, for example, warns against the impoverished constitutionalism of EU law and its dehumanising effects.[31] He decries the lack of political affinity with the EU polity and its alienating jurisprudential discourse. Continuing in this vein, elsewhere, he has called for the need for narratives by which people can make sense of their condition and interpret their common life.[32]

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[30] See further D. Curtin and I. Dekker, "The EU as a 'Layered' International Organization: Institutional Unity in Disguise" in G. de Búrca and P. Craig (eds.), *The Evolution of EU Law* (Oxford: OUP, 1999) p. 83.
[31] I. Ward (2001), *supra*, n.5.
[32] I. Ward, "Amsterdam and the Continuing Search for Community" in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (Oxford: Hart, 1998).

Both Legrand and Ward are articulating the problems of the alienation of the integration project, but there is a fundamental difference in perspective; for Legrand, national legal culture is inherently and perpetually closed to any outside imports from integration. His view is that there is no possibility of seeing or creating a shared legal culture at EU level. Ward on the other hand, while deeply critical of current deficits of supranational law in particular, does not seem to deny scope for the emergence of something more positive in the future.

Neil Walker comments that Ward can be read as saying that "law [lacks] the sensibility to articulate and inculcate a new ethic of belonging".[33] This would imply that both unconverged and converged legal systems are fundamentally unable to appeal to the need for creating a "shared context of possible understanding"[34] or the type of commonality to which Ward refers. I discuss, in the next section, how this might be possible, because of the convergent potential of legal integration. Convergence does not necessarily equate with loss (of national culture, of local standards, of belonging, humanity); it can produce a positive gain as opposed to more frequently bemoaned losses. This may lie behind the fact that Member States have specifically never attempted to dam the flow of actual or possible convergence of their legal systems under the influence of EC/EU law. Precious and unique as their national legal cultures are and vital though national democratic standards are, in the real "constitutional conversation"[35] the actors often appear unthreatened by potential convergence. Equally, the Luxembourg Accords were never invoked to protect "vital" national cultural or democracy interests.[36] Member State governments seemingly are less threatened by convergence than the voices of difference suggest.

Convergence before the courts

The essential argument of the previous section was that, contrary to some other voices in the debate, transplants do not have to be regarded as necessary irritants. To do so is too narrow a view of legal cultures generally, but more so in the context of European legal culture, of European integration. The goals sought by communities, at national or supranational level, can have fundamental tensions and there is nothing unexpected about that. Equally, the reaction to and reception of the convergent effects of the EC/EU legal order are manifestly imbued with tensions and contradictions. Curtin and Dekker, in their effort to uncover some of the obfuscations of the EU legal order, use a magnifying glass to see it properly. In order to observe the multiple workings of convergence, an instrument more like a sensor or radar might be more appropriate at "measuring" the reality of converging legal systems, as this is often not tangible or articulated in obvious

[33] N. Walker, *supra*. n.8, "The Idea of Constitutional Pluralism".
[34] .J Habermas, *supra*, n.16.
[35] de Witte, ch. 3.
[36] P. Craig, "Constitutions, Constitutionalism, and the European Union" (2001) 7 *ELJ* 125.

ways. The process of convergence is just as amorphous in its many manifestations as national legal cultures can be. To take this point further, convergence born of a coming together of national cultures in a given context under the influence of and with the facilitation of the EU legal order, is just as complex and fluid as the legal systems that lie beneath. A few examples of recent decisions and Opinions from the ECJ may help us to "feel in the dark" for some of the various manifestations of convergence and transplanting, either way, Member State to EU and vice versa.

The first is *Netherlands v. Council*,[37] where the ECJ found that "the domestic legislation of most Member States enshrined in a general manner the public's right of access to documents held by public authorities as a constitutional or legislative principle". Secondly, take the recently delivered Opinion of AG Léger in *Council v. Hautala*.[38] In this case, concerning access to documents/information from the EC institutions, the Council appealed from the Court of First Instance decision, claiming that that Court misconstrued Decision 93/731, and sought to make a distinction between a right to information and a right of access to public documents. *Netherlands v. Council* did not concern, in substance, the nature of the right to, or principle of, access to documents in EC law. But the finding of shared attitudes in Member States, accompanied by the Commission's study of comparative access to document rights, is the basis for Léger pointing out in his Opinion that this consensus amongst Member State laws "reflects the strength and relevance of that right".[39] In a development paralleling the developments at EC level, a large number of states have amended their domestic legislation since 1996. This "convergence of national laws ... constitutes a decisive reason for recognising the existence of a fundamental right of access to information held by Community institutions".[40] The AG goes on to emphasise that 13 out of 15 member states have a general rule on public right of access to information held by the administration and, even though such rules are not identical, they demonstrate a "common conception in most of the Member States".[41] This reference to a common conception is in fact reminiscent of the kind of unarticulated, shared, *mentalité* to which Legrand refers. He does so for the opposite reason of highlighting the inevitable differences between the Member States, but here it is evoked as evidence of closeness amongst Member State laws. As Léger recalls, such "convergence of constitutional traditions" suffices to establish the existence of a principle of a fundamental right at EC level without the need to draw on other European or international instruments. Indeed, he asserts that "it may suffice that Member States have a common approach to the right in question, demonstrating the same desire to provide protection" relying on *Hauer* and *Hoechst* to make this contention.[42] The existence of this common

[37] Case C-58/94 *Netherlands v. Council* [1996] ECR I-2169.
[38] Case C-353/99 P *Council of the European Union v. Heidi Hautala*, appeal from the Court of First Instance, Opinion dated 10 July 2001 nyr, and judgment of 6 December 2001 nyr.
[39] Para. 54 of the Opinion.
[40] Para. 55.
[41] Para. 58.
[42] Para. 69, Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727 and Cases 46/87 and 227/88 *Hoechst AG v. Commission* [1989] ECR 2859.

conception in Member State constitutional traditions leads the AG to state that "it appears natural to me to accept that there exists a principle of access to information held by the national public authorities and that that principle is such that it would engender an equivalent principle at Community level".[43] This leads him finally to two main contentions: first, that Community institutions should be subject to the same principle of access which is common to the Member State institutions; and, secondly, that transfer of sovereignty in specific fields should be accompanied by similar transfer of safeguards accorded to citizens.[44]

This Opinion by Léger concerns the construction of a fundamental principle in the EC legal order based upon recognising shared traditions and conceptions at Member State level. The key tenet of his argument is that such shared traditions as to fundamental principle are a sufficient basis for the establishment of a similar principle at Community level. The consequence: convergence in national laws is the basis for a fundamental right in EC law. This is an example of what might be termed reverse "or bottom-up convergence"; it is the other side of the convergence coin as compared to the view of convergence taken in most debates on the subject. It is a positive perspective, viewing convergence as happening amongst Member State laws, under the influence of or at the same time as a development in EC law, which in turn influences a development in Community law. However, such a view contrasts with Curtin and Dekker in this regard, as they specifically highlight the area of access to information to show the negative effects of Community law. I expand on this further below.

A final point about the access to information story is that, as well as providing an example of non-irritating convergence, it also demonstrates an interesting trajectory from a moment of "political conversation" of the type to which Bruno de Witte refers in his chapter. The right of access to documents/to information began life as a political statement in the form of a Declaration attached to the Maastricht Treaty. This is a demonstration of the significance of the IGC process and how an EC "fundamental right" or principle can develop from a merely political product of that process into a full blown fundamental right; a relatively short journey, in fact, from politically influenced initiative via Court endorsement into acknowledgement as right. AG Léger in *Hautala* emphasises the importance of this consistent political will by the Member States.[45] As he points out, Declaration No. 17 is the first tangible act in which the Community acknowledged the general right of access to information. Of course, not all IGC initiatives are similarly successfully "implanted" in the

[43] Para. 59.

[44] He also seeks the support of the provisions in the Charter of Fundamental Rights of the European Union, relying on the solemnity of its form and the procedure that led to its adoption to suggest that it is a privileged instrument for identifying fundamental rights and a source of guidance as to the true nature of the Community rules of positive law (para. 83).

[45] Case C-353/99 P *Council of the European Union v. Heidi Hautala*, appeal from the Court of First Instance, Opinion dated 10 July 2001, para. 52 nyr.

body of EC law; EU citizenship occupies a grand and lofty position in the Treaty (Articles 18-22), but has yet to receive proper attention from either political or judicial institutions since its placing there.

In their analysis of the institutional unity of the legal order of the EU, Curtin and Dekker draw on the principle of loyalty, based on Article 10 EC, which they argue is "evolving into a general principle of Union Law".[46] There are two, independent, interesting aspects of this argument: first, that a loyalty principle/obligation can be traced in Union (as opposed to Community) provisions; and, secondly, that the operation of a "general principle" can be extended to Union legislative activity and policies. This has wide-ranging implications for the future judicial control and interpretation of the action of the Union. How loyalty works in this context is seen in "interference by the EU as such in Member States' democracy and fundamental rights"[47] and in the evolving legal practice of EU mutual recognition. This inevitably restricts the freedom of action of national governments, and obliges them to recognise and apply rules emanating from another Member State. This might be said to be "enforced" convergence - as opposed to voluntary or spontaneous convergence, which works only if there is mutual trust in each other's systems. The positive implications of a theory of loyalty are not reciprocated in practice, as it can operate so as to reduce the existing rights of citizens. This "enforced convergence" via loyalty can have the result that Member States feel unable to apply their own (higher) standards in the face of EC/EU provisions that are closely related to national constitutional values. Curtin and Dekker return to the access to information field, citing *Metten* as an example of a national authority/Court, in the face of convergence at EU level, applying EC rules in order to pre-empt the more generous provisions of the national constitution.[48] This position is implicitly endorsed more recently in the enactment of Regulation No. 1049/2001 on Public Access to Parliament, Council and Commission Documents, which specifically mentions the principle of loyal co-operation, which should ensure that Member States "do not hamper the proper application of the Regulation".

Both of these examples from access to information contrast in a marked way with Léger's Opinion in *Hautala* and, as Curtin and Dekker point out, suggest that the "principle of loyalty is employed so as to impose an obligation on Member States to override their more extensive provisions of national law in case of conflict".[49] Loyalty is operating, they argue, so that fundamental principles of national legal orders will not undermine an emergent fundamental principle of the Union legal order.[50] This is what writers such as Legrand and Harlow are afraid of; the overriding of national constitutional values by binding principles of EU law. How does this possibly fit in with analysis of the type given by Léger? Is the latter an exercise in window dressing,

[46] D. Curtin and I. Dekker, ch. 4.
[47] *Ibid*.
[48] *Metten v. Ministry of Finance*, July 1995 (Raad van State, afdeling administratie).
[49] Curtin and Dekker, ch. 4, p. 75.
[50] *Ibid*.

hiding the reality of the convergence process? Or it is a matter of perspective; whichever way you look at it, convergence, even on precisely the same substantive issue, can be seen as either positive or negative?

After Léger's arguments in *Hautala*, one might believe the relationship between convergence in national laws and fundamental principles of EC law to be quite clear and straightforward. The next case considered shows this not to be so. The recently decided *Jippes v. Minister van Landbouw*[51] does present another example of what I would term (potential) positive convergence. It demonstrates also how a degree of convergence amongst Member State laws can lead to the expression of a need to see that particular law or principle confirmed at Community level. It was a reference from the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry) in the Netherlands, which was dealt with by way of accelerated Article 234 procedure,[52] and addressed the question of the legality of the policy of slaughter to control foot-and-mouth disease. Ms Jippes asked to have her animals[53] vaccinated rather than slaughtered. This request was denied by the Dutch agriculture ministry, and Jippes appealed that decision to the referring court and raised an argument that the relevant Community law containing a vaccination ban was incompatible with the European Convention on the Protection of Animals kept for farm purposes. The relevant Community law on foot-and-mouth disease is Directives 85/511 and 90/423, which provide for the slaughter of animals in the case of a foot-and-mouth outbreak as well as emergency vaccination in specific circumstances as an exception to a slaughtering policy. These were supplemented by Decision 2001/246 dealing specifically with the Netherlands outbreak. The relevant animal welfare provisions are found in both international[54] and Community rules, the latter being Declaration No. 24 and Protocol attached to the TEU.[55] Aside from the particular foot-and-mouth vaccination/slaughter issues, Jippes and the other appellants contended that the vaccination ban was contrary to what they termed was a general principle of animal welfare protection in Community law. As the Court summarised, this contention was based on the fact that "that principle forms part of the collective legal consciousness" [of the Member States].[56] The fact that animal welfare was not listed amongst the objectives of the Community should not, according to Jippes and the other appellants, affect its establishment as a general principle or, alternatively, as "an interest to be taken into account in making a policy choice".[57] The question raised by the referring Court was whether such rule or principle forms part of the Community legal order.

The ECJ looked to various Community sources and found insufficient support for the establishment of animal welfare as a general principle of Community law. The lack of its inclusion amongst the Treaty objectives, no

[51] Case C-189/01, decided on 12 July 2001 [2001] ECR I-5689.
[52] Art. 104a ECJ Rules of Procedure;
[53] Four sheep and two goats.
[54] The European Convention for the Protection of Animals kept for Farming Purposes.
[55] It is interesting to contrast the different paths of Declaration No. 17 (access to information) and this Declaration.
[56] Para. 48 of the Decision.
[57] *Ibid*., para. 54.

well-defined principle in the TEU protocol and Article 30's reference to the life of animals by way of exception only, led the Court to conclude that the need to ensure animal welfare is not to be regarded as a general principle of Community law. However, it is to be classed as an interest of the Community, to be taken into account in the formulation and implementation of policy. The Court did not address the argument as to "collective legal consciousness" and in fact, to the contrary, draws attention to the differences which currently exist between the legislation of Member States as well as "the various sentiments harboured within those Member States".[58] In substance, it finds that the protection and health of animals was taken into account in the formulation of Community policy; i.e. both the general slaughter provisions and the specific Decision of 2001 were in fact aimed at improving the health of animals.

In dismissing the possibility of a general principle of animal welfare protection, the Court does not develop any lengthy argument as to the differences that exist between Member States or the meaning of "sentiments" as to animal welfare. It presents these differences and sentiments as a given, without acknowledging the legitimacy of a contrary argument as to a shared, collective legal consciousness. Was it swayed by the economic implications of any positive endorsement of animal welfare as a principle? Was it the wrong case (involving only six endangered animals) or the wrong time, coming as it did in the middle of widespread foot-and-mouth outbreaks across the EU and the largely economic interest arguments raised by the six states intervening in the case? It is true that the denial of a general principle in this case was not primarily rooted in the assertion of differences in Member States' law and legal culture, or culture as to animal welfare, for only Community law sources in essence are examined. But the claim that animal welfare protection should be classed as a general principle formed the significant first part of the referring Court's questions, founded on the appellants' claims as to collective consciousness. The ECJ is willing to draw, briefly, upon the position of animal welfare in Member State laws and attitudes as part of the negative assessment of general principle, but ignores that this might in any way feed into an opposing argument. The denial of general principle completely ignores the possibility of some element of collective legal consciousness that might affect this negative analysis. This approach contrasts in marked fashion with the arguments of AG Léger in *Hautala* and I compare the two positions further below.

But first a brief discussion of an interesting point made in a recent Opinion by AG Jacobs[59] in *Netherlands v. European Parliament and Council*.[60] The Netherlands was seeking to have Directive 98/44 (on the legal protection of biotechnology) annulled, its objection, in essence, based on "the notion that plants, animals and parts of the human body may be patentable",[61] raising six specific grounds for annulment, including

[58] Para. 79.
[59] As in the Léger Opinion, the recently proclaimed Charter of Fundamental Rights is here also cited as if it were a potentially legally binding instrument.
[60] Opinion of AG Jacobs in Case C-377/98, 14 June 2001 nyr and judgment of9 October 2001 nyr.
[61] Para. 10 of the Opinion.

subsidiarity and human rights. Recital 6 in the Directive refers to "*ordre public* and morality", and inventions are to be unpatentable if they offend either of these. The national patent office and courts are required by the Directive to look to ethical and moral principles recognised in a Member State in order to determine whether *ordre public* is threatened. There is a history of this practice in Community intellectual property law; i.e. a refusal of registration if national public policy is offended, which refusal is subject to review by the EC. Nonetheless, national authorities may determine the scope of the concept of public morality in accordance with their own scale of values. But Jacobs in this Opinion, considering the issue of legal certainty of the Directive and whether public morality and *ordre public* are sufficiently clear, suggests that the limits of this national or local discretion now be revised and reviewed. "It may be that the ethical dimension of [patenting of biotechnology] is now more appropriately regarded as governed by common standards".[62] He relies for this on a decision of the Technical Board of Appeal of the European Patent Office in 1995. Morality was there defined as being founded on "the totality of the accepted norms which are deeply rooted in a particular culture".[63] This is a statement that would find acceptance with those who argue against convergence. But this is followed by the interesting statement, a glimmer of light on the obscure and complex recesses of the European culture question, "For the purposes of the European Patent Office, the culture in question is the culture inherent in European society and civilisation".[64]

The *Hautala* Opinion seems to suggest convergence working in reverse order, whereas the Curtin and Dekker analysis of the same area of law suggests the very opposite, tangible evidence of one-way, forced convergence, EU rules railroading national law and legal cultures. This is very far from the sensitive evocation of low-level Member State influence in IGC format germinating a general principle of wider access to information in citizen interest at EU level. From Léger, one might begin to see how a European culture might be said to exist; common or shared values being identified and located at national level, and "transplanted" to EU level. Yet the opposing view, as analysed by Curtin and Dekker, demonstrates the insensitive, dehumanising, anti-citizen type overriding by the EU of national values, a "top-down" transplant bound to irritate. In further contrast, take Jippes seeking to impress upon the Court the need to recognise the existence of a general principle, relying like Léger on a collective legal culture, but the European Court of Justice effectively ignoring this. Finally, though, as seen in the recent *Netherlands* case, another European-level judicial body has the courage and passion (in perhaps an unlikely context) to invoke European culture and civilisation, and acknowledge the existence of a European culture. What is odd here is that such words would sound alien coming from the ECJ itself, natural home of such recognition which that Court might seem to be in principle.

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[62] Opinion of AG Jacobs in Case C-377/98, 14 June 2001, para. 102.
[63] *Ibid*.
[64] *Ibid*.

The *Jippes* case is an example of an attempt to assert that convergence or shared values should be recognised; the Opinion in *Hautala*, an analysis of how such shared local values can feed into the EC legal order (reverse convergence); *Metten* (and the new Regulation) a case of "negative'' convergence, the realisation of "irritable'' EC law; and, finally, in the Jacobs Opinion we find the embodiment of the fears of those who are wary of convergence, in the simple statement of an Advocate General that there is a European culture and shared morality and values (*mentalité*) in Europe. In *Jippes*, a shared *mentalité* is evoked to try and prove a principle; in *Metten*, a principle is used to quash a local *mentalité*. In *Hautala*, it is Member States' shared values that underpin and define a principle of access to information, yet under the Regulation (and in other instances given in Curtin and Dekker), "shared" laws are artificially imposed from another legal order. "Common conceptions'' are preciously respected by Léger in *Hautala*, yet ignored by the ECJ in *Jippes*. There are, in other words, two co-existing, conflicting trends: the local defeated by EU loyalty, leading to "involuntary" convergence; or, as against that, shared, converged values at local level, called upon as the basis of (new) fundamental principles at EU level.

Conclusion

There is a tension in the EU legal order between the need to respect and preserve the specificities of the national legal systems, and the need to draw upon shared national values to authorise and legitimate supranational law. The question of the "desirability" of convergence amongst the national legal orders lies at the heart of this tension. What has been suggested in this chapter is that convergence need not have negative effects upon national legal systems and can, if shared values and attitudes are harnessed properly, lead to constructive effects in the wider EU legal order. My main contention has been that convergence of national rules does not have to be an irritant, does not have to offend either national democratic standards or national legal culture, and does not have to operate in such a way as to override long established national provisions. As other chapters in this collection have shown, convergence can of course have the potential to do so and mine is not a thesis based on a blindly optimistic view of the process of convergence. However, convergence can be and is, already in cases, a positive, constructive process, which hints at the emergence of a European legal culture. The instances of bottom-up convergence that I have identified here contribute to a space of culture and principle, which sits between and brings closer together national and transnational systems. Such convergent trends do not compensate for the lack of an adequate theory of democracy in a plural framework of governance[65] but can feed into its formation.

[65] N. Walker, "All Dressed Up" (2001) *OJLS* 563, review article of J.H.H. Weiler, *The Constitution of Europe* (Cambridge: CUP, 1999).

Central to the debate, and highlighted by Pierre Legrand in this collection, is the question of culture and legal culture. I have suggested in this chapter that it is essential to recognise the possibility and potential of a European legal culture in itself. Convergence occurs because of the existence of such a culture and, at the same time, helps to create and recreate its content. The emergent transnational judicial space allows actors at many levels to contribute to this process. However, there are inevitable tensions as I have shown above, between the effects of convergence on national legal orders and the way in which national legal orders can contribute to the EU legal order. Conflict and consensus - divergence and convergence - are destined to swim together eternally in this constitutional sea. This contradiction, and indeed this collection as a whole, tends to suggest that it is necessary to accept some inevitable levels of complexity and confusion as part of more global, constructive process. The overall picture of converging legal systems that emerges is eventually more akin to a Jackson Pollock than to a serene, ordered Vermeer.