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Piasecka, Anna

2008

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Citation for published version (APA):

Piasecka, A. (2008). *European Integration vs. European Legal Cultures : A Comparative Case Study concerning Harmonization and Implementation of EU Migration Law*. Lund University.

Total number of authors:

1

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EUROPEAN INTEGRATION VS. EUROPEAN LEGAL CULTURES



**A COMPARATIVE CASE STUDY
CONCERNING
HARMONIZATION AND IMPLEMENTATION
OF EU MIGRATION LAW**

*PhD – Thesis
in
Sociology of Law*
2008

European Integration vs. European Legal Cultures

**A Comparative Case Study
concerning
Harmonization and Implementation
of EU Migration Law**



UNIVERSITÀ
DEGLI STUDI
DI MILANO



LUND UNIVERSITY

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PhD – Thesis written within the doctoral
programme:

Renato Treves International Research
Doctorate
in
“Law and Society”

Thesis presented and defended
in Milano
8 July 2008
at
Milan University
(Università degli Studi di Milano)
Philosophy and Sociology of Law
Department
Faculty of Law

Established in partnership with;
The University of Milan-Bicocca
The University of Insubria
The University of Bologna
The University of Urbino
The Centro nazionale di prevenzione e
difesa sociale in Milan
The University of Lund
The Carlos III University of Madrid and
the University of Antwerp

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PhD-thesis title
European Integration
vs.
European Legal Cultures

*A Comparative Case Study concerning
Harmonization and Implementation
of EU Migration Law*

Preface

Writing a scientific work demands a combination of creativity and discipline, which seldom are qualities that go “hand in hand”.

It is difficult to sit back and try to give an image of what the last three years have meant. Writing a PhD has been a very interesting process, during which I have learned the importance of discipline, organization and self-reflection. It has been a course of fun, freedom, as well as an anxiety and stress related situations.

Now when this work is finish there are a number of people that should (be) mention specifically, since they have given me so much (such great amount) of their time, knowledge and encouragement.

I am very appreciative for having the opportunity to take part in the Renato Treves International Doctorate in Law and Society coordinated by Milan University. I am grateful for the international experience and the opportunity to meet international scholars and get a chance to realize a multifaceted education that has given me international practice and knowledge for life. The people I have meet throughout the Treves program will always have a very special place in my memory. A particular gratitude to Professor Vincenzo Ferrari, for coordination the Treves programme and giving me the chance to take part in it.

Without a tutor and mentor, writing PhD thesis would be a particularly lonely and difficult process. In my opinion the tutors role is to give the PhD-candidate what he/she needs most in the process, somebody that can be able to make us do what we can, and make us realize

what we are capable of. For this, I am very thankful to my tutor Professor Håkan Hydén, that has been with me from the start of this PhD, to the end, and stressed the fact that I can actually do this. Thank you Håkan, for the inspiration, support and guidance as well as all the time you have given me throughout the years. I am especially thankful for all the opportunity you have given me to take part in conferences, scientific projects and seminars.

For becoming a Sociologist of Law, I have to thank my co-tutor, Associate Professor Lars Eriksson. My first meeting with Sociology of Law was through Professor Lars Eriksson and it is because of his inspiration that I am here today. Just as you were there at the beginning Lars, you are with me at the end of the PhD, and it is thanks to you , that my “thinking process” moved ached fast enough to let me finish the thesis in time.

I want to mention the incredible support I have had from my colleagues and *friends* from the department from Sociology of Law at Lund University. A special thank to Lilian Dahl that has always done her best to help me overcome all my bureaucratic discomforts in the university world, as well as always made me feel welcome at the department of Sociology of Law. Thank you Lilian, without you I would be an administrative catastrophe.

Throughout the years I have grown closer to my colleagues at the Sociology of Law department, have had many interesting discussions, dialogs and consultations about our work, which has been an enormous help. Nevertheless, at the very end of your PhD-work, you are all alone with the material and have to make something of it. Even then, the fantastic support of all my colleagues has had a big impact on that the PhD got finished. In this context, I want to set aside a special thanks to my PhD-candidate colleagues, Anna-Karin Bergman, Susanna Johansson, Stefan Larsson and Helene Hansen for their maintaining support and enduring all my complaints and questions.

A particular consideration to my family is essential. While writing the PhD-thesis, they have always encouraged me that I will do it, and never left any room for doubt. They have listened to my complaining and in the last two months while I have been finishing the PhD, had to endure several difficulties because of me. A special thanks to my parents for believing in me from the beginning, and to my fiancé for being a fantastic support for the last nine years.

A PhD cannot be written without financial support, in relation to this, I want give a special recognition to the scholarship offered by the Treves programme and the University of Milano, the Crafoord foundation, and the department of Sociology of Law, where my colleagues, Associate Professor and Doctor Annika Rejmer have created multiple opportunities in relation to financial support. Ultimately, I want to thank the whole boards of the Treves programme for creating this opportunity for young scholars to have international experience.

Anna Piasecka

Lund University
20th of June 2008

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1 *Introduction and Background*

The comprehension of harmonization and implementation of European Law, as a part of European Integration, begins with its name “Europe”. It comes from the Latin word *Europa* and Greek *Ευρώπη* and means centre, middle, main geographical and cultural point. How easy it is to notice that the name in itself encourages and predisposes a Euro-centralism, which in fact has a long ideological history of hegemony relating to “European culture”. This design has been the inspiration of today’s European Union, that through an integrated Europe we can reach higher goals in the member states that are part of the community, and ensure peace, freedom, welfare and equality for all its citizens. There is however a reason why Europe has chosen this path of integration. The European continent has had a dynamic and violent history. Countries of Europe have battled each other from the very foundation of Europe. There have been alliances of integration between European countries that have risen and fallen, and new ones have taken their place. There have been measures to assimilate Europe before, but the attempt has never succeeded. (Tokarczyk, 2000, p. 1).

Europe suffered two world wars that brought destruction to the continent. After the last war ended in 1945, some European Countries

determined that the only way to ensure peace is if Europe is an alliance and mergers economically. As of 1950, the European Coal and Steel Community begun to unite European countries economically and politically in order to secure lasting peace. The six founders are Belgium, France, Germany, Italy, Luxembourg and the Netherlands. Nevertheless, the 1950s came to be dominated by a cold war between east and west, separating Europe ones again, and after two world wars, the second half of the 20th century was victimized by a cold war between west and east. This political conflict separated neighbours and caused suspicion and hostility between the people, countries, leaders and ideologies. In Europe, the iron curtain split the continent in half. Under several decades there where different views about how states, religion, economic development and societies should evolve.

In 1989, one of Europe's political systems broke down. The fall of Communism in the countries east of the iron curtain and the reformation that swept through Eastern Europe was the first step on the way towards a united Europe.

Today Europe is not only a region or a continent. Europe is an international society with not one history but a multifaceted narration of ideologies and identities, which has lead up to the will to create a common civilization that will have a united and strong future. Historically it has been unattainable to compound many countries into a societal system through democratic procedures. The communistic Soviet Union is often discussed as an example of when a centralization of power becomes a hegemony that dominates others, as was the case of Eastern Europe.

The “new Europe” faces consequently the task to obtain a democratic societal system with 27 or more member states that thrive with self-determination and liberty. The political process that has lead to the current design that contains and means a present struggle of power

that often results in compromises and a consensus that makes it possible to continue the process of integration.

What gives the European Union strength and impact, is more than international cooperation. It is a parliament with a legitimate function of power to decide about legal norms that binds legal subjects in the form of member states. It is also the opportunity to make decisions with majority, as well as European institutions that can make legal initiatives, and have power of legal interpretation.

In 1993, the Single Market was completed with the “four freedoms”; movement of goods, services, people and money. The 1990s were also the decades of two treaties, the ‘Maastricht’ Treaty on European Union in 1993 and the Treaty of Amsterdam in 1999. A small village in Luxembourg gives its name to the ‘Schengen’ agreements that gradually allows people to, *inter alia*, travel without having their passports checked at the borders. This opens a completely new scope of difficulties for the European Union. With the free movement of persons, there is a need for regulations concerning migratory movements. Migration flows within Europe, and to Europe from third countries, is not a new phenomena that came about with the opening of European borders. This phenomenon has however taken new form and opened new problems.

Since Schengen opens up the possibility for EU-citizens to move freely throughout the Union, it also opens the possibility for third country nationals that have gained a residence permit in one EU-member state, to move without restraint. This could potentially mean that while one EU-member state has very restrictive migration law, it would not matter in practice since another EU-member state would have a liberal legislation, and the immigrant would be able to apply to the liberal country and then move wherever he/she wanted in the EU. Another possibility for the immigrant would be to move around in

Europe and attempt to attain a residence permit in one European country after the other, to finally perhaps get it in one of the countries.

This has brought about new EU legislations like the Dublin convention, stating that an immigrant can only apply for asylum or residence permit in one EU-member state, and that decision is final. The European Union now had a legislation that unified reception procedures in *one aspect* and they could control migration from outside. Europe was to be legally perceived as one country. Yet again, this untied a new range of complications. Europe now had a system that ensured an immigrant would not try applying for asylum in several EU-member states. But what about the equal grounds for reception, and the different legal systems in the European countries? At the Tampere Council meeting on the 15th and 16th of October 1999 it was decided that the only way to ensure equality and a fair receptions for immigrants, and at the same time ensure an area of freedom, security and justice in the European Union, is to have a harmonized European migration law. The efforts for this started without more ado in the Amsterdam treaty, with a five-year program that would ensure the unification of migration law in the areas of asylum, reception condition and procedures through the creation of EU-directives. At this time, the implementation of the above mentioned measures are implemented in national legislations of EU-member states.

This PhD-thesis begins its point of analyses at this moment in time. Can the European directives really ensure that there is an equality throughout Europe and a fair reception for immigrants in member states? If we want to know, we have to study the member states that are implementing these directives in practice and establish a deeper understanding for their social structures. This study aims at approaching this issue from a perspective of sociology of law, mainly, to study what forms of “foreign” law takes different societies, in this case EU-member states legal cultures. The legal culture of a member state,

cannot be changed overnight and reflects the possibilities of an equal implementation of EU-law. Each member state has their own history that is in fact effected by European history in general, but the legal systems in Europe have had their own developments. The member states legal culture can be perceived as “underlying traits, ideas and experience” within the legal field. If we study legal cultures in member states, they can illustrate how developed a legal field is, and how possible it is to assume that we will have a common migration law. If we understand the dynamic between needs and legal requirement of member states vs. the intention to harmonize European law, the process of integration in Europe will become more transparent, adapted and productive. I aim at trying to present a proposal by integrating these thoughts in a comparative case study of the EU-member states, Poland and Sweden and their implementation of EU-directives.

1:1 *Research Enquiry and Questions*

There are four general research questions in this PhD. The research questions will be answered to form an outline of the dynamic between harmonization and implementation of EU-law and diversities in that process in member states.

Initially, it is important to understand the normative intentions of the European Union to be able to discuss if the member states actions are corresponding to EU's expectations. The interesting question is *why and how* member states have an equivalent implementation, or not, in regards to implementing the normative intentions of EU. If

there are differences in the implementations of EU-member states, we have to understand why these differences occur, and what this could further mean for the progressing European harmonization. To understand this dynamic I have chosen to define the following research questions;

- What normative intentions are constructed in European treaties and directives concerning migration law?
- How are these normative intentions recoded, interpreted and expressed in national law?
- Are there differences in interpretation between member states? If so why?
- What does the above mean for the harmonization of migration law?

1:1:2 *Some Definitions of Concepts Used In the Research Enquiry*

Normative generically indicates to “*relating to an ideal standard or model*”(National Encyclopedia). Practically it has a firm insinuation of relating to a *typical* standard or model. *Normative* statements in philosophy verify how something should or ought to be, how to value something, which things are good or bad, which actions are right or wrong. Normative is usually contrasted with positive (i.e. descriptive, explanatory) when describing types of theories, beliefs, or propositions. In law, as an academic discipline, the expression "normative" is used to portray the way something ought to be done according to a value position

An *intention* (*plural intentions*) specifies a course of action that is intended to follow. It relates to the performing of an action with a specific *purpose* in doing so. The *end* or *goal* that is aimed for is intended to be accomplished. Whether an action is *successful* or unsuccessful depends at least on whether the intended result was brought about. A normative intention from the European Union consequently means what a country should do, and that their goals and aspirations ought to contain for a successful harmonization.

Harmonization of law comes from the root word harmonize which under the OED means “make or form a pleasing or consistent whole”. In the case of harmonization of law, the aim is to make a consistent whole of law. It is an important concept in the European Union for creating common standards across the internal market. The legal definition of harmonization is: “Cooperation between governments to make laws more uniform and coherent”, and a “policy of the

European Community to achieve uniformity in laws of member states to facilitate free trade and protect citizens” (Nygh, P & Butt, P 1997 p. 543).. Making laws more uniform and coherent, does not necessarily mean that they have to be identical, but the practical outcome of law in practice cannot be completely different depending on what member state we study. “Harmonization is a process of ascertaining the admitted limits of international unification but does not necessarily amount to a vision of total uniformity (Menski, W. 2005, p. 39).

The politics of *migration* and the *concept of migration* law should be understood as the whole and complete set of rules and actions in relation to migration, out from a country, and into a country (immigration an emigration). From this point however, this study will be referring to migration mostly in the *context of asylum* seekers and third country nationals applying for residence permits in the EU. The term “migration” is used instead of asylum or other terms, because it is the perspective and concept the European Union uses to take in the entire viewpoint. The legislations concerning migration are also very often compound and merged, with all the regulations of both asylum and EU-citizens free movements in one single legal statute. The concept of *legal culture*, which has an immense part in the study, will be elaborated in chapter 3.

1:2 *Research Purpose*

There are several purposes with the study. The primary intention is to build an explorative methodological model with a theoretical framework that can be tested empirically. This model is a “hypothesis

construction” that assembles a hypothetical representation constructed in the intention of exploring a form of analyses. The empirical example of migration law will illustrate the theoretical structure, and be a case of how to study legal cultures of European member states and the impact of EU law on national legislation. For this reason, the empirical material itself is not so extensive. It aims at exemplifying and being a point of entry, an impact, through which we can discuss the model and theoretical framework. The construction of hypothesis is based on theoretical concepts. The study does not aim at reflecting the position of the immigrant and his different disposition depending on which member state he/she applies for asylum. The intention of the theoretical model is to have a tool with which we can study an immense social construct as the European Union empirically and still have important results. There are many scholars that never attempt to study “Europe”, because it becomes highly abstract. Nevertheless, if we create a model that could potentially provide tools for analyses, we could have an outline that would be useful in concrete measures to ensure that the cooperation, and above all communication, between EU and national states becomes clearer. This study uses the context of the migration field in two EU-member states, to demonstrate how we can recognize and comprehend the framework of harmonization in practice. Through studying harmonization in the context of member states specific legal cultures, we will be able to measure the legitimacy and evolution of EU-law in a certain contexts.

1:3 *Disposition*

The thesis is divided into 5 chapters. The first chapter introduces the study and elaborates around the research questions, which are driving the analyses foreword. I introduce the subject and discuss the purpose of the study as well as generally define some of the central concepts.

The second chapter is dedicated a descriptive passage concerning the structure of the European Union's legislative construction, the role of power and politics in the EU, as well as legislation processes and governance. I also elaborate the perspective of perceiving the European Union as political system even though the EU is not the object of study as such. The need for defining "the European Union" in a certain perspective, derives from the necessitate to elaborate from what angle I want to consider integration and harmonization, and what field I believe them to subsist in. Considering EU as a political system changes the theoretical approach to harmonization and by definition to implementation of EU-law, because they become political measures intended for a certain goal.

Chapter 3 embarks on the theoretical framework. This chapter builds the explorative "hypothesis construction" and elaborates a methodological model with by a development of the theory by Pierre Bourdieu. Bourdieu's perspective is the base for structuring the hypothesis and the theoretical framework. The theoretical chapter also discusses and defines the concept of legal culture and describes how the term will be used and developed through the study. Discourse analyses is a part of the study in the course of my document analyses,

which is why I also consider a brief theoretical discussion about the perspectives discourse analyses brings about.

Chapter 4 presents the method of my thesis and some methodological reflections in studying the European Union. Discourse analyses is discussed as qualitative method of studying legal documents, and the meaning behind doing a deconstructive reading in the context of my theoretical framework commencing in a social constructivist approach. There is also a descriptive passage dealing with a portrayal of what documents are to represent the demonstrative empirical example.

Chapter 5 ends the thesis with a merger of the previously presented developments by an analytical framework that brings us back to answering the research questions. From the point of the discourse analyses, I evaluate the normative intentions of the European Union to harmonize the migration field, and discuss what this means for the legal cultures of my case studies. Further, I present the general thought of the hypothesis and theoretical model to discover legal cultures in a comparative perspective. I discuss how we can, by studying practice and understanding diversities between member states, understand the process of implementation of EU-directives. Ultimately, the thesis ends with a discussion about harmonization of migration law and what scientific opportunities the elaborated theoretical framework and model can bring about.

1:4 Limitation of Material and Perspectives

In any study relating to Europe, or even a nation, there is an abundance of perspectives and angles of approach. A macro-sociological study opens up for countless possibilities and variables to study. Of course, every study has its limitations and perspectives that have to be chosen in relation to the context of the research enquiry. This study limits itself to being a hypothesis building framework with a theoretical approach, and the limitations are set by what the theory can articulate in the given context. The empirical material used in the study is consequently narrowed down to what is needed as a representation of how the theoretical framework could be used scientifically. The European Union could be discussed from numerous perspectives but the choice to study it as a political system, lies in the need for an approach that would contain possible explanations to how and why a political system like the EU uses their political power to impose normative intentions concerning harmonization onto member states.

The theoretical framework could be approached from various perspectives, however I find that Pierre Bourdieu's theory gives a very interesting angle in which we can study and elaborate legal cultures. His theory in itself proposes a methodological model of how we can study practice in different contexts, and with his openness in this approach, it is possible to develop this consideration in the direction of legal cultures.

The methodological part of this study would be quite uninteresting without a discourse analyses. A discourse analyses gives a possibility to make a deconstructive reading of legal documents and allow the researcher to see what social constructions are “behind”, the legal text.

As empirical method, discourse analyses uncovers the rules and norms of legal cultures in my case studies. Any other text analyses methods would be dreary, un-colourful, and only give a description of the text. The limitation to only study the treaties and the directives concerning migration law lies in the decision to only focus on the normative intentions and implementation processes. There are other angles to take in a document analyses, for example studying case law from the EC-court. The decisions of the EC-court also provide important implication, both for EU as whole and for member states. By studying cases from the EC-court, it would be possible to go even deeper in the understanding of what normative intentions there are concerning the unification of migration law. The reason for not analyzing case law from the EC-court is mainly due to the time limitations, and to the fact that the extra document analyses would presumably not alter the form of the methodological model and the theoretical structure. There are of course other qualitative methods than a discourse analyses and document analyses to study diversities of legal culture, and specifically their practice. However since this PhD is focused on creating a methodological model with a theoretical frame, other methods like interviews or observations in agencies practicing migration would in this case be redundant. The empirical material does not aim at presenting “reality” or describing a current situation, but is merely an example to illustrate how the methodological model to discover legal cultures can be utilized. In a future study where the aim would be to test the model in a more inductive approach, other methods would be necessary.

When the study compares case studies and legal cultures, the comparison is based on a developed theoretical structure not on empirical facts.

The migration field has many interesting angles and variables that effect its construct. Each scholar could give numerous examples of

what effects migration in society and what societal conflicts and dynamics arise from it. There are variables and social structures in each country that have an outcome on the migration issues, and when we analyse legal culture there are many matters that form it. We can consider the labour market as one of the primary variables mentioned in previous research. The labour market issues in relation to migration has been one of the most argued political agendas in Europe. Since this is an immense political dilemma, it is in all probability one of the elements effecting a countries legal culture. Apart from the labour market, that in itself is a very wide field, with black labour market issues etc, we also have other social structures as history, geography, economy, religion etc. All these variables are measurable phenomena that could be very interesting to study in relation to how they generate legal culture in a field. However, this PhD, as said before, limits itself to constructing a model and discussing how we could study the above-mentioned variables.

2 *Understanding the European Union as a Political System*

It is difficult to approach such a broad and general study as the study of the European Union (EU). As a social scientist, you have to make the decision to overlook details and concentrate on the “bigger picture”. Nevertheless, it is crucial to define a framework and perspective to have a clear outline of the study, before starting the point of analyses.

What kind of political creation is the EU? This trivial question has caused a lot of problems for scientists in disciplines as law and political science. If EU ones was created to be an international organization, the gradual and deepening integration has changed the cooperative project into an international body without any parallel in the world. This can mean that scientifically EU is continuing to be an undefined phenomenon and to quote one of the European commission’s presidents a “*un objet politique non-identifié*”¹, meaning an unidentified political object. Even if this perspective can seam overstated the

¹ Jacques Delors, president of European Commission (between 1985 and 1995).

fact remains that EU is neither an international organization nor a state in its customary meaning. However the EU has traits of them both. As an international organization, the EU is constructed by its member states, being the EU-countries. These members have key roles when it comes to decision making, however on the other hand the EU has a supranational character that is visible for example by the fact that some EU-institutions have an independent position in some decisions. EU has also some characteristics of a federal state like the division of power between the national and centralized supranational level (Tallberg. 2007, p. 12). The European Union has a complicated task to achieve concerning integration, since “Europe” does not exist as a “country” or “state” in a traditional sense. There is no common arena for the citizens of Europe to build a public opinion. There is no European party system or European president, no common media, common language, general ideology or legal system. But there is a common market and tendencies towards unified policies and law, which define Europe’s economy and therefore identifies solutions and problems for each member state (A. Piasecka, P. Saitta 2006).

The development of The European Union began approximately 50 years ago and has since then been defined by two parallel processes. On one hand the cooperation has been deepening by the fact that member states have stretched the cooperation to additional political areas and delegated more authority to the common EU-institutions. On the other hand EU has expanded to involve additional European member states (Tallberg. 2007, p. 21)

There are many ways to approach a study of the European Union and its institutions. Many scientific disciplines have prearranged this approach. Political scientists in international politics tend to see EU as a special international organization while scientist in administration and comparative politics have tried to understand EU through drawing parallels to national politics. However there is a perspective that is

becoming more popular and that is the perspective of perceiving the EU as a political system (Tallberg. 2007, p. 13). The European Union as political system opens many possibilities of studying power dynamics, and what measure EU uses as political system to impose norms upon member states. It is in reference to this important to remember that while studying EU as political system we are not studying it as a State (Hix, 2006).

A political system is created by three major parts, the political actors that try to achieve their interests through the political system, political institutions for collective decision-making and political decisions that effect the division of resources and values among the actors of the political system (Tallberg. 2007, p.13). Often this system is compared to a process of production, where the interest of the actors is the political input, the institutions are the political machinery and the decisions are the political output.

In the European Union you have all three processes. Many political actors such as companies, political parties, citizens, unions, etc are directly or indirectly participating and realizing their political interest in EU's political process and expressing their views and interest in purpose of affecting the direction in which the decision-making process goes (*ibid*). The political machinery is by now well developed. In the centre for the legislation process we have the commission, parliament and council of ministers, to which we should add a number of EU-institutions, none the least the EU-court of Justice and the European Council. These institutions or organs together have the power to legislate, execute, and judge. This system produces an immense range of political decisions and these decisions have their consequences in the member states, among others because of the fact that EU-law abides before national law. Almost all political areas are today in some way an object for legislation or collaboration within the EU

(Tallberg. 2007, s 13). The European integration process is part of the political system

At this point, we must consider what separates the notion of political system in this context from the notion of *system*, developed, for example, in Niklas Luhman's work (Luhman 1983, 1984). "System theory" posits that "legal structures" are self-referential. This proposition confuses the symbolic structure, or political measures, within the social system, which produces it. It does this to the extent that it presents the old formalist theory of the juridical system, under a new name. However, although a symbolic order from the order of norms and doctrines contains objective possibilities of development and directions of change, it does not contain the principles of its own dynamic. (Nonet & Selznik 1978).

There are several definitions of "political system", though all of them have similar practical and empirical examples of what a political system should contain. A political system is a system of politics and government. It is usually compared to the legal system, economic system, cultural system, and other social systems. It is different from them, and can be generally defined as a normative system and a system of ideology. A political system is a place of institutions, interest groups, political parties, trade unions, and lobby groups. The relationships between those institutions and the political norms and rules that govern their functions (constitution, election law) is what makes the political system dynamic and legitimate. A political system is composed by the members of a social organization (group) who are in power and is a system that necessarily has two characteristics; a set of interdependent components and boundaries toward the environment with which it interacts. The political system can be considered a concept in which we can theoretically regard as a way of the government by formulating a policy and organizing administration. (Almond, Gabriel A, et al. 2000).

We can find properties in the definition of a political systems that we find in the EU structure: Interdependent parts, Citizens, Government, Boundaries , Citizenship, Territory, Property, are all central dialogues in focus within the EU body. By choosing to focus on EU as a political system the dynamics and mechanisms on which a political system functions can be analyzed.

2:1 *The Role of Politics and Power within EU-Institutions*

The institutions, or in other words, the political machinery, assemble the core in EU's political process. Through EU's institutions interests become politics. Within these instruments of collective decision-making political views and interest meet each other and resolute the line of EU's political perspective. The forms in which EU-institutions are assembled control who and what is important in EU's political process. There is a balance of power that influences the level of authority political actors have. By seeing these dynamics we can say that this is why EU-institutions form EU's political decisions. This also means that the political decisions can be changed whenever the political construction and positions of power in the EU-institutions change.

The five most central EU-institutions with political and legal power that effect every scientific study of the European Union are the European Commission, the European Parliament, the European Council (Council of ministers) and the EC-court (Tallberg. 2007, s 14). The EU-institutions are driven by politics and power. When different political interests meet in interplay politics are made, and when decisions

are made in this interplay power is exercised (Tallberg. 2007, s 16). This can seem self-evident but important to mention since a glance at the EU and its institutions can seem somewhat technical and bureaucratic. Competitive interest clash and decisions that are made can be to an advantage for one group in society and disadvantage for another.

Sometimes EU is misrepresented as if it stood for a certain political perspective. However EU's political system doesn't represent either "right wing" politics or "left wing" politics per say, but constitute a level of decision-making where different political interests clash to achieve influence just as in the national, regional and local levels.

An often used argument today as to why we need to have a decision level that is supranational is the consideration that a growing amount of issues are transnational in nature and thereby demand integrated measures. To effectively be able to engage in solving economical, ecological and social problems member states delegate their authority in decision-making to the joint EU-institutions. Practically this means that the member states are gambling their sovereignty and sacrificing a certain amount of national independence to achieve joint influence over the problems at hand. This process is a way to reconstruct the political efforts in a political issue that is no longer effectively dealt with nationally. However this also means that none of the national governments can be certain that their political perspective will be significant in the joint decision making (Tallberg. 2007, s 17).

2:1:2 EU's Legislation Process and Governance

The EU governments have sought to reduce the democratic deficit by increasing the powers of the European Parliament since 1987. Under the Amsterdam treaty's version of the co decision procedure, the Parliament is a coequal legislator with the Council, whereas the Commission's influence is likely to be more informal than formal. Second, as long as the Parliament acts as a pro-integration entrepreneur, policy outcomes under consultation, cooperation and the new co decision will be more integrationist than the Council prefers (Garrett, 2000, p. 1).

The EU's legal system contains a multiplicity of legislative procedures used to enact the above mentioned legislation. The treaties provide the basis for all legislation and lay down the different ways of adopting legislation for different policy areas. A common feature of the EU's legislative procedures is that almost all legislation must be proposed by the Commission, rather than member states or European parliamentarians. The two most common procedures are co-decision, under which the European Parliament can veto proposed legislation, and consultation, under which Parliament is only permitted to give an opinion which can be ignored by European leaders. In all cases legislation must be agreed by the council (U. Bernitz, A. Kjellgren, 2006).

In the centre of the European legislation process we find the commission, parliament and the council of ministers. In addition we find other EU-institutions and organs like the EU-court and the EU-council. In all, these institutions have legislative, executive, and judiciary au-

thority. This system produces a volume of political decisions. EU's collected regulations often called *l'acquis communautaire* was estimated to hold an amount of 85 000 pages of text in 2004 (Tallberg. 2007, p. 13).

The Law of the European Union is a unique legal system which operates alongside the laws of Member States of the EU. EU-law has direct effect within the legal systems of its Member States, and overrides national law in many areas, especially in terms of economic and social policy. It has been ruled several times by the European Court of Justice that EU law is superior to national laws, and even Member States' constitutions. Where a conflict arises between EU law and the law of a Member State, EU law takes precedence, so that the law of a Member State must be disappplied. This doctrine, known as the supremacy of EU law, emerged from the European Court of Justice in *Costa v. ENEL*. (Case 6/64, *Falminio Costa v. ENEL* [1964] ECR 585, 593).

However, while Community law is accepted as taking precedence to the law of Member States, not all Member States share the analysis used by the European institutions about why EU law overrides national law, when a conflict appears. Many countries' highest courts have stated that Community law takes precedence provided that it continues to respect fundamental constitutional principles of the Member State, the ultimate judge of which will be the Member State (more exactly, the court of that Member State), rather than the European Union institutions themselves. This reflects the idea that Member States remain the "Master of the Treaties", and the basis for EU law's effect. In other cases, countries write the precedence of Community law into their constitutions. For example, the Constitution of Ireland contains a clause that, "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European

Union or of the Communities..." EU law covers a broad range which is comparable to that of the legal systems of the Member States themselves (Article 3 T. EU). Both the provisions of the Treaties, and EU regulations are said to have "direct effect" horizontally. This means private citizens can rely on the rights granted to them (and the duties created for them) against one another.

The other main legal instrument of the EU, "directives", can have direct effect, but only "vertically". Private citizens may not sue one another on the basis of an EU directive, since these are addressed to the Member States. Directives allow some choice for Member States in the way they translate (or 'transpose') a directive into national law - usually this is done by passing one or more legislative acts, such as an Act of Parliament or statutory instrument in the UK. Once this has happened citizens may rely on the law that has been implemented. They may only sue the government "vertically" for failing to implement a directive correctly (U. Bernitz, A. Kjellgren, 2006). Directives require transposition into the domestic legal system of the Member State in order to become effective. If a Member State fails to transpose the Directive in a timely manner or fails to do it at all, the Directive will take 'direct effect', that is, individuals are able to derive rights from that Directive directly despite not being transposed into domestic law. A Directive could be transposed through enactment under legislation from the national parliament or through agreement by reference (Ginsburg, & Cooter 2004 p. 64). The Directives are flexible to the extent that the national authorities of the Member States have the choice of the form and method of the implementation of the Directive. This takes into account the fact that Member States have differing legal systems (Craig & de Búrca 112). Hence this allows the establishment of a harmonized framework of laws whilst preserving the established national laws of each member. This is the major appeal of harmonization over unification.

Treaties and *directives* are thereby the most important legal acts in the EU. *Treaties* are legally binding and directly applicable. This means that they abide in the same way for all member states, companies, institutions and citizens from the time that they are declared by the Council. Even *directives* are binding, except these can be directed to all or some of the member states and they often demand implementation into national law to abide. The member states have a time limit (usually two years) to implement a directive to national law so that the goals of the EU are fulfilled. The point of a directive is that they (most of the time) don't unite a legal field completely, as a treaty does. They don't demand in the same way that all member states apply exactly the same law. The directive is an effort for a very related law, that is to say a harmonization of law. The directives contains very specific goals that the countries must attain, but the conduct towards these goals are left up to the member states. In this way the member states don't have to start new institutions or create completely new laws. They can use existing institutions and organizations and change laws that already exist. They are complied to uphold the goals and ambitions of the EU, but not to structure the law in the same way (U. Berntz, A. Kjellgren, 2006).

There is also a third form of legislation, *decisions* by the Council or Commission. These are binding for those who they address. Finally recommendations and statements by the Council or Commission are not binding but a form of indication towards what purpose a member state should move (Tallberg. 2007, s 44).

Next to these methods of legislation, EU has developed different forms of softer legal instruments as a complement, these are defined as *soft law*. The soft law can be for example, communication, guidelines, and messages from the commission, that although not legally binding have a political meaning and some legal position. A good example of these softer instruments is the open order of discussion.

This method means, in simple terms, that the European Council and Council of Ministers, after suggestions from the Commission, form goals and guidelines that the member states are expected to follow in the development of their politics and legislation on the national level (U. Bernitz, A. Kjellgren, 2006).

2:2 *Formal and Informal Powers in the Political Process of EU*

One of the main attributes of the nation state is the ability to make “authoritative allocations” for society. In practice, this means an ability to formulate and implement public policy programs governing the operation of society. Whether the European Union can be considered a fully fledged state is very debatable. For example, Hix, in his characterisations of political system, concludes that EU is certainly a political system, in that it exhibits most of the characteristics that are attributed to a political system. However, he concludes that is not a state as it lacks monopoly on the legitimate use of coercion that characterizes a state (Hix 1999, p- 2-5). Even, so it is beyond dispute that the EU has acquired for itself at least policymaking attributes of a modern state across an increasingly wide range of policy sectors and has quite a degree of coercive power in order to enforce policy decisions (Richardson 1996, p. 4).

Like in other political systems, the European political process is shaped, by as well formal structures of decision-making as informal structures. The formal elements are of very important to understand so we can grasp how institutions relate to one another and how decisions come to form. But, if we only study the formal structures we risk

overlook important reasons to why some decisions are made and not others. All negotiations do not come about in an official conference room, and often there are more actors involved in a decision than they who have the task formally. This is why we need to study the informal elements to have a complete view of EU as political system.

Except for the two dominating clashes between the member states and between the institutions, the EU contains more political divergence that perhaps is not given too much consideration. The parliament members have to relate both to what the political group in the parliament needs and what their native national party requires. The national governments control over EU-politics can be challenged by those who represent the member states in Brussels- national representation. Regions and municipalities are not just tolerating to be represented by the member state, but conduct their own foreign politics through the offices they have in Brussels. National politicians often speak another language at home than at meetings held within the EU and are struggling to satisfy the opinion in the member state and gain political results in the EU. Brussels has now become the city with most lobbying in the world where NGO's and different groups of interest find an arena where they can influence the politics of the future (Tallberg. 2007, p. 58-59).

All decisions in the EU are not necessarily written down in the *l'acquis communautaire*, informal agreements are often a guideline for a member states action. Informal decision can work as a way for member states to reach agreements and compromises when this agreement would be impossible if it had to be formally printed (Tallberg. 2007, s 61).

2:2:1 *Political Areas of the European Union*

Throughout EU's existence the amount of political areas where decisions are made has grown immensely. At the same time the differences between political areas have increased. The EU-institutions are not engaged to the same amount everywhere, the forms shift in the different areas. With every new treaty EU's role as political system has grown as a result of the fact that the member states have delegated more legislation authority to EU in more political areas. Today EU decides in many additional fields that were strictly domestic before. The European cooperation is today no longer a foreign affair but an issue for all authorities, institutions, companies, municipalities, regions and department in a national state.

EU's competence or level or authority can in a somewhat simplified way be divided in three levels. These levels are of course not constant, but dynamic.

- Exclusive EU-competence: Only the EU has right to make decisions
- Divided competence: EU and member states share the right to make decisions
- Exclusive member state competence: EU has no right to make decisions

Areas of politics where EU has exclusive competence are mostly trade, fishing, transport and monetary politics. In these fields the EU has exclusive right to legislate and responsibility to perform certain duties and attain goals (Tallberg. 2007, s 64). Nevertheless, these areas are constantly changed depending on the member states goals and the direction of EU-integration.

In most areas EU shares its competence and decisions. Often the divided competence is a result of the fact that in a specific political field some aspects demand joint decision-making and other do not. Examples are social policies where in some context it is considered motivated to cooperate. In some cases the divided competence can be a question of that EU has general principles in a field and they let member states legislate in that field as long as they do not breach these principle. Another important factor in the choice concerning what is delegated to the EU-level and what is delegated to the national level is dependent on how controversial and politically sensitive a question is.

In the Maastricht treaty the EU decided in the so called the subsidiarity principle shall be guiding in which level in which the decisions are to be made. By this principle the EU can not take any decisions if it is not considered that the goals of the EU can not be attained by the member states themselves. If the EU considers that a member state cannot attain a goal set up by the European Union they can decide to legislate in that area. In practice this principle has been hard to apply. To an immense extent this is a matter of subjective judgment and the subsidiarity principle has been used as political weapon both by them who are interested in a further EU involvement and those apposing it.

The third category, being the one where the member states have exclusive competence was the one the EU started with. Today the questions remaining in this area are the core questions of sovereignty concerning for example territory.

It is only in the first pillar that the member states have transferred their sovereignty to the EU-institutions. The EU-institutions are independent in the legalisation process. Since the Council makes decision with majority, the cooperation in the *first pillar* is defined as *supranational*.

*tional*². In practice this means that EU can make decisions without the member states support. In the second and third pillar the cooperation is conjured in divided competence. EU's supranational institutions have a more limited role and the cooperation needs all the member states to agree and consent (Tallberg. 2007, s 64-68).

2:2:2 *The Three Pillar System*

The role of the three pillar structure in EU as political system, has a relevance to where we find migration law, since this is not as clear as it may seem. Migration law cannot be put in to a pillar like some other types of EU-legislation since the problems of migration are handled by all three pillars in different ways. Migration law has also been transported from one pillar to another with the enforcement of the Amsterdam treaty, this will be elaborated in chapter 2:3.

The Treaty on European Union, which was signed in Maastricht on 7 February 1992, entered into force on 1 November 1993. The Maastricht Treaty changed the name of the European Economic Community to simply "the European Community". It also introduced new forms of co-operation between the Member State governments - for example on defence, and in the area of "justice and home affairs". By

² *Supranationalism* is a method of decision-making in political communities, wherein power is held by independent appointed officials or by representatives elected by the legislatures or people of the member states. Member-state governments still have power, but they must share this power with others. Because decisions are taken by majority votes, it is possible for a member-state to be forced by the other member-states to implement a decision. Unlike a federal state, member states fully retain their sovereignty and participate voluntarily, being subject to the supranational government only while remaining members.

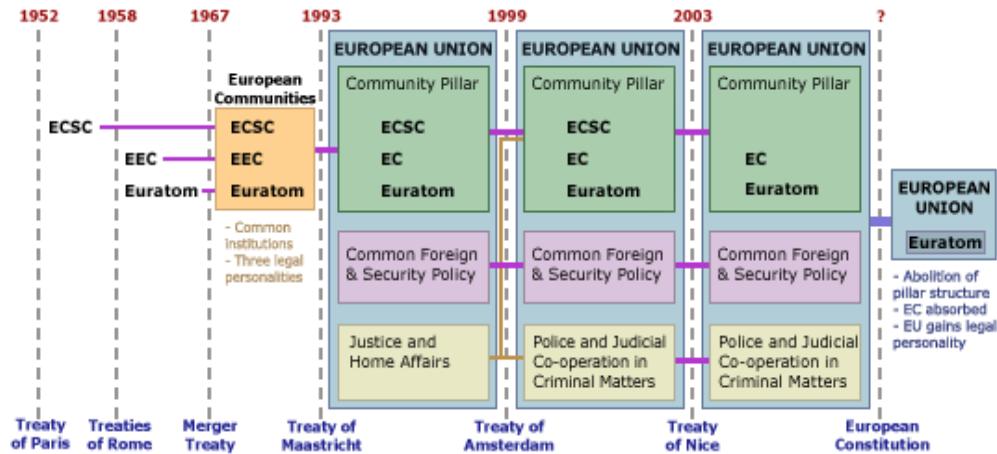
adding this inter-governmental co-operation to the existing "Community" system, the Maastricht Treaty created a new structure with three "pillars" which is political as well economic. This is the European Union.

The first pillar is mostly based on the principle of rules on redistribution and macro economical stabilization. It's the collection of the legal fields that where earlier in the EC and the new changes that have taken place when the treaties have been rewritten (Tallberg. 2007, s 69). The first pillar is what we call in EU-law, supranational. As explained before, EU-has exclusive competence to legislate. This pillar is growing steadily with every new treaty that comes to be enforced, which lead to the conclusion that EU is becoming more supranational.

The second pillar differs very much from the first one. First of all because EU's exclusive competence is no longer abiding. Then the form of cooperation and purpose of the legislation is also different. The ambitions for the unified foreign affairs and security policies (GUSP) are mainly to give the EU an international political role in the world that will correspond to its economical significance. At the same time the member states different national interests and the form for cooperation, divided competence, makes the political actions difficult to obtain. It is not so much a question of legislation as coordination of the member states politics outside Europe. The ambition that EU will "speak with one voice" exists from some establishments, however it has jet not been obtained (Tallberg. 2007, s 75-76).

The third pillar issues that member states cooperate in fields that are close to the first pillar, however the cooperation is generally more focused on functions like law, order and control over territory. These are issues that member states consider being the core in the sovereign states national authorities, as well as issues that concern individuals in a very concrete way. It is in this perspective we have to understand the

late development of cooperation in this field and the member states demands on divided competence as form for decision-making.



The third pillar was established in its first version in the Maastricht treaty (1991). The introduction of cooperation in what is called legal and domestic issues as asylum politics, immigration, individuals free movement over borders, fight against drugs, international fraud, cooperation within civil law and criminal law, cooperation in customs as well as translational police cooperation took place because there was already marginal cooperation in many of these fields. The common market opened possibilities and problems with for example free movement in the EU. The removal of borders and customs between EU member states stressed new demands between customs, polis and immigration authorities (Tallberg. 2007, s 80).

Intergovernmental decisions became a setback because while member states had difficulties agreeing, the problems migratory flows cause were attainment more proportions.

EU cooperation in legal and domestic issues came to change immensely after the drafting of the Amsterdam treaty in 1997. Cooperation concerning asylum, immigration, free movement and external border control was moved from the intergovernmental third pillar to the supranational first pillar. At the same time the Schengen cooperation³ was brought in to the first and third pillar after being an intergovernmental agreement between EU member states. What is left in the third pillar today is judicial cooperation in criminal matters and police cooperation, which also includes Europol.

The cooperation within the third pillar was for a long time characterize by limited progress and reluctance from the member states. The issues are very delicate and demand unanimous decision making. Because of the delicateness off the issues it has been very difficult to reach understandings .

Through the Amsterdam treaty EU's supranational institutions claimed limited roles in the decision making process, even though cooperation is still intergovernmental to its character and the council is still the first institution. The terror attacks in the US the 11 September 2001 and in Spain march 2004 as well as London July 2005 have set a faster paste to the cooperation in the third pillar. EU has among other created a joint package of counter measures against terrorism. These measures have shown a new initiative of will to cooperate, however it is often pointed out that that powerful measures of control create a greater risk of legal security (Tallberg. 2007, s 80). Since these measures have been carried out there has been a growing concentration on legislation based on control.

³ Schengen treaty- abolishment of control of persons at EU borders

2: 3 *The Position of Migration Law in the EU*

The flow of persons in search of international protection in the EU has been such that the Member States have decided to find common resolutions to this issue. A set of commonly agreed rules at European Community level in the field of asylum can provide a understandable added value while continuing Europe's "humanist tradition". The Hague Programme adopted in November 2004 improves these objectives through the setting up of the second phase instruments of the Common European Asylum System with a view to adoption by 2010.⁴



The 1997 Amsterdam treaty stated a first step towards a "communitarization" of immigration and asylum policies. The Tampere meeting opened up for a common EU migration policy. Shortly after, Europe had many determined communications and proposals, all of which have been presented by (to) the Commission (A. Piasecka, P. Saitta, 2006).

⁴ (http://ec.europa.eu/justice_home/fsj/asylum/fsj_asylum_intro_en.htm)

Asylum is a form of shield given by a State on its territory based on the principle of non-refoulement and internationally or nationally recognised refugee rights. It is granted to a person who is unable to seek protection in his/her country of citizenship and/or residence in particular for fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

The main intentions and values of the common asylum policy were agreed in October 1999 at the European Council in Tampere (Finland) by the Heads of State or Government. The decision was that a common asylum policy should be implemented and a common European asylum system be established. A first set of principles and measures had to be adopted by May 2004. A scoreboard was created to clearly set the responsibilities of each Member States, the EU Council of Ministers and the Commission to accomplish the objective. Some of the steps in the first legislative phase are completed. In the future the plan is that the rules should lead to a common asylum procedure and a standardized status for those granted asylum valid all over the EU. This has been confirmed by The Hague programme (adopted in November 2004 by the Heads of State or Government), which bases on the realization of the Tampere programme and sets the agenda for the next five years (<http://ec.europa.eu/>).

The Amsterdam Treaty was enforced in May 1999, adding a new title IV "Visa, Asylum, Immigration and Other Policies Related to Free Movement of Persons" to the EC Treaty. The new Articles 61 to 69 of the EC Treaty are designed to progressively establish an area of freedom, security and justice (<http://ec.europa.eu/>).

Today we have four main legal instruments on asylum – the Reception Conditions Directive, the Asylum Procedures Directive, the Qualification Directive and the Dublin Regulation. These are all intended to level the asylum field and set foundations for a Common European Asylum system, on which additional structures could be

constructed to maintain the EU as a single asylum space and legitimize a confidence in a system.

The Dublin Regulation contains rules about the Member State creating a system for assessment and application for asylum. This is a legal instrument for the prevention of multiple demands. What it shortly covers is that once an asylum application has been made in a EU member state, this member state decides if the applicant is to be granted asylum or not. It is not possible to apply in another country.

The Reception Conditions Directive guarantees minimum standards for the reception of asylum-seekers, covering housing, education and health.

The Qualification Directive contains a set of measures for qualifying either for refugee or subsidiary protection status and sets out what rights are attached to each status. The Directive also introduces a harmonised administration for subsidiary protection in the EU for those persons who fall outside the range of the Geneva Convention but who on the other hand still need international protection, such as victim of generalised violence or civil war. This is of increasing importance as the number of persons in need of this type of protection is growing both in Member States and on a worldwide scale.

The adoption of the Asylum Procedures Directive means that throughout the EU, all actions at first instance are subject to the same minimum standards. Both accelerated and regular procedures provide the same safeguards for applicants, as well as the basic rules and guarantees in relation to the interpretation and access to legal aid. The Directive also introduces the obligation for all Member States to ensure an “effective remedy before a court or tribunal” and such judicial scrutiny goes well beyond the above mentioned standards (E. Guild, 1996).

In addition to the legislative work, solidarity is meant to be enhanced through the creation of the European Refugee Fund (ERF).

The ERF promotes solidarity between Member States and promotes balance in efforts they make in receiving asylum seekers, refugees and displaced persons. The ERF should also support Member States actions to encourage the social and economic integration of refugees and their return to their home countries.

These existing measures are now being transposed into national law, implemented or evaluated. The Commission's first task should be to ensure that transposition of the Directives takes place accurately and in time and to monitor and report on what has been done. This monitoring should help facilitate a convergence in interpretation between Member States and arrive at levels of harmonisation beyond what is stipulated in the Directives. The European Court of Justice will also have a key role to play and its rulings on interpretation of the framework legislation will also contribute to uniform interpretations of the agreed texts (E. Guild, 1996).

These new rules have communalised major parts of the previous intergovernmental cooperation of EU Member States in the field of justice and home affairs, i.e. made them a concern of the European Community. Consequently, the so-called "Third Pillar", which had been created by the Maastricht Treaty, is now restricted to judicial cooperation in criminal matters and police cooperation (E. Guild, 1996).

The term Schengen Agreement is used for two agreements completed between European states in 1985 and 1990 which deal with the elimination of border controls between the member countries. By the Treaty of Amsterdam, the two agreements themselves and all decisions that have been enacted on their basis have been incorporated into the law of the European Union. This body of legal provisions is referred to as the Schengen Acquis,⁵ following modifications to that

⁵ The Schengen Acquis had been legally defined by the Council Decision of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in confor-

acquis, including the Schengen Agreements themselves, have been made in the form of European Union regulations, that is to say on the supranational level.

The Schengen rules apply among most European countries, covering a population over 400 million and a total area of 4,268,633 km² (1,648,128 sq mi). They include requirements on common policy on the temporary entry of persons (including the Schengen Visa), the harmonisation of external border controls, and cross-border police and judicial co-operation. This is why the Schengen rules have to be considered while discussing European Migration Law. The legal basis for Schengen in the treaties of the European Union has been introduced in the Treaty establishing the European Community through Article 2, point 15 of the Treaty of Amsterdam within the new title named before; "Visas, asylum, immigration and other policies related to free movement of persons" into the treaty, currently numbered as Title IV, and comprising articles 61 to 69 (EU-treaty). The Treaty of Lisbon changed this again and renames the title to "Area of freedom, security and justice" as well as divides it into five chapters, called "General provisions", "Policies on border checks, asylum and immigration", "Judicial cooperation in civil matters", "Judicial cooperation in criminal matters", and "Police cooperation". (Treaty of Lisbon, article 2, points 63-68).

mity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis (1999/435/EC)

Immigration has been one of the most discussed problems and has led to controversial negotiations in the European Union. One of the foundations upon which the European community stands is the protection of minorities and ethnic groups in view of what took place during the Second World War. European integration in regards to migration policy is a long and complex process where the tensions between member states sovereignty and the need for international cooperation are best exemplified. The realities of international movements of people across Europe take a more complicated shape when examined within the context of the European Union. This “supranational” entity gathers twenty-seven Member States whose internal borders are fragile or non-existent when it comes to certain matters, such as freedom of movement for European citizens, capitals, services and goods.

The European Union's anxiety with migrants is a sensible one. The establishment of a space without internal borders requires unity among its Member States on common criteria concerning the qualifications and status of third country nationals who wish to enter or reside in Europe. It also requires common actions to struggle with the undesired effects of internal open borders, specifically, illegal immigration. Because of its nature as a process, migration policies and their following translation in legislative instruments constitute an uneven body of bilateral and multilateral relations between States that develops over time, within and outside the European Union institutional and legislative framework (G. Papagianni, 2006).

Integration of immigrants and national minorities is one of the pillars of social unity. There has been an ongoing debate of creating a positive community for European societies through the promotion of a political, economic, cultural and legal environment that is favourable to diversity and the promotion of social cohesion based on the strengthening and protection of human rights, fundamental freedoms, and particularly, social rights. Despite all the above mentioned intentions, there have been difficulties in constructing a common and united legislation concerning immigration in the EU. Immigration has been measured in terms of a dilemma to which the national state must offer its own solutions to since 1973. However, since 1985, the European Commission has been taking into account the necessity of creating a community-based immigration policy, but this was not incorporated on the European Union agenda until the start of the following decade.

At the present time, there seems to be some harmony among governments of the member states to cooperate on issues concerning immigration and asylum.

The impractical fact of facing this dilemma autonomously and the interdependencies produced by the establishment of a unified European market are, therefore, becoming increasingly apparent. Simultaneously, the indiscretion of each member state in relation to the phenomenon and national normative positions concerning the content of the immigration process frustrate the accomplishment of comprehensible and binding agreements.

The difficulties of establishing a full-Europeanized immigration seem to lie in the political sphere. There seems to be a supranational ‘will’ to perform and create a common immigration law, although, with sizeable national variations. According to some statistics compiled in 1989, 35% of the European respondents to the Euro barometer survey is favourable to a common legislation that would apply directly

to all member states, and a further 30% stated that a strict coordination among national legislation through a reciprocal consultation procedure would be constructive (Eurobarometer 1989).

The immigration debate has numerous references to “Europe”. In a good number of public opinions, it is common to argue that immigration is a “European” problem just as it is common to complain about the shortcomings of the “European” immigration policy A. Piasecka, P. Saitta, 2006).

If asylum is a European internal problem which has to be tackled on a European level is another concern – in a Europe without borders it made sense to aim for an approximation of conditions for asylum seekers, so that one country would not seem more attractive a destination than another, thereby encouraging unnecessary secondary movement and to ensure that wherever an asylum applicant made his or her application in Europe, there was a certainty that he or she would be able to access support, have a fair hearing and not be disadvantaged by a more or less generous interpretation of who was a refugee than if he or she had found themselves in another European country.

We could think of the European Coordination, which was already drafted in the Treaty of Rome [1957]. In that document the common will to create an area of free circulation of goods, services, capital and, finally, of people was established. The free circulation of people was a rather controversial issue, but in the seventies, the agreement on the European citizens was reached. The European Court of Justice had adopted a very large definition of “worker” and this had restricted the chances of single states to intervene on behalf of individual freedom. According to data from the International labour office (ILO), migratory flows between the member states were very modest, less than 2% of the European population. It could be argued that this situation made it effortless to implement the direct law concerning free circulation

and the “four European freedoms”⁶ that gave the European citizens the right to freely circulate as well as that to have the same legal opportunities all over the continent. On the other hand, citizens from non-member countries residing in the European countries remained strictly under the jurisdiction of the member states in question(A. Piasecka, P. Saitta, 2006).

The first attempt to start a real European Coordination relating to migration goes back to 1985, with the recognition of some “guidelines” by the European Commission. These guidelines represented the common fears about the high number of undocumented immigrants living in Europe, the increase in requests for asylum, and proposed a harmonization of the mechanisms of entrance, stay, work, and control of immigrants.

Germany, France, the Netherlands and Denmark presented a recourse and insisted that the Commission should not intervene on this subject. In that year, the same States signed a common declaration to affirm that these issues were to be the exclusive competence of each member country. Since then, most of the decisions on migratory control have been taken in Europe on the basis of “bilateral” or “intergovernmental” agreements, which are much more functional to the needs of the States (Sciortino 2001, 82).

Later, during the nineties, this issue continued to arise. The subject of asylum, in particular, was, and continues to be, a very sensitive issue. States have been trying to reduce the attractiveness of this channel by cutting social assistance, increasing the controls on the

6 In European Union law, the Four Freedoms is a common term for a set of treaty provisions, secondary legislation and court decisions, protecting the ability of goods, services, capital, and labour to move freely within the internal market of the European Union. More precisely, they are: The free movement of goods; The free movement of services and freedom of establishment; The free movement of persons (and citizenship), including free movement of workers; The free movement of capital.

status of asylum seekers, shortening the time needed to evaluate the requests. However, what matters is that this particular field is characterized by the will of the European political classes to conserve their autonomy as much as possible. In the mid-nineties, for instance, the Council of Ministries of Justice approved a resolution that pushed the control of temporary residence out of the communitarian coordination process.

A fact that might help to interpret the existing difficulties of developing a European policy of immigration is the past. The flow, in fact, does not push indiscriminately on all borders. In a certain sense, it is a reaction to a plurality of relations existing between areas of “departure and arrival”, linked to the colonial past, to tradition, and to the economy. For instance, Greece and Italy would benefit from the growth of Albania much more than England and Sweden would. Similarly, the collapse of Algeria would involve France much more than Denmark, and so on. Therefore it is possible to argue that, as a consequence of this fragmentation, states do not really view cooperation as a categorical imperative. Intergovernmental agreements with neighbouring member states and with those non-European countries that play some role in the organization of migratory flows⁷ have, so far, been the frequent remedies against such flows (A. Piasecka, P. Saitta, 2006). However, this is an empirical question, yet to be answered.

⁷ Recent pacts between the Italian and Libyan governments are just an example of this kind of agreements.

3 Theoretical Framework

In this chapter, I will try to build an image and representation of how I will build up the theoretical framework in my study. The theoretical framework will show that a “hypothesis construction” is the purpose of my study. The thesis is not meant to be built upon an empirical material that is discussed in a theoretical context, but is intended to create a methodological model constructed in the intention of exploring a form of analyses. The empirical example will illustrate the theoretical structure, and the construction of hypothesis is based on theoretical concepts as well as empirical results. Thus, a part of the answers to the research questions will have a theoretical response and a part will be based on empirical results. The theoretical approach is on an abstract level however still contains empirical entry points.

3:1

Perspectives and Theory of Pierre Bourdieu in Building an Approach to Legal Cultures

Pierre Bourdieu was a commended French sociologist whose work engaged methods from a broad variety of disciplines: from philosophy and literary theory to sociology and anthropology

The most distinguished *aspect of Bourdieu's theory* is the development of methodologies, combining mutually theory and empirical data, that endeavour to dissolve some of the most difficult antagonisms in theory and research, trying to settle such difficulties as how to understand the subject within objective structures and in the process, trying to reconcile structure and agency. This is what Bourdieu mostly is appreciated for, since scientist always struggle with the question of combining a theoretical development of concepts with detailed empirical studies. His contribution to modern social science does not consist of a social theory in its proper sense, but rather methodological concepts, or conceptual tools that he constantly tests in his empirical studies. Bourdieu claims that if these concept are dismounted from their scientific context they become meaningless (Andersen, H & Kaspersen, L-B p. 401). This is why I will start out with putting these concepts into a scientific context in this chapter and subsequently explain them more in detail.

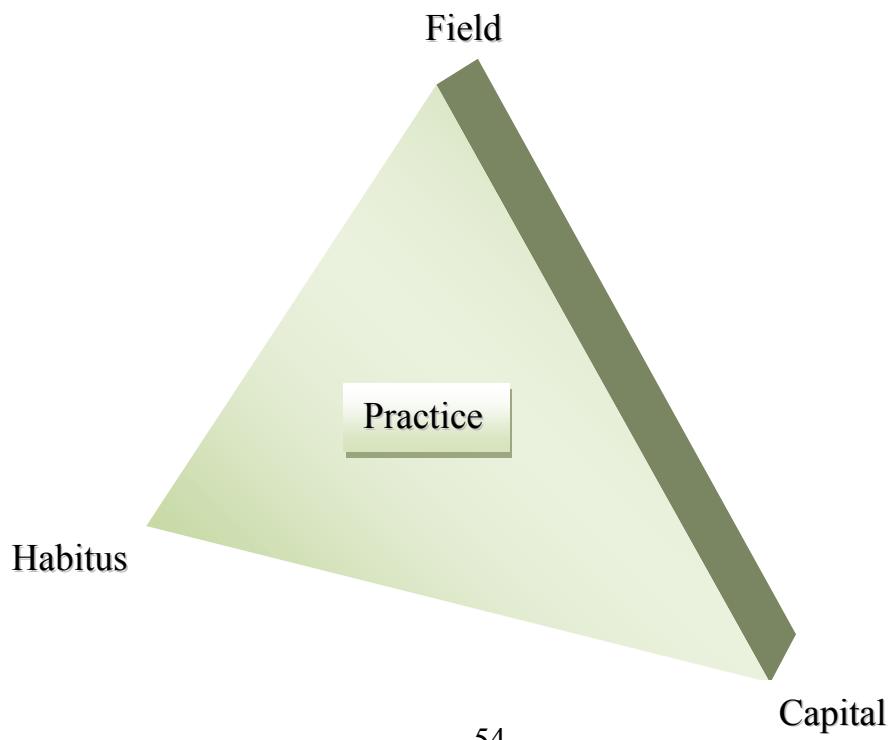
The key concepts in Bourdieu's work are habitus, field, and capital. To start out very shortly, Bourdieu presents a theory and methodological bases with some concepts that work together in forming a plan

how to empirically study a phenomenon. When we work empirically Bourdieu tells us to start studying the practice of the “agent” or institution we are studying. In this practice we will find the following concepts Bourdieu created to fully understand a phenomenon. The agent is socialized and located in a "*field*" - an evolving set of roles, dispositions, practices and relationships in a social domain, where different forms of "*capital*" such as prestige knowledge or financial resources are at stake. The agent accommodates to his or her roles and relationships in the context, their position in the field, and internalises relationships and expectations for operating in that domain. These internalised relationships and habitual expectations form, over time, the "*habitus*". By letting practice indicate what field is studied, we gain knowledge about the field itself and its structure as well as what recourses an agent has in the field and the social structures abiding in the field. Bourdieu extended his concept of field as he studied legal systems. He coined the term “juridical field”, which naturally refers to an area of structured, socially patterned activity or “practice”, in this case being disciplinary and professionally defined. The “field” and its “practices” have particular significance in Bourdieu’s usage. They are broadly comprehensive terms referring respectively to structure and the characteristics of an entire professional world (Bourdieu, 1987 p.814 f).

Bourdieu tries to resolve structure and agency, as external structures are internalised into the habitus while the actions of the agent externalise interactions between actors into the social relationships in the field. Bourdieu’s theory, therefore, is a dialectic between "externalising the internal", and "internalising the external." This dialectic establishes a perspective where it is possible to understand the dynamic of implementing EU-law, and it explicitly explains the power dynamics of EU member state striving to influence legislation processes in the EU before the law is enforced, through externalizing their internal

legislation to the EU-level, as well as the following episode of EU member states having to implement law and internalising external directives.

Bourdieu also adds methodological frameworks and terminologies such as cultural, social and symbolic capital to the concepts of habitus and field. In the field there is an ongoing struggle of recognition and validation which constitutes the most fundamental dimension in the field. Any quality or action can be symbolic capital, assuming that in the specific field it has as a positive value. (Andersen, H & Kaspersen, L-B p. 403). Capital is not just a definition of an economical status, but extends to all substance that are objects of recognition. Symbolic capital is another word for distinction and resources that can be used to “get ahead” in relation to someone else. Those who possess cultural capital demonstrate that they master the codes of the legitimate culture (*culture générale*) They possess enough knowledge of procedures, history and politics to be able to step into the “power sphere” of the societal context they belong to (Andersen, H & Kaspersen, L-B p. 409). I will go deeper into these concepts and show how they can give a whole new view on practice of the process of implementation of legal documents.



Bourdieu's work emphasized the role of practice and embodiment in social dynamics. It is based upon theories of Karl Marx, Max Weber, Emile Durkheim, Norbert Elias, Ludwig Wittgenstein, Maurice Merleau-Ponty, Edmund Husserl, Georges Canguilhem, Gaston Bachelard, among others.

Bourdieu's work is influenced by traditional sociology, which he initiated to synthesize into his own theory. From Max Weber he retained the significance of domination and symbolic systems in social life, as well as the idea of social orders which would eventually be altered by Bourdieu into a theory of fields.

From Karl Marx he gained a perception of "society" as the sum of social relationships;

"what exist in the social world are relations – not interactions between agents or intersubjective ties between individuals, but objective relations which exist independently of individual consciousness and will".
(Bourdieu, P. & L.J.D. Wacquant. 1992. p. 97).

From Emile Durkheim he brought in a certain deterministic and, through Marcel Maus and Claude Lévi-Strauss, structuralist style that emphasized the inclination of social structure to reproduce themselves. Bourdieu then departed from these Durkheimian analyses by emphasizing the role of the social *agent* in enacting, through the embodiment of social structures and symbolic orders. In addition he emphasized that the reproduction of social structures does not operate according to a functionalistic logic.

One should not neglect Bourdieu's philosophical influences: Maurice Merleau-Ponty and, through him, the phenomenology of Edmund Husserl played an essential part in the formulation of Bourdieu's focus on the body, action, and practical dispositions (which found their primary manifestation in Bourdieu's theory of *habitus*).

Bourdieu's work is grounded upon the attempt to transcend a series of oppositions which characterized the social sciences (subjectivism/objectivism, micro/macro, freedom/determinism). In particular he did this through conceptual innovations. The concepts of habitus, capital, and field were conceived, indeed, with the intention to abolish such oppositions.

Bourdieu sought to connect his theoretical ideas with empirical research, grounded in everyday life, and his work can be seen as cultural sociology or, as he labeled it, a "*Theory of Practice*". His contributions to sociology were both empirical and theoretical. The idea of extending the concept of capital to categories such as social capital, cultural capital, and symbolic capital was important to analyze positions in a multidimensional *social space*. Bourdieu claimed that we are not defined by social class membership, but by the amounts of each kind of capital we possess.

At the centre of Bourdieu's sociological work is a logic of practice that emphasizes the importance of practices within the social world. Against the intellectualist tradition, Bourdieu stressed that mechanisms of social domination and reproduction were primarily focused know-how and competent practices in the social world. Bourdieu fiercely opposed Rational Action Theory (Rational Choice Theory) and claimed it was a misunderstanding of how social agents operate. Social agents do not, according to Bourdieu, continuously calculate according to explicit rational and economic criteria. Rather, social agents operate according to an implicit practical logic, a practical sense and dispositions. Social agents act according to their "feel for the game" (the "feel" being, roughly, habitus, and the "game" being the field (Bourdieu, P. 1977).

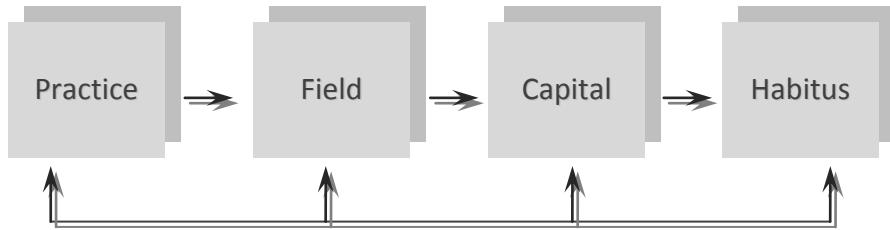
Bourdieu may have been too sudden with his dismissal of rational choice theory, since he himself claims that the conduct of agent in a field is based on a logic and that agent act so that they achieve as

much social capital as possible, by somebody that is a follower of rational choice theory it could be claimed that acting accordingly to “the game” is a rational calculated behaviour.

Bourdieu's sociological work was dominated by an analysis of the mechanisms of reproduction of social hierarchies. In opposition to Marxist analyses, Bourdieu criticized the domination given to the economic factors, and stressed that the capacity of social actors to actively impose and engage their cultural productions and symbolic systems plays an essential role in the reproduction of social structures of domination. What Bourdieu called symbolic violence (the capacity to ensure that the arbitrariness of the social order is ignored, or mis-recognized as natural, and thus to ensure the legitimacy of social structures) plays an essential part in his sociological analysis.

For Bourdieu, the modern social world is divided *fields*. For him, the differentiation of social activities led to the constitution of various, relatively autonomous, social spaces in which competition centres around particular species of capital. These fields are treated on a hierarchical basis and the dynamics of fields arises out of the struggle of social actors trying to occupy the dominant positions within the field. While Bourdieu shares prime elements of conflict theory, like Marx he diverges from analyses that situate social struggle only within the fundamental economic antagonisms between social classes. The conflicts which take place in each social field have specific characteristics arising from those fields and that involve many social relationships which are not economic.

Bourdieu shared Weber's view that society cannot be analyzed simply in terms of economic classes and ideologies. Much of his work concerns the independent role of educational and cultural factors. Instead of analyzing societies in terms of classes, here Bourdieu uses the concept of *field*, the social arena in which people maneuver and struggle in pursuit of desirable resources.



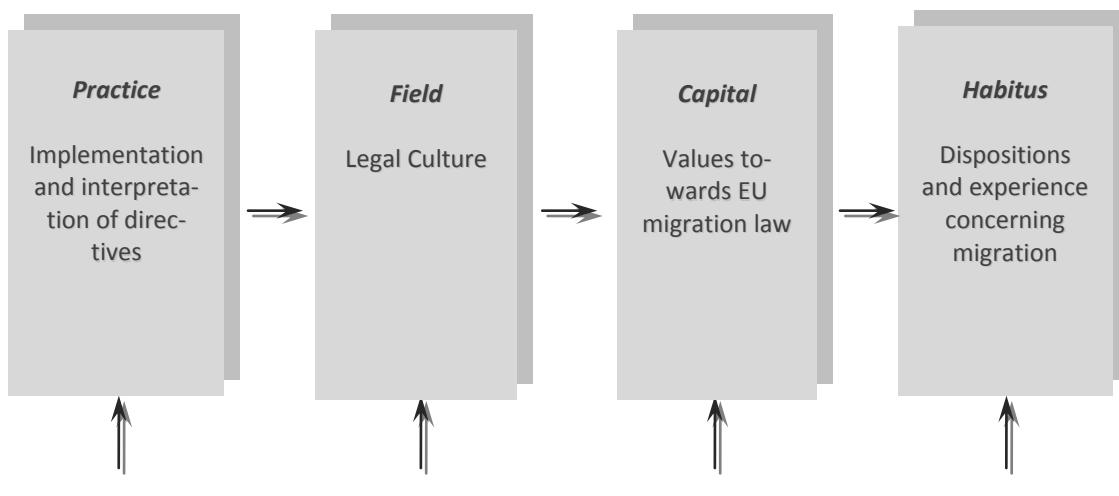
When Bourdieu's methodological frameworks and terminologies are tested by studying implementation of EU-directives in the case studies (member states) the *practice* indicates what field is studied, the field of *legal culture* in the studied member state. Knowledge about the field itself and its structure as well as what recourses an agent has in the field and the social structures abiding in the field gives some interesting answers concerning the differences of implementation and the prerequisite a member state has.

The relationship between symbolic capital, habitus and field illustrates a circular representation of a present condition we are interested in.

The fields answer the questions to what "game rules" abide in the legal culture of Poland and Sweden, the fields are genuine social spheres that emerge from what is at stake in the secluded field, like the juridical field or the political field. Typical characteristics in a field are relationships between the controller and the controlled, the ones who "have" and don't "have", and other type of hierarchies. Bourdieu also emphasizes that there are sharp lines between different fields. Fields are loaded with dynamics, they are like arenas were forces meet and draw in different directions. Which means that "the game" in itself is what's at stake. There is always an ongoing battle in the field about what game rules are valid (Bourdieu, 1987, p. 38).

The symbolic capital is what defines and legitimates the game rules. The concept of symbolic capital is about social power relationships, it shows what gives authority in social life. Symbolic capital represents a sphere of norms that tell us what is desirable in a certain field.

The habitus is our structured way of thinking, reasoning, judging, acting and understanding. We establish our habitus by, upbringing and socialization when we gain knowledge of functions in our surroundings. It is our practical common sense. So habitus has two meanings, one is our mental ability to comprehend a distinction, our cognitive perception ability, the other is our ability to express our distinctions through language and actions. The relationship between symbolic capital, habitus and social field, all form practice. Through an analyze of the practice of governmental agency applying the implemented EU-directives in national law, we can differentiate how the practice is organized, what this says about the legal culture in which is it performed (*field*), what values concerning EU migration law we find in the field (*symbolic capital*) and what dispositions and experience we can find in the field (*habitus*). By these analyses, we can achieve knowledge of what functions and game rules apply in the studied field and what capital counts (Bourdieu 1987, p. 38). When we attain this knowledge, we will know what habitus forms the capital that counts in the social field and builds the practice.



3:1:1

The Field of Legal Culture in the EU -Member States

If we want to understand a field metaphorically, its analogue world would be like a magnet, a field exerts a force upon all those who come within its range. But those who experience this force are generally not aware of their source (Bourdieu, 1987, p 830). The field is a setting in which agents and their social positions are located. The position of each particular agent in the field is a result of interaction between the specific rules of the field, agent's habitus and agent's capital (*social, economic and cultural*) (Bourdieu, 1984). Agents in the legal field are constantly engaged in a struggle with those outside the field to

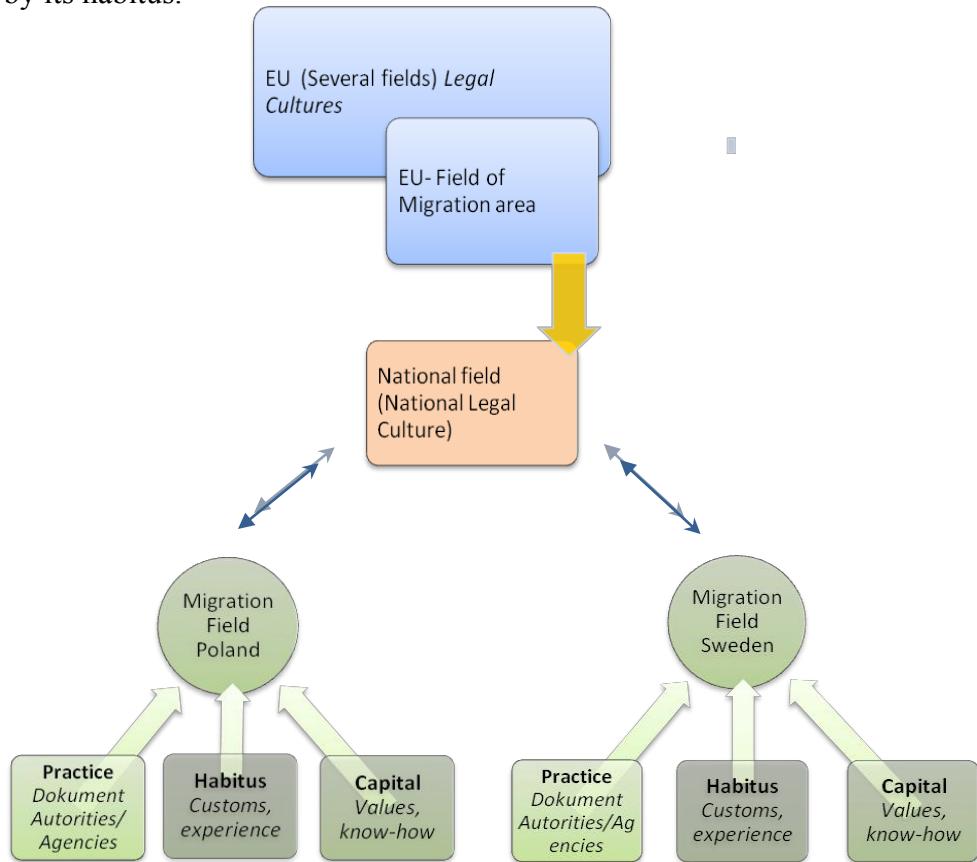
gain and sustain acceptance for their conception of the law's relation to

the social whole and of the law's internal organization. The legal field of member states has to constantly rapport and confirm their implementation of EU-law to the EU, it also has to legitimize its conduct towards other social fields (like economical, labour market etc.) and society as whole. Bourdieu traces in detail the social and particularly the linguistic strategies by which the inhabitants of the legal culture pursue this effort to impose their internal norms on broader realms and to establish the legitimacy of interpretations favourable to the self-conception of the field, to the ratification of its values, and to the internal consistency and outward extension of its prerogatives and practices (Bourdieu, 1987, p 809). Fields interact with each other, and are hierarchical, most are subordinate of the larger field of power. A EU member states juridical field is hierarchically subordinated to the larger political power field of the European Union and goals of that power field, it cannot, ones in

the EU, without conflict go towards a separate individual juridical development. The goals of EU also become a part of the symbolic capital of the juridical field which makes it even more complex to go in another direction than the field to what it is hierarchically subordinated. Bourdieu is of the same opinion as instrumentalist theories of jurisprudence to the extent that he strongly believes the juridical field functions in close relation with the exercise of power in other social realms and through other mechanisms. He argues that the explicit codes of the juridical field, that are shaped by the influence of external social, economic, psychological and linguistic practices, which while never being recorded or acknowledged, underlie laws explicit functioning and have a determining power that must be considered if one is to realize how the law really functions in society (Bourdieu, 1987 p 807). According to Bourdieu, this understanding is potential since the practices within the legal systems are strongly patterned by tradition, education, and the daily experience of legal custom and professional usage. They operate as educated deep structures of behaviour within the juridical field, as what Bourdieu terms *habitus*. They are considerably distinct from any other practices in any other social universe. And they are definite to the juridical field, they do not derive in any considerable way from the practices which structure other social activities or realms. Consequently, they cannot be understood as simple "reflections" of relations in these other realms. They have a profound influence, of their own. What is essential to that influence is the power to determine in part *what* and *how* the law will decide in any specific instance, case, or conflict or in a particular area like migration law (Bourdieu, 1987 p 807).

At this point, it is important to mention that this analyses aims at *moving across* several levels. If we perceive the field as legal culture, that means that EU-law also has a legal culture, the national law has a legal culture and the specific juridical field has a legal culture. These levels will be evolved later in the study, but it is important to mention

them at this stage to have them in mind when reading the text and keeping in mind that every level and legal culture can be understood by its habitus.



The field as system of social positions (e.g. a profession such as law) is structured internally in terms of power relationships (e.g. the power differential between judges and lawyers). More specifically, a field is a social arena of conflict over the appropriation of certain types of capital being whatever is taken as significant for social

agents. Fields are organized both vertically and horizontally. This means that fields are not strictly analogous to classes, and are often autonomous, independent spaces of social play. The field of power has a particular character since it exists "horizontally" through all other fields in society. The field of power struggles therefore with the control of the "exchange rate" for the forms of cultural, symbolic, or physical capital between other fields. A field is constituted by the relational differences in position of social agents, and the boundaries of a field are distinguished by where its effects end. Different fields can be either autonomous or interrelated (e.g. consider the separation of power between judiciary and legislature) and more complex societies are "more differentiated" which means that they have additional fields. Fields are constructed according to underlying, fundamental principles of "vision and division", or organizing "laws" of experience that govern practices and experiences within a field. The nomos underlying one field is often irreducible to those underlying another, as in the noted disparity between the nomos of the aesthetic field that values cultural capital and in some sense discourages economic capital, and that of the economic field which values economic capital. Agents subscribe to a particular field not by way of explicit contract, but by their practical acknowledgement of the stakes, implicit in their very "playing of the game". The acknowledgement of the stakes of the field and the acquiring of interests and investments prescribed by the field is termed illusion.

Bourdieu's fundamental claim concerning the juridical field, is that like any other social field, is organized around a body of characteristic behaviours, internal procedures and assumptions and self-sustaining values what we might informally term a "*legal culture*." (Bourdieu, 1987 p. 14). The key to recognize it is to accept that this internal organization, while it is surely not indifferent to the larger and grander social function of the law, has its own partial but quite established autonomy. If we take

the term "politics" in its broadest sense, referring to the complex of factors (economic, cultural, linguistic, and so on) that determine the forms of relation in a given social totality, we find, according to Bourdieu, what might be termed an *internal politics of the profession*, which exercises its own specific and pervasive influence on every aspect of the law's functioning outside the professional body itself. Bourdieu himself does not define or work with the term legal culture, but we find similar description of it in works. If I am to study legal culture as a juridical field in any other perspective the term needs a clear definition. However, when an attempt to define legal culture is made you stumble on numerous debates and conflicts in the scientific world without really finding a comprehensible and applicable definition. It is possible to find an immense amount on literature on legal culture and even scientific institutes at universities that have specific departments teaching legal culture. It is in other words a concept and almost a discipline that is more or less defined by the individual interested in studying it. It is not so unlike sociology of law, that has its own dramatically discussions and debates on what the discipline actually contains. Scholars operating in the field of legal culture dispute and deliberate around the concept and make numerous efforts to stipulate a "workable" definition, but do not really come to an evident conclusion. Often a book about comparative legal culture is a discussion about comparing different definitions of the concept, not about how to compare legal cultures empirically. Bourdieu's definition of a juridical field and the dynamics of habitus and symbolic capital operating in the field is, in my regard vague and weak, but a theoretical definition of legal culture as well as any other. Nonetheless there are definitions close to Bourdieu's views and there are very important scientific works done on the theme of legal culture. The anticipation for a concept of legal culture that is suitable for a comparative sociology of law, is the idea of a term that would embrace all the elements of the contextual framework that has to be taken

into account if comparisons of legal systems and their characteristic elements are to be sociologically meaningful. The difficulty of any such term, as the concept of just *culture* itself, is its imprecision and vagueness, which is a consequence of the demands made upon it and the role in analyses that is typically required for the term (Nelken, 1997 p. 14). Lawrence Friedman's work is the most persistent effort to work with an explicit concept of legal culture, and to elaborate its theoretical use, in recent comparative sociology of law. In Friedman's most extensive theoretical discussion of legal culture, he offers a variety of characterizations. Legal culture refers to "public knowledge of and attitudes and behaviour patterns toward the legal system" (Friedman, 1975 p. 193) Legal cultures may also be "bodies of custom organically related to the culture as whole" (Friedman, 1975 p. 194). Legal culture is part of a culture generally; "those parts of general culture – customs, opinions, ways of doing and thinking – that bend social forces forward or away from the law and in particular ways" (Friedman, 1975 p. 15). This the emphasis is on clusters both of ideas and of behaviour patterns, intimately related. In later formulations, legal culture appears only as ideational; the behaviour elements appear to have been discarded. Legal culture consists of "attitudes, values and opinions held in society, with regard to law, the legal system, and its various parts. (Friedman, 1977 p. 76). "ideas attitudes, values, and beliefs that people hold about the legal system" (Friedman, 1986 p. 17). or ideas attitudes expectations and opinions about law, held by people in some given society that people hold about the legal system (Friedman, 1990 p. 213).

The vagueness of these formulations makes it hard to see what precisely the concept covers and what relationship there is between the diverse elements said to be incorporated in the scope. As long as explanatory worth is not attached to the concept of legal culture and it is used only as a residual category to refer to a general setting of thought

belief, practices and institutions within which law can be considered to be present, no grave methodological problems take place. But to make concrete claims there is a problem with such a broad definition, especially if I am using it together with Pierre Bourdieu's broad definition of juridical field. Nothing tangible is present. However, Friedman does constitute a certain perspective in his definition that helps to make a clearer definition of legal culture in this study. He remarks that "one can speak of legal culture at many levels of abstraction" (Friedman, 1975 p. 204 f). Each nation has a legal culture that can be described as "underlying traits of a whole legal system – its ruling ideas, its flavour, its style" (Friedman, 1975 p. 15). "each country may have its own legal culture and no two are exactly alike" (Friedman, 1975 p. 199). Friedman underlines the diversity and multiple levels and regions of legal culture, finally he develops the concept of legal culture in a way that implies an agreement of what may be exceptionally diverse elements of ideas, practices, values and traditions (Cotterrell, 1997 p. 20). Thus the use of the term legal culture encounters a view of "internal" legal culture as unity set against "external" legal culture (Friedman, 1975 p. 202). In my study I do not find the part of Friedman's concept concerning the public opinion of law as legal culture relevant, and in fact, very difficult empirically. Another scholar, David Nelken, presents legal culture, in its most general sense, as "one way of describing relatively stable patterns of legally oriented social behavior and attitudes" (Nelken 2004, p.1). He claims that the identifying fundamentals of legal culture varies from information about institutions such as the number and roles of lawyers or the traditions on which judges are appointed and controlled, to different structures of behavior such as litigation or prison rates, and, at the other extreme, more wide aspects of ideas, values, aspirations and mentalities (Nelken 2004, p.1). like we see in Lawrence Friedman.

By framing Bourdieu's view of a juridical field and combining it with Friedman's concept of legal culture I find that the juridical field is embraced within the "internal" legal culture and what is external are other fields that effect the juridical field. As I see it, to study the legal culture from Bourdieu's perspective is good enough, and if we perceive legal culture as a juridical field we will be able to map the legal culture and understand its habitus by studying practice.

Roger Cotterrell, another scholar working with the term of legal culture, criticizes that the concept developed by Friedman lacks rigour, and appears, in certain crucial aspects, ultimately theoretically incoherent (Cotterrell, 1997). Cotterrell's critique is based, not so much on the elaboration of Friedman's concept of legal culture, but around the reflection and general problems in using "culture" as an explanatory concept in theoretical analyses of law. He claims that it may be impossible to develop a concept of legal culture with sufficient analytical precision to give it substantial utility as a component in legal theory, and especially, to allow it as a variable in empirical research of sociology of law (Cotterrell, 1997). According to Cotterrell, the complications with the concept of legal culture can be overcome by replacing the term with "legal ideology", which is particularly connected with the professionals practices of law and detailed enough to be analysed empirically. (Pennisi, 1997 p. 107). The concept of ideology is surely practical for explaining the meanings of law for legal professionals, but in itself it is not able to distinguish the meanings which relate the law from those which belong to the general culture. It can consequently not allow us to be convinced of directing our sociological attention exclusively upon legal phenomena (Pennisi, 1997 p. 107). Cotterrell himself maintains that culture is an opportune concept which provincially refers to a general environment of social practices, traditions, understanding and values in which law subsists. Legal culture may therefore have the same level of significance for sociology of

law that the notion of legal families has for comparative law; a means of characterizing in extremely broad, and more or less impressionistic terms, large collectives of distinct elements (Cotterrell, 1997 p. 21). The same critic Cotterrell addresses towards Lawrence Friedman could be addressed towards Pierre Bourdieu. His definition of juridical field, that he claims to be an *informal* legal culture, is even more broad and vague than the one given by Lawrence Friedman. Besides Friedman's concept being too broad, according to Cotterrell, he claims that it is difficult to use the concept of legal culture empirically and he means that this concept can be replaced in most contexts of analyses by other concepts. Much of what legal culture can embrace might be considered a *legal ideology*. (Cotterrell, 1997 p. 21). Like legal culture in Friedman's formulation, legal ideology can be regarded not as much a unity but rather as an overlay of present ideas, beliefs, values and attitudes embedded in, expressed through and shaped by practice. Cotterrell claims that *legal ideology* has an advantage to *legal culture*. It is more a detailed idea of the source of legal ideology and the mechanisms of this creation and effects can be offered than seems to be the case with legal cultures. The concept of legal ideology presents a focus for significant inquiry regarding the way in which legal doctrines, transformed in ideological thought help to constitute or shape social understandings and structures of beliefs, attitudes and values. Cotterrell adds an additional advantage of using the concept of legal ideology, that it seems easy to think in terms of specific ideologies, or currents of ideology, and to recognize that currents of ideology may conflict with each other and reflect different kinds of social experience. Cotterrell, 1995 p. 7-14).

In my consideration, I do not in fact understand the base for Cotterrell's criticism against Friedman for having a broad and most important, problematic concept, that it addition is difficult to study empirically, when he himself exchanged the term culture to ideology. I differ

that this replacement of terms should make legal culture less difficult to study scientifically, I would even argue that it can make it more difficult. “*Ideology*” as term instead of “*culture*”, opens a whole new scope of problematic definitions and necessary operationalizations of the term ideology. Ideology is a term that is just as theoretically complex as democracy. It is a term used by scholars, from Marx to Weber, in very diverse traditions, containing values of power dynamics and aspects of control. Generally ideology can be defined as a ambiguous, indefinite connected system of political ideas and values⁸. In this study I therefore do not see the relevance in confusing the term of legal culture with other terminologies.

The clarity of the concept depends on the criterion selected to define what counts as “legal”, and involves a reason and a way to distinguish, between the wider aspects of culture, which elements concern to the law. The concept of legal culture must be characterized so that it conforms to the sense attributed to the term “legal” within a socio-logical discourse (Pennisi, 1997 p. 106).

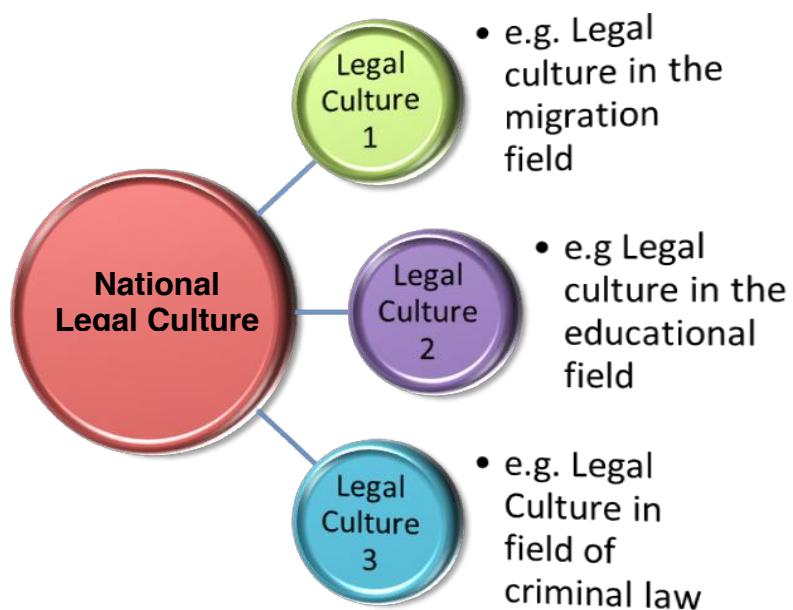
I am founding my perception of legal culture by *leaning* towards Lawrence Friedman, (in other words being in accord with it, however not without some criticism), but building the framework of analyses on Bourdieu’s theoretical frameworks. There is one more useful addition I consider relevant to add to the framework analyses. Friedman, especially in this most recent work, strongly emphasized an idea of plurality of legal cultures *with in* countries of nations, and discusses that complex societies have complex legal cultures (Friedman, 1990 p. 213). Here we can articulate not one legal culture in a legal system, but different legal cultures developing aside each other depending on the needs of the legal system. I consider this to be an important methodological development, since we can speak of a legal culture concerning a certain legal division. It becomes empirically and theoreti-

⁸ Definition found in the National Encyclopaedia / www.ne.se

cally possible to distinguish and study the legal culture in a nation *concerning* migration law.

I am not arguing that there is no *national* legal culture, and that a macro-national perspective on legal culture is not fascinating, I am maintaining that, empirically, it might be less complicated to stipulate that there are numerous legal cultures in a greater national legal culture (e.g. legal culture in the field of practice of migration law, legal culture in the field of practice of criminal law, etc.) In a complex society it is exceedingly potential that one legal culture is not similar to another legal culture in the same national environment since there are so many structures effecting a certain field, making it almost unattainable to study a “general” or national legal culture with concrete empirical examples. We can assume that a certain legal culture is a part of, and effected by, the national legal culture, but having as a goal to define this national legal cultures seems less relevant in an empirical study. The effort to distinguish diverse national legal cultures from each other, can have an interesting potential in the future. In an EU-perspective, it can be interesting to elaborate what will happen with a legal culture in the migration field in a few years. If EU harmonization proceeds to unify EU-law, we can in the future have a possible study of how similar legal cultures in the same divisions are in different member states. “Blocking” the term legal culture to apply to national legal culture, is not foreseeing in an internationalization perspective. There have been previous research criticizing that we cannot talk about a national legal field. If we are to discuss law from a pluralistic perspective, we need to recognize that structures, or legal cultures, form in different parts of law. Civil law does not compose of the same formation as Criminal law. As a result, the legal cultures will be different in each juridical field we study. If we are to perceive law through a pluralistic perspective we cannot speak of a common national legal structure. (Hydén 2008).

I am not one that is particularly fond of creating models and specially categories, for they open an unnecessary scope of scientific problems. Are the models “closed” or “open”, do they represent systems, and what do they really mean? The models in this study, specifically the following model are merely to highlight the points made about legal culture; they are not tested theoretical models, but an illustration of what I am elaborating.



3:1:2 *How to Understand the Differentiation of Legal Interpretations by Habitus*

Following Bourdieu's thinking we have to look at the juridical field, the field of legal culture, as a place where practices within the legal systems are strongly patterned by tradition and the day after day experience of legal custom and professional usage. The experience within a juridical field operates as a deep structure of actions, what Bourdieu stipulates as *habitus*. The habitus of the juridical field and legal culture I am studying is according to Bourdieu significantly diverse from any other practices in any other social universe and also distinct to the legal culture of study. As a result the juridical field has a deep authority, of its own towards itself. The most crucial influence, in this case, is the authority to decide in part, what and how law will decide in a specific occurrence, case, or conflict, or in a certain area in migration law and what the final result of the legal interpretation of EU directives in nation law codifications will be (Bourdieu, 1987 p 807). By this reasoning Bourdieu developed a theory of the action, around the concept of *habitus*, which exerts a considerable influence in social sciences. This premise seeks to show that social agents develop strategies which are adapted to the needs of the fields that they occupy. These strategies are unconscious and instead act on the level of a psychological logic. Habitus is a complex concept, but in its simplest usage it could be understood as a set of acquired patterns of behavior, and experience (Scott & Marshall 1998). These patterns, or

"dispositions," are the result of an internalization of culture or objective social structures through the experience of an individual or group. The concept of habitus has been used as early as Aristotle but in contemporary usage it was introduced by Marcel Mauss and later re-elaborated by Pierre Bourdieu. Bourdieu extended the scope of the term to include a person's attitudes and dispositions. He used it, in a more or less systematic way, in an attempt to resolve a prominent antinomy of the human sciences: objectivism and subjectivism. In Bourdieu's work, (Bourdieu, Pierre, *Outline of a Theory of Practice*, 1972) habitus can be defined as a system of durable and transposable "dispositions" - lasting, acquired schemes of perception, thought and action. The agents develop these dispositions in response to the determining structures such as external conditions, experience and fields, they encounter. The habitus provides the practical skills and dispositions necessary to navigate within different fields, such as the field of legal culture, and guides the choices of the individual without ever being strictly reducible to prescribed, formal rules (Bourdieu, Pierre, 1972). At the same time, the habitus is constantly remade by these navigations and choices, including the success or failure of previous actions.

Describing neither complete determination by social factors nor individual autonomy, the habitus mediates between "objective" structures of social relations and the individual "subjective" behavior of actors. In this way Bourdieu theorizes the inculcation of objective social structures into the subjective, mental experience of agents.

In Bourdieu's theory, agency is not directly observable in practices or in the habitus, but only in the experience of subjectivity. Hence, some argue that Bourdieu's project could be said to retain an objectivist bias from structuralism. Further, some critics charge that Bourdieu's "habitus" governs so much of an individual's social makeup that it significantly limits the concept of human agency. In

Bourdieu's references to "habitus" it sometimes seems as if so much of an individual's disposition is predetermined by the social habitus that such pre-dispositions cannot be altered or left behind.

Defenders of Bourdieu argue that such critics have misunderstood and exaggerated the conservative extent of "habitus" in Bourdieu. Bourdieu allows agency its location within the bounded structures of society and self. And, Bourdieu advocates a method for researchers to include diverse cultural voices in their work (Bourdieu 1972). The agent develops dispositions in response to the objective conditions it encounters. The objective social field places requirements on its participants for membership within the field. The agents thereby absorb objective social structure into a personal set of cognitive and somatic dispositions, and the subjective structures of action of the agent are then equivalent with the objective structures and extant requirements of the social field, when this occurs a *doxic* relationship emerges. *Doxa* are the fundamental, deep-founded attitudes, taken as self-evident universals, that inform an agent's actions and thoughts within a particular field (Bourdieu 1977 p. 160). Doxa tends to favour the particular social arrangement of the field, thus privileging the dominant and taking their position of dominance as self-evident and universally favourable. Therefore, the categories of understanding and perception that constitute a habitus, being in agreement with the objective organization of the field, tend to reproduce the very structures of the field. Bourdieu sees habitus as the key to social reproduction because it is central to generating and regulating the practices that make up social life. The term doxa is used to denote what is taken for granted in any particular society. The doxa, in his view, is the experience by which "the natural and social world appears as self-evident" (Bourdieu 1977 p. 164). It encompasses what falls within the limits of the thinkable and the sayable ("the universe of possible discourse"), what "goes without saying because it comes without

saying" (Bourdieu 1977 p. 167, 169). The very humanist intent of Bourdieu's application of the doxa notion are to be traced in the distinction where doxa sets the limits on a social mobility within the social space through limits imposed on the characteristic consumption of each social individual: certain culture artifacts recognized through doxa as not appropriate to actual social position, hence doxa helps to certificate social limits, the "sense of one's place", the true sense of belonging, closely connected with the idea of "this is not for us" (*ce n'est pas pour nous*). Thus individuals become voluntary subjects of those incorporated mental structures that deprive them from more deliberate consumption (Bourdieu 1979 p. 549). The term doxa could be pragmatically defined as "a deeply rooted tradition" that comes into form in a very strong legal culture, that is constituted by such a complex and established part of the habitus that it not only becomes an experience, know-how and procedure, but also a socio-psychological norm and belief that is natural and self evident. The term doxa opens a whole new more individually based space for analyses that could be very interesting in the context of understanding habitus deeper. However I consider it to be so theoretically close to the individual level of analyses that it falls out from the framework of analyses in this study. Doxa is a part of habitus that could potentially be relevant to distinguish methodologically from habitus, but in a study that takes the position of presenting a micro-level individual perspective on the implementation and interpretation of EU-directives, not in a study concentrated on the macro and meso level and empirically based on a text analyses with no individual perspective. If the study would concern, for example, the cultural background of agents working with migration law and habitual effect on the outcome, doxa could be more deeply developed.

Working with the definition of habitus as a part of the field and a necessity for the effective functioning of a field, habitus has to have a

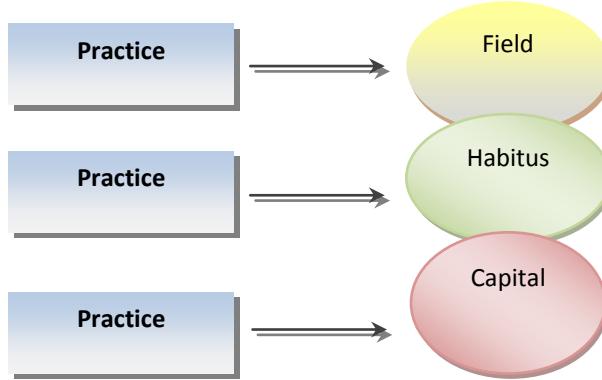
clear definition and pragmatic framework if it is to be studied empirically and used as a methodological concept. In my observation, habitus can be express as the set of complex experience, skill, customs and traditions as well as norms, possessed by agents in a field. Bourdieu calls these elements dispositions, which in essence means characteristics and nature of the field. If we start out by making a claim that the “juridical field” is defined by its legal culture, the habitus will tell us what the legal culture is in *practice*, in other words what kind of habitus a certain juridical field possess. By this claim we come closer to being able to make a comparative consideration between different juridical fields and being able to compare the juridical fields of several EU- member states by establishing what habitus abides and operates within each studied juridical field. I consider the definition of “habitus in practice” potential to in two ways; Constructing a theoretical hypothesis and testing it on a empirical material, or using the empirical material to see what dispositions (experience, skill, norms, etc) are relevant in the field. Bourdieu points out that the fundamental idea of his methodology is to begin in a study of practice, and the practice will illustrate and confirm the field and thereby the habitus. Starting thereby in a document analyses of implemented migration law and rapsorts made by member states to the EU, it becomes manifest that the habitus in the legal culture can by empirically knowledgeable and described by perceiving how the juridical field is organized and structured. By studying and mapping out the practical structure of a juridical field and thereby defining what organizational elements are fundamental in each field it is further possible to compare legal cultures by comparing the organizational elements (habitus) that subsist in the juridical field. This comparison gives an interesting turn in the theoretical framework. The comparison itself is not scientifically, particularly interesting. What is interesting is that this process offers a model

where is possible to both estimate the development of a legal culture in EU member states on certain premises and confront its development to the set-up and framing of the EU. It also gives possibilities to approximate a hypothesis concerning potential consequences of the same EU-directive being implemented in different European juridical fields.

To be able to compare and discuss differences of legal culture as mentioned above I have decided to label and identify legal culture by giving it a definition and a “value” - “*weak legal culture*” and a “*strong legal culture*”. These values have *no* positive or negative inclinations, one legal culture is not better than another, and they do not refer or relate to any ideal standard or model. These are definition of how complex, advanced, experienced and routed the habitus of a legal culture is. A strong/weak legal culture merely refers to how developed, practiced and experienced a juridical field is concerning the migration area, this relates to the habitus of the field. A strong legal culture has in-routed traditions habitus, and familiarity with the subject and a well developed system and organization concerning migration, a weak legal culture lacks these elements, which is to say, it has no habitus. All forms of culture, legal or other, are constructed and developed over time, which is why it is possible to freeze this moment in time and estimate at what stage the development of a legal culture is situated by analyzing the current habitus of the legal culture. To able to make a estimation of strong/weak legal cultures, it is very important to clarify that the estimation is made in a distinct legal field, this is one additional significant reason to speak about different legal cultures in a setting and not one general legal culture. If a member state has a weak legal culture (low quantity of *habitus*, experience, practice and properties) in the migration field, this does not mean that it cannot have a very strong legal culture in another field, and vice versa.

Naturally a scientifically dilemma occurs in this process. The dilemma does not arise in the first stage of the process, since it is a descriptive stage of describing the elements that structure the juridical field and what habitus the agents in that field possess. The dilemma surfaces when I come to the point of estimating the legal culture, and even further problems develop when a comparison between legal cultures is done and compared to EU frameworks. To “estimate” or measure a legal culture, means to value it. Whenever a scientific work bases its analyses on any kind of value there enters a complexity of normativity. In spite of my awareness of this complication I still consider this possible model of analyses to be interesting enough to be tested as an angle of analyses of European integration. From Bourdieu’s perspective, the problem seems to be principal when it comes to *on what level* we are measuring and *what* we are measuring. In fact, what is measured is not really the legal culture or the juridical field, since Bourdieu has stated clearly that we can only study practice to find the field, habitus and capital. These are abstract concepts used to describe the dynamics in a particular phenomenon, not empirically measurable variables. What we in fact are measuring is practice, and by assessing practice we can speak of different legal cultures. Legal cultures are therefore defined by their practice that characterizes the structure of the field. To compare legal culture I use the variables weak and strong legal cultures. The only empirical way to study Bourdieu’s theory is to study practice to find field, habitus and capital. Bourdieu’s chain of thought referring to that by studying practice, we find the field and thereby the capital that abides within the field, furthermore we come to an understanding of what habitus the field is consisted by, can be confusing though is suggests a linear thought, like presented in the first illustration of Bourdieu’s theoretical concepts. In fact, it is not a linear chain. The proper illustration would

suggest that we have to search for field in practice, habitus in practice and capital in practice.



What is the diversity between fields and habitus? I don do not consider that there is a very specific different, habitus is Bourdieu's way of discussing the field, which is why I am to address legal culture to understandig the habitus of it. The field is simply constituted by the habitus, making the relationship between them inseparable.

3:1:3 *Legal Cultures of Europe and Cultural Capital*

In the opening of the chapter I referred to that Bourdieu used the concept of cultural capital to develop his theory of field and habitus.

Cultural capital refers mostly to explain the dynamics within the field. Cultural capital (*le capital culturel*) is a sociological concept that has gained widespread popularity since it was first articulated by Bourdieu. Bourdieu and Jean-Claude Passeron first used the term in *Cultural Reproduction and Social Reproduction* (1973). In this work he attempted to explain differences in educational outcomes in France during the 1960s. It has since been elaborated and developed in terms of other types of capital in *The Forms of Capital* (1986); and in terms of higher education, for instance, in *The State Nobility* (1996). For Bourdieu, capital acts as a social relation within a system of exchange, and the term is extended “to all the goods material and symbolic, without distinction, that present themselves as rare and worthy of being sought after in a particular social formation (cited in Harker, 1990:13) and cultural capital acts as a social relation within a system of exchange that includes the accumulated cultural knowledge that confers power and status. (Barker p.37). Cultural Capital is comprised of three subtypes: embodied, objectified and institutionalized (Bourdieu, 1986, p. 47). Bourdieu distinguishes between these three types of capital: An *embodied* state. This is where cultural capital is embodied in the individual. It is both the inherited and acquired properties one's self. Inherited not in the genetic sense, but more in the sense of time, cultural, and traditions grants elements of the embodied state to another, usually by the family through socialization. It is not transmittable instantaneously like a gift. It is strongly linked to one's habitus, a person's character and way of thinking. Linguistic capital, defined as the mastery of and relation to language (Bourdieu, 1990:114), in the sense that it represents ways of speaking, can be understood as a form of embodied cultural capital. This type of cultural capital is very close to an individual level, and suitable for individual based analyses. It is not particularly relevant to go in depth of the concept, though it tells us little of the common

trades of a certain field. An *objectified* state is another elaboration of the concept of cultural capital referring to things which are owned, such as scientific instruments or works of art. These cultural goods can be transmitted physically (sold) as an exercise of economic capital, and "symbolically" as cultural capital. However, while one can possess objectified cultural capital by owning a painting, they can only "consume" the painting (understand its cultural meaning) if they have the correct type of embodied cultural capital (which may or may not be transmitted during the selling of the painting). A weak legal culture can thus not consume migration in the same way as experienced member states can. The concept of objectified state of cultural capital is closer to a theoretical concept that could explain dynamics within a field, and a complementary concept to realizing a closer understanding a legal cultures habitus and being able to compare dynamical relations within the field. An *institutionalized* state however aims even closer. This is an institutional recognition of the cultural capital held by agents, most often understood as academic credentials or qualifications. This is possible to test empirically in this study when approaching the estimation of legal culture as weak/strong. A strong legal culture has to have a forceful institutionalized state, at the same time a sovereign legal system and since qualifications of agents in a juridical field often originates from traditions and experience through practice. The concept cultural capital is fundamentally linked to the concepts of fields and habitus. These three concepts have been continually developed throughout all of Bourdieu's work. A field can be any structure of social relations (King, 2005:223). It is a site of struggle for positions within that field and is constituted by the conflict created when individuals or groups endeavour to establish what comprises valuable and legitimate capital within that space. Therefore one type of cultural capital can be at the same time both legitimate and not, depending on the field in which it

is located. It can be seen therefore, that the legitimation of a particular type of cultural capital is completely arbitrary. The power to arbitrarily determine what constitutes legitimate cultural capital within a specific field is derived from symbolic capital. Habitus is also important to the concept of cultural capital, as much as cultural capital can be derived from an individual's habitus (Harker, 1990 p. 10; Webb, 2002, p. 37; Gorder, 1980, p. 226). It is formed not only by the habitus of the field (Harker et al, 1990:11) but also by the objective probability of the class to which the individual belongs (King, 2005, p. 222), in their daily interactions (Gorder, 1980:226) and it changes as the individual's position within a field changes. (Harker, 1990, p. 11).

The concept of cultural capital has received widespread attention all around the world, from theorists and researchers alike. It is mostly employed in relation to the education system, but on the odd occasion has been used or developed in other discourses. Use of Bourdieu's cultural capital can be broken up into a number of basic categories. First, are those who explore the theory as a possible means of explanation or employ it as the framework for their research. Second, are those who build on or expand Bourdieu's theory. Finally, there are those who attempt to disprove Bourdieu's findings or to discount them in favors of an alternative theory.

In sociology and anthropology, *symbolic capital* can be referred to as the resources obtainable to an individual on the basis of honor, prestige or recognition, and functions as an authoritative embodiment of cultural value. A war hero, for example, may have symbolic capital in the context of running for political office. Symbolic capital cannot be converted to other forms of capital (economic, cultural, social). Rather, these latter three can have also symbolic value. For example a car may have both economic and symbolic value. Value of any given object is always a sum of its symbolic and other capital. Symbolic capital is always defined by the system in which it is valued. Different

system value the same object differently: for some, car as economic capital has less symbolic value than for others. Symbolic capital can be scientifically and methodologically difficult to apply in this study because a comparison between two legal cultures, doesn't mean that it is obvious to compare their symbolic capital. To make a silly example, the rapid implementation of a EU-directive can be a symbolic capital in one legal culture, and be something that the legal culture strives after achieving, showing a modern development to a fast adjustment of legislation. While another legal culture has the opposite symbolic capital, that to implement the directive as "little as possible" is a symbolic capital and sign of autonomy. This does however not say anything about how strong or weak a legal culture is and how well founded its habitus is, it merely states the means and properties of "the game", and brings us know more about the of the habitus itself.

3:2 Framing the Paradox of Implementing Unified Legislation in Different EU-Member States

As mentioned above, Bourdieu utilized the methodological and theoretical concepts of habitus and field in order to make an epistemological break with the prominent objective-subjective antinomy of the social sciences. He wanted to effectively unite social phenomenology and structuralism. Habitus and field are proposed in this purpose for they can only exist in relation to each other. While a field is constituted by the various social agents participating in it (and thus their habitus), a habitus, in effect, represents the transposition of objective

structures of the field into the subjective structures of action and thought of the agent. The relationship between habitus and field is a two-way relationship. The field exists only so far as social agents possess the dispositions and set of perceptual representation that is necessary to constitute that field and fill it with meaning. On the other hand, by participating in the field agents incorporate into their habitus the proper know-how that will allow them to constitute the field. Habitus endorses the structures of the field, and the field mediates between habitus and practice.

Therefore, Bourdieu attempts to use the concepts of habitus and field to tear down the division between the subjective and the objective. (Whether or not he successfully does so is debatable.) Bourdieu asserts that any research must be composed of two "minutes." The first an objective stage of research where one looks at the relations of the social space and the structures of the field. The second stage must be a subjective analysis of social agents dispositions to act and their categories of perception and understanding that result from their inhabiting the field. Proper research, he says, cannot do without these two together.

Those researchers and theorists who explore or employ Bourdieu's theory use it in a similar way as it was articulated by Bourdieu. They usually apply it uncritically, and depending on the measurable indicators of cultural capital and the fields within which they measure it. Bourdieu's theory either works to support their argument totally, or in a qualified way.

Hage uses Bourdieu's theory of cultural capital to explore multiculturalism and racism in Australia. His discussion around race is distinct from Bourdieu's treatment of migrants and their amount of linguistic capital and habitus. Hage actually conceives of "whiteness" (in Dolby, 2000:49) as being a form of cultural capital. 'White' is not a stable, biologically determined trait, but a "shifting set of social

practices” (Dolby, 2000:49). He conceptualizes the nation as a circular field, with the hierarchy moving from the powerful centre (composed of ‘white’ Australians) to the less powerful periphery (composed of the ‘others’). The ‘others’ however are not simply dominated, but are forced to compete with each other for a place closer to the centre. This use of Bourdieu’s notion of capital and fields is extremely illuminating to understand how people of non-Anglo ethnicities may try and exchange the cultural capital of their ethnic background with that of ‘whiteness’ to gain a higher position in the hierarchy. It is especially useful to see it in these terms as it exposes the arbitrary nature of what is “Australian”, and how it is determined by those in the dominant position (mainly ‘white’ Australians).

For Marx, "capital is not a simple relation, but a process, in whose various movements it is always capital" (Marx, K. 1973 p.258)

Bourdieu sees symbolic capital (e.g. prestige, honour, the right to be listened to) as a crucial source of power. Symbolic capital is any species of capital that is perceived through socially inculcated classificatory schemes. When a holder of symbolic capital uses the power this confers against an agent who holds less, and seeks thereby to alter their actions, they exercise *symbolic violence*.

We might see this when EU attempts to harmonize a legal field, considered contra productive by some member states. From EU it is met by disapproving political discourses and symbols which serve to suggest the message that a harmonization is required, but never makes this coercive fact explicit.

People come to experience symbolic power and systems of meaning (culture) as legitimate. Hence the member state will often experience a responsibility to follow EU’s implicit requirement, regardless the actual productiveness and need for the new legislation. The member state is made to misrecognize the need of implementing the legislation. Moreover, by perceiving EU’s symbolic violence as

legitimate, the member states are complicit in their own subordination - the sense of duty has coerced the member state more effectively than explicit reprimands could have done. There is not a complete symbolic violence deriving from the EU. Since the EU is an international cooperation, each member state effects the harmonization of law. However, since there is a power play between old and new countries, the end result of in form of legal codes that are to be implemented can in some cases take the form of symbolic violence. Symbolic violence is fundamentally the imposition of categories of thought and perception upon dominated social agents who then take the social order to be just. It is the incorporation of unthought structures that tend to perpetuate the structures of action of the dominant. The dominated then take their position to be "right." Symbolic violence is in some senses much more powerful than physical violence in that it is embedded in the very modes of action and structures of cognition of individuals, and imposes the vision of the legitimacy of the social order. Cultural capital (e.g. competencies, skills, qualifications) can also be a source of misrecognition and symbolic violence. Therefore member states with weak legal culture can come to see the experience and disposition of their neighbors with strong legal culture as success and always legitimate. A key part of this process is the transformation of symbolic or economic legacy into cultural capital (e.g. experience) - a process which the logic of the cultural fields impedes but cannot prevent.

Bourdieu insists on the importance of a reflexive sociology in which sociologists must at all times conduct their research with conscious attention to the effects of their own position, their own set of internalized structures, and how these are likely to distort or prejudice their objectivity. The sociologist, according to Bourdieu, must engage in a "sociology of sociology" so as not to unwittingly attribute the object of observation the characteristics of the subject.

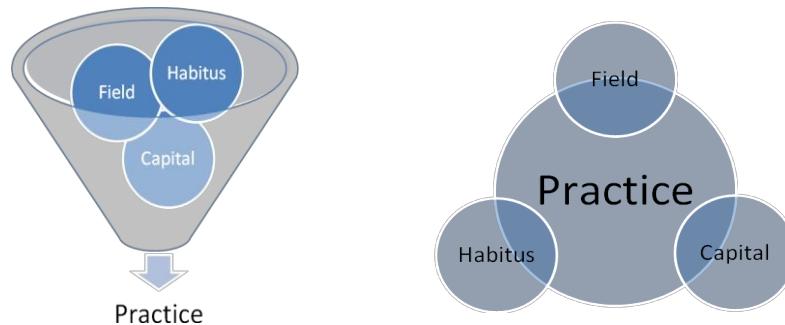
One must be cognizant of their own social positions within a field and recognize the conditions that both structure and make possible discourses, theories, and observations. A sociologist, therefore, must be aware of his or her own stakes and interests in the academic or sociological field and render explicit the conditions and structures of understanding that are implicitly filled in his or her practices within those fields. Bourdieu's conception of reflexivity, however, is not singular or narcissistic, but must involve the contribution of the entire sociological field. Sociological reflexivity is a collective endeavor, spanning the entire field and its participants, aimed at exposing the socially conditioned unthought structures that underlay the formulation of theories and perceptions of the social world.

Bourdieu's sociology in general can be characterized as an investigation of the pre-reflexive conditions that generate certain beliefs and practices that are generated in capitalist systems.

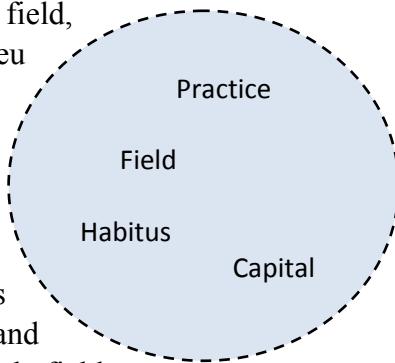
Bourdieu takes language to be not merely a method of communication, but also a mechanism of power. The language one uses is designated by one's relational position in a field or social space. Different uses of language tend to reiterate the respective positions of each participant. Linguistic interactions, thus, are manifestations, or instantiations, of the participants' respective positions in social space and categories of understanding, and thus tend to reproduce the objective structures of the social field. This determines who has a right to be listened to, to interrupt, to ask questions, and to lecture, and to legislate. Therefore Bourdieu's theories do not go so far from discourse analyses which will be elaborated following as a complementary framework to work with Bourdieu's theory.

But why use a complementary framework? Is it not enough with Bourdieu's structure and eclectic to supplement his works with additional perspectives? No theory is faultless, and a theory that

claims to have its strongest segment in the methodological field, but doesn't quite follow through is open to balancing with other perspectives and tools. On the surface, Bourdieu is very pedagogical and has clear structures and methodologies to follow. But as you scratch this surface and go in depth it the concepts he uses, they slowly begin to merge with one another.



Then you come as far in the study as it is time to apply his theory on your empirical results it becomes evident that the clear methodological concepts of practice, field, habitus and capital given by Bourdieu "float" or merger together. The only concept that is possible to narrowly distinguish is practice. A considerable quantity of his theory is; semantics. This leads to that also the analytical results in the study based on Bourdieu's framework become floats together and merges. When practice is studies and field, habitus and capital is defined in the study, the empirical results are difficult to distinguish as to what is field, habitus and capital. Nevertheless, I think Bourdieu's theory has a very attractive and



motivating perspective that is open enough to let the scientist create an exciting study and his theory, because of its openness is possible to apply to many areas. In my main critic against Bourdieu is also a affirmative and positive feature, since even though it has its positives to include a theory that has concrete concepts that do not float together, the studied reality, often in fact does float together and has inseparable structures. These inseparable structures have to be captures by a methodological tool and framework so that they become clear in the study. The inseparable structures often hide in discourse which is an important form of social practice, that both reproduces knowledge as well as changes knowledge, identities and social relations, social structure is a social relation in society as a whole and in determined institutions, and the social structure has both discursive and non-discursive elements (Fairclough, 1992, p 64) Analyzing a discourse can offer an awareness of the concealed driving force in a studied practice, therefore, enable us to solve concrete problems - not by providing explicit answers, but by making us ask ontological and epistemological questions. Discourse analyses will therefore be an example of an empirical way to study field, habitus and culture.

3:3 Discourse Analyses as Part of the Theoretical Structure

The term discourse analysis first entered general use as the title of a paper published by Zellig Harris in 1952. Although that paper did not yet offer a systematic analysis of linguistic structures “beyond the sentence level”.

As a new cross-discipline, Discourse analyses began to develop in the late 1960s and 1970s in most of the humanities and social sciences, more or less at the same time, and in relation with, other new (inter- or sub-) disciplines, such as semiotics, psycholinguistics, sociolinguistics, and pragmatics. Whereas earlier studies of discourse, for instance in text linguistics, often focused on the abstract structures of written texts. The concept discourse analyses contains in fact two concepts, discourse method and discourse theory. In some contexts, these conceptions are phrased in a different way. It is said that discourse analyses can be *used* as a method or as a theory, or, in fact, both. I believe that discourse analyses is both a theory and a method, however I am distinguishing them for the sake of simplicity of analyses and clarity in disposition. In this theoretical chapter, I want to describe the use of discourse analyses as a theoretical perspective and show how it, together with the concepts given by Bourdieu, gives a specific angle of analyses to my document study. Discourse Analysis is meant to provide a higher awareness of the hidden motivations in others and ourselves and, therefore, enable us to solve concrete problems - not by providing unequivocal answers, but by making us ask ontological and epistemological questions.

Though critical thinking about and analysis of situations/texts is as ancient as mankind or philosophy itself, and no method or theory as such, Discourse Analysis is generally perceived as the product of the postmodern period. The reason for this is that while other periods or philosophies are generally characterized by a belief-system or meaningful interpretation of the world, postmodern theories do not provide a particular view of the world, other than there is no one true view or interpretation of the world. In other words, the postmodern period is distinguished from other periods (Renaissance, Enlightenment, Modernism, etc.) in the belief that there is no meaning, that the world is inherently fragmented and heterogeneous, and that any sense making system or belief is mere subjective interpretation - and an interpretation that is conditioned by its social surrounding and the dominant discourse of its time. Postmodern theories, therefore, offer numerous readings aiming at "deconstructing" concepts, belief-systems, or generally held social values and assumptions. Some of the most commonly used theories are those of Jacques Derrida (who coined the term "deconstruction"), Michel Foucault, Julia Kristeva, Jean-François Lyotard, and Fredric Jameson (this extremely brief listing of a few critical thinkers is neither comprehensive nor reflecting a value judgment; these are merely *some* of the most common names encountered when studying postmodern theories).

I want to mention some discourse theories and perspectives that have given me inspiration in choosing this perspective on a study of European implementation processes. Discourse theory refers to an understanding of "the social" as a discursive construction, where all social phenomenon can be analysed with discourse analytical tools. A discourse theory is often correlated with texts and language, but also to the analyses of social fields. Because of its broad focus, discourse theory is very suitable as a theoretical base for various social constructive angles of approach. However, some discourse theories,

like Laclau and Mouffe, are just developing theory and are thereby difficult to use as practical methodological tools in a text analyses. Laclau and Mouffe's goal is to develop their theory through a deconstruction of other theories. (Winther-Jörgensen. M Phillips. L, 2000 p.31) The general thought in discourse theory is that social phenomenon are never finished, ended or total. Their meaning can never be final and fixed, which gives room for a constant conflict about definitions of society and identity – a conflict that achieves social consequences. A discourse analysis strives to establish a univocity of “the social” on all levels (Winther-Jörgensen. M Phillips. L, 2000 p.31) Laclau and Mouffe build their theory through a convergence of two theoretical perspectives, marxism and structuralism. Marxism provides them with a way to approach “the social” and structuralism offers a theory about meaning and sense. Laclau and Mouffe melt these traditions together to realize a perception of the social field as a network of sense building processes. The purpose of their discourse analyses is to map the processes where we struggle about how the meaning of texts and signs is established and fixed and to see how some meanings become so conventional that we perceive them as natural. A discourse is therefore perceived as a fixation of meaning in a specific domain. (Winther-Jörgensen. M Phillips. L, 2000 p.32-33) The discourse is consequently defined by Laclau and Mouffe as a totality, where every sign is distinctively determined as a moment through the relations to other signs, as a fishing net. This makes it possible to exclude all other possible meanings as signs and the other possible ways they can effect each other. This makes Laclau and Mouffe discourse a reduction of possibilities. (Winther-Jörgensen. M Phillips. L, 2000 p. 34 f). All signs in a discourse are *moments*, they are knots bound together in a network and their meaning is determined by the different ways they distinguish themselves from each

other (*differential positions*) (Winther-Jörgensen. M Phillips. L, 2000 p. 33)

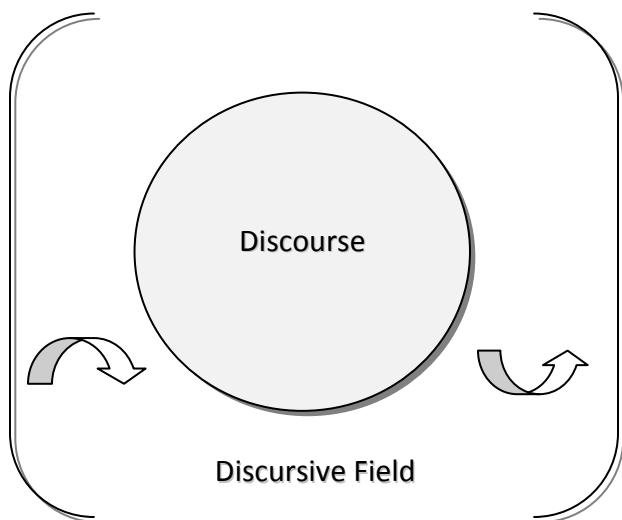
This definition is very clear and interesting and makes it possible to formulate limitations in research with the help of their framework. If a discourse is a reduction of possibilities it is unproblematic to just state from Laclau and Mouffe that in this study the discourse of legal cultures is therefore perceived as a fixation of meaning in a specific domain, and all other factors such as for example labour market, EU member states history and socio-economical structures are reduced to something that Laclau and Mouffe call the *discursive field* that will be discussed subsequently. However, I consider this limitation being too simple, taking into account the definition of legal culture. If we perceive legal culture as something that is effected by other social structures and not being a self reproductive system, it is not possible to apply a rigid definition to discourse as Laclau and Mouffe do. On the other hand, Laclau and Mouffe do find a way out from this dilemma by defining the something they call the discursive field or the “constitutive external” (Laclau and Mouffe 1985, p 111)

The discursive field is a reservoir of attributes that signs and meanings have had, or have in other discourses, but that have been ignored in the specific discourse to achieve uniformity (Winther-Jörgensen. M Phillips. L, 2000 p. 34 f). A discourse always constitutes itself in relation to what it excludes, thus in relation to the discursive field. But in Laclau and Mouffe’s discourse theory it is not completely clear if the discursive field is a quite unstructured territory of all possible meaning formation, or if it is structured by the given discourse. To give an example and put this critic in context in my study of implementation processes concerning EU migration law, we can claim that in an official discourse of implementation processes of EU-directives shouldn’t contain political and economical issues such as unemployment of immigrants in labour market questions, and discussion of weather the

specific legal culture can handle more immigrants in Europe's labour markets if the EU demands this from the nevertheless there is nothing that restricts an element from a discourse on unemployment and labour market from existing and at a given time being included in the discourse of implementation processes of EU-member states, directives. Does this mean that the discourse of unemployment among immigrants could be a part of the discursive field? Or is it just discourses that move in the same territory that constitute the discursive field. In both these situations Laclau and Mouffe converge these concepts into the discursive field, making it slightly unclear and problematic to use empirically.

As others before me, I find it relevant to divide these concepts analytically. "The discursive field" can consequently characterize all possible formations of meaning, while "discourse order" a concept from Fairclough can characterize a limited number of discourses that struggle in the same territory. However, I want to stay with Laclau and Mouffe for a while longer. The discursive field is thus the external of the discourse, all that it excludes.

But because a discourse is always constituted in relation to the discursive field, it is always at risk of being undermined by this field. This is to say that the discourse uniformity can be displaced by



other definitions of meaning (Winther-Jørgensen. M Phillips. L, 2000 p. 34-35) This is where the concept *element* comes in. Elements are the signs that have not yet gained their final meaning. These are the signs that are ambiguous and multifaceted. With this concept it is now possible to reframe the definition of discourse. A discourse is trying to make the “elements” into “moments” by reducing their ambiguous multifaceted character and giving them uniformity. Discourse theory defines this as closure, a temporary stop in the significance of signs. However the closure is never completely over, the transition from element to moment is never fully completed (Laclau and Mouffe 1985, p 110) The uniform discourse can never be fixated to the extent that it cannot be undermined by the multifaceted discursive field. In the case of EU member states legal cultures the national legal discourse has to be modified because EU-directives and EU-law in general is “on the way in” and has to be implemented in national law, thus national discourse has to modify and be undermined by the discursive field.

As said from the beginning Laclau and Mouffe’s discourse theory is very abstract and difficult to use empirically. They do however create one point in their theory that can be of some empirical assistants as a tool. Laclau and Mouffe establish that meaning arises around some *nodal points* (Laclau and Mouffe 1985, p 112). A nodal point is a privileged sign from which the other signs are organized and from which achieve their meaning (Winther-Jørgensen. M Phillips. L, 2000 p. 34-35) In the political discourse “democracy” is a nodal point, and in the national discourse “the people” are the privilege sign of it. In EU “harmonization” is a nodal point and “intentions to unify” is one of the examples of a privileged sign. If I put all of these concepts together and in relation to each other it becomes clear that the *discourse* strives after the abolishment of as many multifacilities as possible through making the *elements* to *moments* by a *closure*. But this ambi-

tion never succeeds entirely because the possibilities of *meaning* that the discourse abolishes to the *discursive field* always threaten to destabilize the uniformity. All moments remain therefore potentially multifaceted. Laclau and Mouffe's concept of discourse does not only apply to language and language signs, but to all social phenomenon. I explained earlier how the discourses try to structure signs as if all signs had a uniform and fixed meaning in a total structure. The same logic applies to the whole social field; we act as if reality around us has a uniform and permanent structure, as if society and our identity are objectively certain. But just as the structure of language never is determined, the changing society and identity always remain floating and changing dynamically. The task of the analyses is therefore not to map the objective reality, but to observe how we create reality so that it becomes an objective and understandable world (Winther-Jørgensen. M Phillips. L, 2000 p. 40) For Laclau and Mouffe the political processes have a great importance politics have precedence (Laclau 1990, p 33). The political articulations determine actions and thought, and thereby how society is constructed. Politics in discourse theory should not be understood narrowly as the politics of certain political parties, but as a wide definition and concept that refers to the "the social" that is repeatedly constituted in certain determined ways that exclude other options. Actions are contingent articulations, temporary fixations that have meaning in a non-defined territory whereby the ruling discourses and thereby society is reproduced or changed. To form society in a certain way, and thereby exclude all other options, is the way Laclau and Mouffe understand politics. Politics is thereby not only a reflected surface of a deeper social reality, but social organization itself is a result of corresponding political processes (Winther-Jørgensen. M Phillips. L, 2000 p. 43) I have previously mentioned that Laclau and Mouffe do not make any detailed analyses of empirical material themselves. And when they define concrete discourses it is

rather as abstract events than as resources that are used and reformed in the everyday actual practice. Yet this does not mean that Laclau and Mouffe's theory cannot be used in such purpose. It however demands some imagination. It is highly possible and interesting to work with for example Laclau and Mouffe's nodal points and their concretization of the different between discourse and discursive field. I fell that these theoretical tools can give some general interesting perspectives in my study. But to be able to go in deeper in my material and object of study I rather I believe there is a need for a less theoretical, and more empirical discourse analyses, since, in the end, it is used as a text analyses method and a framework to understand and frame the empirical material. I do not however exclude Laclau and Mouffe's theory, but chose to colour it with complementary perspectives that will play a much bigger role in my analyses.

Critical discourse analyse provides theories and methods that makes it possible to theoretically problemize and empirically examine relations between discursive practice and socio- cultural development in different social contexts (Winther-Jørgensen. M Phillips. L, 2000 p. 66) The term "critical discourse analyses" is used in two different ways. Norman Fairclough uses them both as a term for the approach he has developed and as a term for the broader movement within discourse analyses to which there are many approaches, non the least, his own (Fairclough and Wodak 1997)

For discourse analytics, the discourse is a very important form of social practice that both constitutes and is constituted of other practices. As social practice, discourse has a dialectic relationship to other social dimensions. Discourse does not only contribute to forming and reforming social structures and processes, but also reflects them (Winther-Jørgensen. M Phillips. L, 2000 p. 68)

There are many approaches within critical discourse analyses, but I am choosing one focus point, the discourse theory of Norman Fair-

clough. Fairclough has a particularly useful model for discourse as social practice. Just as Laclau and Mouffe, Fairclough has a lot of new concepts he presents. These concepts are bound together in a complex three-dimensional model (Winther-Jörgensen. M Phillips. L, 2000 p. 71) The model and its central components will be presented and put into context in the method chapter.

What is central in Fairclough's discourse analyses is as that discourse is an important form of social practice, that both reproduces knowledge as well as changes knowledge, identities and social relations, this includes power relations. At the same time discourse is formed by other social practices and structures. This is the dialectic relation discourse has to other social dimensions in Fairclough's theory. Social structure is understood by Fairclough as social relations in society as a whole and in determined institutions, and the social structure has both discursive and non-discursive elements (Fairclough, 1992, p 64) Practice that primarily is non-discursive can be the physical practice that is involved in writing a text, typing a EU-directive etc, when the planning of it and communication around the issue is primarily discursive. (Fairclough, 1992, p 66) At the same time Fairclough takes a step away from structuralism and leans towards a more poststructuralist position through claiming that a discursive practice not only reproduces an existing discursive structure but also questions this structure by establishing definitions to what is outside the structure. Another important difference in Fairclough's theory that I find very useful and constructive, is his main focus on theory- and method constructing with reference to empirical research (Fairclough, 1992, p 72)

Fairclough's approach is a text oriented discourse analyses that tries to connect three traditions; Detailed text analyses, inspired by Michael Halliday's functional grammar. Macro sociological analyses of social practice, inspired by Foucault's theory that lacks methodol-

ogy for analyses of specific texts. This is the main reason for why I have chosen to not include Foucault's discourse analyses in this study. It has many interesting perspectives, but is in fact too theoretical to be used as a tool to make an document analyses.

The interpretative micro sociology inspired by ethno methodology. (Winther-Jørgensen. M Phillips. L, 2000 p. 71) Fairclough uses the detailed text analyses to achieve an insight in how discursive processes can be read linguistically in specific texts. However he criticizes some approaches in linguistics and concentrates on a text analyses to gain a understandable but shallow understanding of the relation between text and society. Since Fairclough considers text analyses rather shallow, he tries to find a way where the connections between text and the socio-cultural processes and structures can be analyzed. There is a need for an interdisciplinary approach where it will be possible to combine text analyses and social analyses. The idea to build this upon macro sociological traditions lies in the thought that macro sociological traditions consider that social practices are formed by social structures and power relations, and that society often is not aware of these processes. The purpose of building the rest of the discourse analyses on the interpretative micro sociological tradition is to understand how society actively creates regularity (Fairclough, 1992, p 47)

Michael Foucault is probably the scientist that is mostly associated with discourse analyses. When Foucault perceives and studies discourses they are much broader than the linguistic approach. Foucault's definition of discourses is: "The whole practice that produces and creates a certain type of statements" (Foucault 1993 p. 57) The word "discourse" is frequently used in scientific debates, the word discourse is however used in the framework of discourse analyses as an idea of the concept that language is structured in different patterns that our statements follow when we act in different social domains.

Discourse analyses is often claimed to belong to the field of social constructivism. Social constructivism is a sociological and psychological theory of knowledge that considers how social phenomena develop in particular social contexts. Within constructionist thought, a social construction (social construct) is a concept or practice which may appear to be natural and obvious to those who accept it, but in reality is an invention or artifact of a particular culture or society. Social constructs are generally understood to be the by-products (often unintended or unconscious) of countless human choices rather than laws resulting from divine will or nature. This is not usually taken to imply a radical anti-determinism. Social constructivism is usually opposed to essentialism, which defines specific phenomena instead in terms of transhistorical essences independent of conscious beings that determine the categorical structure of reality. A major focus of social constructivism is to uncover the ways in which individuals and groups participate in the creation of their perceived social reality. It involves looking at the ways social phenomena are created, institutionalized, and made into tradition by humans. Socially constructed reality is seen as an ongoing, dynamic process; reality is reproduced by people acting on their interpretations and their knowledge of it.

3:3:1

Imbedded Social Constructions in Legal Documents

The first book with "social construction" in its title was Peter L. Berger and Thomas Luckmann's *The Social Construction of Reality*, first published in 1966. Since then, the term found its way into the mainstream of the social sciences. The work introduced the term *social construction* into the social sciences. The central concept of *The Social Construction of Reality* is that persons and groups interacting together in a social system form, over time, concepts or mental representations of each other's actions, and that these concepts eventually become habituated into reciprocal roles played by the actors in relation to each other. When these roles are made available to other members of society to enter into and play out, the reciprocal interactions are said to be institutionalised. In the process of this institutionalisation, meaning is embedded in society. Knowledge and people's conception (and belief) of what reality is becomes embedded in the institutional fabric of society. Social reality is therefore said to be socially constructed. Emile Durkheim first theorized about social construction in his anthropological work on collective behavior, but did not coin the term. The central idea of Berger and Luckmann's Social Construction of Reality was that actors interacting together form, over time, *typifications* or mental representations of each other's actions, and that these typifications eventually become *habitualized* into reciprocal *roles* played by the actors in relation to each other. When these reciprocal roles become routinized, the typified reciprocal interactions are said to be *institutionalized*. In the process of this

institutionalization, *meaning* is embedded and institutionalized into individuals and society - knowledge and people's conception of (and therefore belief regarding) what reality 'is' becomes embedded into the institutional fabric and structure of society, and social reality is therefore said to be socially constructed.

Berger and Luckman's work has been influential in the sociology of knowledge, including the sociology of science, where Karin Knorr-Cetina, Bruno Latour, Barry Barnes, Steve Woolgar and others use the ideas of social constructionism to relate what science has typically characterized as objective facts to the processes of social construction, with the goal of showing that human subjectivity imposes itself on those facts we take to be objective, not solely the other way around. Marvin Carlson believes that our lives "are structured according to repeated socially sanctioned modes of behaviour" and this "raises the possibility that all human activity could potentially be considered as performance." (Marvin Carlson, "What is Performance?") This includes the idea of social construction, this is the unnatural way in which people act in public society to conform. In the tradition of sociology of knowledge, what seems real to members of a social class arises from the situation of the class, such as the capitalist or working classes, especially with respect to the economic fundamentals which affect the class. According to the theories advanced by Karl Mannheim, who formulated the classic theories of sociology of knowledge, intellectuals occupy a special position which is to some extent free of the intellectual blinders imposed by the social position of other classes.

Antonio Gramsci's theory of hegemony both prefigures and enriches current social constructionist discourse. As a Marxist, Gramsci was interested in the way inequities between classes are maintained, and the role of knowledge in this process. Marx himself recognized the important role of knowledge in the maintenance of

class structure, observing that the prevailing ideology in society tends to be the ideology of the ruling class, and proposing that the proletariat are suppressed by a social structure which gave a 'false consciousness'. Whilst previous Marxist thinkers saw hegemony in terms of political and ideological leadership, Gramsci took the idea of hegemony as ideological dominance and expanded it to the common sense knowledge of the everyday. In Gramsci's view, the interests of the ruling class are not only reflected in politics and ideologies, but also in the taken-for-granted, assumed-as-natural knowledge that appears as common sense. By accepting a version of common sense that protects the interests of the bourgeoisie as natural and inevitable, the proletariat 'consent' to domination: revolution is prevented and the social order is maintained (Hall, S., Lumley, B. & McLennan, G (1978).

Michel Foucault's influential idea of "discourse" (and "discursive formation") can also be seen to contribute to and connect with social constructionist thought.

An illustrative example of social constructionist thought at work is, following the work of Sigmund Freud and Émile Durkheim, religion. Freud argued that the basis for religion is rooted in our psyche, in a need to see some purpose in life. A given religion, then, does not show us some hidden aspect of objective reality, but has rather been constructed according to social and historical processes according to human needs. Peter L. Berger wrote an entire book exploring the social construction of religion, *The Sacred Canopy*.

Social constructivism can be seen as a source of the postmodern movement, and has been influential in the field of cultural studies. Some have gone so far as to attribute the rise of cultural studies (the cultural turn) to social constructivism Within the social constructionist strand of postmodernism, the concept of socially constructed reality stresses the on-going mass-building of worldviews by individuals in

dialectical interaction with society at any time. The numerous realities so formed comprise, according to this view, the imagined worlds of human social existence and activity, gradually crystallized by habit into institutions propped up by language conventions, given ongoing legitimacy by mythology, religion and philosophy, maintained by therapies and socialization, and subjectively internalized by upbringing and education to become part of the identity of social citizens. Social constructivism is a very important part of the framework for a discourse analyses, the discourse this theoretical structure Bourdieu's notion of field, habitus, and symbolic capital also are to be social constructions. Consequently, we are studying legal cultures as social constructions and the habitus, being our "way in" to study legal cultures also has to be perceived as a social construction.

4 *Methodological Framework*

4:1 *Methodological Reflection in the Study of the EU*

When studying the European Union and European integration⁹ the question of how to explain this process and development has been disputed among scientists. The main dispute has been concerning; which are the driving forces in the integration process and why the European cooperation has taken the specific development it has. There have been two major directions in the debate.

Neofunctionalism argues that the supranational institutions of the European Union themselves have been a driving force behind European integration; reinterpreting agreed results from Intergovernmental

⁹ European integration is the process of political, legal, economic (and in some cases social and cultural) integration of European states, including some states that are partly in Europe. In the present day, European Integration is primarily achieved through the Council of Europe in Strasbourg and the European Union seated in Brussels and Luxembourg.

Conferences in order to expand the mandate of EU legislation into new and more diverse areas. The theory of neofunctionalism is felt by some to be important as it may explain much of the thinking behind the early proponents of the European Union, such as Jean Monnet, who saw increased European integration as the most important precursor to a peaceful Europe (Tallberg. 2007)

Neofunctionalism assumes a decline in importance of nationalism and the nation-state; it sees the executive power and interest groups within states to be pursuing a welfarist objective which is best satisfied by integration of EU states. The thinking behind the neofunctionalist theory can be best described by considering the three mechanisms, which neofunctionalists see as key to driving the process of integration forwards. These are positive spill over, the transfer of domestic allegiances and technocratic automaticity:

Neofunctionalism is in a sense a theory of regional integration, building on the work of Ernst B. Haas, an American political scientist. Jean Monnet's approach to European integration, which aimed at integrating individual sectors in hopes of achieving spill-over effects to further the process of integration, is said to have followed the neofunctional school. Haas later declared the theory of neofunctionalism obsolete, after the process of European integration started stalling. Neofunctionalism has also been called too Eurocentric and hence incapable of describing the process of integration in general. Neofunctionalism has also been called too Eurocentric and hence incapable of describing the process of integration in general.

Unlike previous theories of integration, neofunctionalism was non-normative and tried to describe and explain the process of regional integration based on empirical data. Integration was regarded as an inevitable process, rather than a desirable state of affairs that could be introduced by the political or technocratic elites of the involved states' societies. Its strength however was also its weakness: While it under-

stood that regional integration is only feasible as an incremental process, its conception of integration as a linear process made the explanation of setbacks impossible (Tallberg. 2007)

By applying the neofunctionalist approach the concentration lies on the importance and decisive role of transnational actors and EU's supranational institutions. The view on integration is that it is the result of transnational actors, for example companies, that have been a driving force for politicians to create joint rules and legislation on the European level and make possible trade and activity across borders. The European Institutions, mostly the commission, have a joint interest in a European legislation and have therefore encouraged and realized a development in this direction. The spreading of cooperation from one area to another, a so called *spill-over*, is explained by the neofunctionalists in a fairly uncomplicated way, In a certain field of politics where there is transnational cooperation, it will be needed to have cooperation in nearby fields, with new initiatives as result (Tallberg. 2007, s 34)

The other direction to explain the driving forces of integration has been *intergovernmentalism*.

Intergovernmentalism is an substitute theory of political integration, where power in international organizations is possessed by the member-states and decisions are made by unanimity. Independent appointees of the governments or elected representatives have solely advisory or implementation functions. Intergovernmentalism is used by most international organizations today. An alternative method of decision-making in international organizations is supranationalism (Stone & Sandholtz)

Intergovernmentalism is also a theory on European integration which discards the idea of neofunctionalism. The theory, initially proposed by Stanley Hoffmann and advanced by Andrew Moravcsik suggests that governments control the level and haste of European inte-

gration. Any increase in power at supranational level, results from a direct decision by governments. He believed that integration, driven by national governments, is often based on the domestic political and economic issues of the day. The theory rejects the concept of the *spill over* effect that neofunctionalism proposes. He also rejects the idea that supranational organisations are on an equal level (in terms of political influence) as national governments.

Usually intergovernmentalism refers to the decision-making methods in international organisations, where power is possessed by the member states and decisions are often but not always made by unanimity. Independent appointees of the governments or elected representatives have solely advisory or implementational functions. Intergovernmentalism is used by most international organizations today (Stone & Sandholtz)

Integration becomes a consequence of a series of aware choices made by member states and expressed in the treaties that are used to strengthen the member states economically and politically. The EU-institution are therefore not to be considered as independent political actors with their own political agenda, but a tool in the hands of governments that have a clear will of what they want to achieve in the cooperation. Cooperation within EU spreads to new fields when member states realize that it is in their interests, and the form that the new cooperation obtains is shaped by the member states negotiation power (Tallberg. 2007, s 35)

It is obvious that both neofunctionalism and intergovernmentalism have something to articulate about the development of integration in the European Union, however they point to different parts of reality. Even though they point out two different pictures, they can also be considered complementary. While neofunctionalism captures the everyday integration and explains how translational activity drives EU towards unified legislation, intergovernmentalism describes how the

demand for European initiatives leads to new treaties in negotiations between member states. There is also a relatively large similarity between these perspectives regarding what factors motivate the key actors in the integration process. Whether it is EU-institutions, translational actors, or member state governments, the three key factors are; economical interdependence, security policy as well as ideology and identity (Tallberg. 2007, s 36)

I have chosen to step out of these theoretical perspectives. Not to denounce them, but to step away from the perception they line out for the researcher. Instead I am perceiving the EU as a social construction and foremost as a constructed political system.

4:2 *Qualitative Methods*

The field of qualitative methods consists of a variety of research fields. The variety is so immense that I think it is reasonable to talk about many qualitative traditions. I am however going to stop by explaining the main features of qualitative methods and go in deeper in explaining what kind of qualitative framework I have chosen and for which reasons.

The qualitative tradition exists mainly in humanistic and social science disciplines. Its purpose is about giving “plentiful” and deep as well as multidimensional descriptions that rarely contain measurable variables. Within social science, we meet the description that qualitative methods help building a “framework” or give a “context”. This can for example mean to describe the environment and field in which the study is placed (P. & B-M Sohlberg, 2002 p. 88) The content of

qualitative descriptions can, beyond giving context, be a question of observing behaviour and products of social actions in general. A form of qualitative studies that have a long tradition in social science are *text analyses*. The main feature of the qualitative description in this correlation is commonly in connection with the analyses itself. In most cases this method is performed by descriptions in forms of referatory and quotations that are mixed with the analyses of the text (P. & B-M Sohlberg, 2002 p. 89) My study is a *qualitative text analyses* where the analyses will be a study of legal documents with social science methods and theories to describe the social context of the studied phenomenon. My analyses will thereby not only be a theoretical analyses of empirical data, but a methodological text analyses that is perceived in a theoretical framework.

One of my main reasons for doing qualitative research is to become more experienced with the phenomenon of interests. There are a wide variety of methods that are common in qualitative measurement. In fact, the methods are largely limited by the imagination of the researcher.

Qualitative research certainly excels at generating information that is very detailed. Of course, there are quantitative studies that are detailed also in that they involve collecting lots of numeric data. But in detailed quantitative research, the data themselves tend to both shape and limit the analysis. For example, if you collect a simple interval-level quantitative measure, the analyses you are likely to do with it are fairly delimited (e.g., descriptive statistics, use in correlation, regression or multivariate models, etc.). And, generalizing tends to be a fairly straightforward endeavour in most quantitative research. After all, when you collect the same variable from everyone in your sample, all you need to do to generalize to the sample as a whole is to compute some aggregate statistic like a mean or median.

Things are not so simple in most qualitative research. The data are more "raw" and are seldom pre-categorized. Consequently, you need to be prepared to organize all of that raw detail. And there are almost an infinite number of ways this could be accomplished. Even generalizing across a sample of documents becomes a complex endeavour (R. Ej vegård, 2003 p. 32)

The detail in most qualitative research is both a blessing and a curse. On the positive side, it enables you to describe the phenomena of interest in detail, in the original language of the research participants. In fact, some of the best "qualitative" research is often published in book form, often in a style that almost approaches a narrative story. However, when you have that kind of detail, it is hard to determine what the generalizable themes may be. In fact, many qualitative researchers do not even care about generalizing, they are content with generating rich descriptions of phenomena.

4:2:1 *Positive and Negative Sides to Qualitative Studies in This Field*

Depending on scientific perspective some qualitative researchers reject the framework of validity that is commonly accepted in more quantitative research in social sciences. They reject the basic realist assumption that there is a reality external to our perception of it. Consequently, it doesn't make sense to be concerned with the "truth" or "falsity" of an observation with respect to an external reality (which is

a primary concern of validity). These qualitative researchers argue for different standards for judging the quality of research.

At the same time the very strengths and contributions of qualitative methods can conversely be weaknesses if they are used badly for superficial analysis. Qualitative research is frequently dismissed as ‘unscientific’ and ‘anecdotal’ by researchers used to quantitative analysis. As discussed in more detail in what follows, in some cases the potential challenges can be overcome through careful use of qualitative methods themselves and in other cases they require triangulation with other methods.

When making a qualitative study of the EU legislation as a researcher, an external understanding may enable a more balanced understanding than that of insiders and a more accurate reflection of complex reality. A qualitative method instead of a quantitative one gives a more balanced representation of different stakeholders and a possibility to a better understanding of processes.

However there are sides of qualitative research that have faced criticism and need attention. A qualitative research may be overly influenced by the subjective views of the researcher, this critic is often met by the argument that for exactly these reason qualitative research never claims to be objective, but wants to give a narrative and a scientific interpretation of a phenomenon. It may therefore be difficult to reconcile differences and assess how representative they are.

The research’s aim is to go in depth and understand a phenomenon, not to give a general outlook and description of the current situation, however qualitative research can be so all-encompassing that it is difficult to focus.

The role of the researcher doing qualitative research is to continually reflect on own biases and prejudices. I have considered that the same fact that gives me an advantage, having knowledge of the coun-

tries I am studying as cases, creates a problem of bias that I have to be aware of throughout the study.

4: 3 *Text and Document Analyses*

There is a range of document sources for social scientists to use. Documents can be perceived as sediments or remains of social practices with a potential of governing and structuring the decisions that are made in everyday life and in the long run. Documents also constitute determined interpretations of social events. The sources for document analyses embrace historical documents, legal, texts, laws, declarations, policies, treaties, but also secondary sources as individual's accounts of events (T. May 1997, p. 214-215)

Many definitions of the concept of "document" are very narrow, but John Scott has formulated a wider definition for scientific purposes:

"A document in its broader sense is a written text... To write is to formulate symbols that represent words, and you do this with the help of a pen, a typewriter or other tools to engrave the message on paper, parchment or other material media... In a similar way the electronic means imply that we can store data and texts as "files" and "documents" that are part of computers instead of documents in their real sense. From this perspective documents can thereby be perceived as physically packaged texts, where the physical tools primary purpose is

to store texts or be a container for them (J. Scott 1990: 12-13)

In this wide definition it is possible to put in a range of different documents as well as even photograph, maps, and personal diaries. However, in my study it is possible to approach document analyses from a much more narrow perspective since I am using a “classical” approach to document analyses and I am using traditional and conventional documents as legal texts. When using original legal documents the partial problem of authenticity and credibility of using documents is also avoided, since legal documents are considered a trustworthy source.

Nevertheless, documents do not speak for themselves. They need to be placed in a theoretical framework so we can make sense of their content. This can be done by *content analyses*, which is as well a variety of text analysis that is based on different steps, formulating the problem, going through the text, sampling and framing the text, interpretation and analyses (T. May 1997 p. 228-229) The analysis can be quantitative, qualitative or both. Typically, the major purpose of content analysis is to identify patterns in text.

When it comes to qualitative content analyses the text as whole is emphasized and the content constitutes as a ground for interpretation to understand for example culture (Ericson et. al. 1991:50)

Content analysis is an extremely broad area of research. The analysis of text is the identification of themes or major ideas in a document or set of documents. The documents can be any kind of text including field notes, newspaper articles, technical papers or organizational memos. Content analysis has the advantage of being unobtrusive and, depending on whether automated methods exist, can be a relatively rapid method for analyzing large amounts of text.

This method allows an analyses of legal texts and their textual information. By this method I can systematically identify its properties, e.g. the frequencies of most used keywords by detecting the more important structures of its communication content.

Qualitative content analyses are build upon a thinking process about the document belonging to a social context. The task is to make a symbolic reading of the text and to understand in which social context the text was written.

In this process the scientist chooses what is most important for the analyses and puts the different part together to create tendencies, sequences, patterns and structures. This process that consists of deconstruction, interpretation and reconstruction, brakes down many of the assumptions that are so important to quantitative analytics (Ericson et al. 1991:55)

Yet, such amounts of textual information must be categorized according to a certain theoretical framework, in my case discourse analyses, which will inform the data analysis, providing at the end a meaningful reading of content.

There are many ways to conceptualize documents, and these choices affect the research questions. For some researchers a document is a reflection of reality, where the document becomes a medium to understanding the correlation between the documents description and the events that are referred to in the document. I have chosen a different perspective with discourse analyses which studies the social constructions a text illustrates and is a method that allows the user to think about what is said in the documents, how it is said and how it could be said differently. This opens possibilities to find what orders and logics abide in the legislation of migration law.

I use the term of deconstruction in regards to analyzing European migration policies, but what is deconstruction? Deconstruction is a term in contemporary philosophy, literary criticism, and the social sciences, denoting a process by which the texts and languages of Western philosophy (in particular) appear to shift and complicate in meaning when read in light of the assumptions and absences they reveal within themselves. Jacques Derrida coined the term in the 1960s, and proved more forthcoming with negative, rather than pined-for positive, analyses of the school. Subjects relevant to deconstruction include the philosophy of meaning in Western thought, and the *ways* that meaning is constructed by Western writers, texts, and readers and understood by readers. Though Derrida himself denied deconstruction was a method or school of philosophy, or indeed anything outside of reading the text itself, the term has been used by others to describe Derrida's particular methods of textual criticism, which involved discovering, recognizing, and understanding the underlying—and unspoken and implicit—assumptions, ideas, and frameworks that form the basis for thought and belief, for example, in complicating the ordinary division made between nature and culture. It is difficult to define formally "Deconstruction" within Western philosophy. Martin Heidegger was perhaps the first to use the term (in contrast to Nietzschean 'demolition') Heidegger's central concern was the deconstruction of the Western philosophical tradition. The English word "Deconstruction" is an element in a translation series (from Husserl's *Abbau* to Heidegger's *Destruktion* to Jacques Derrida's

déconstruction). Scientists have resisted establishing a succinct definition of the word. When asked "What is deconstruction?": Derrida stated, "I have no simple and formalisable response to this question. All my essays are attempts to have it out with this formidable question" (Derrida, 1985, p. 4). There is much confusion as to what deconstruction is and determining what authority to accord to a given delimitation: a school of thought (not so in the singular), a method of reading (often so reduced by attempts at formal definition), or "textual event" (Derrida's implied characterization in the above quotation).

Derrida states that his use of the word deconstruction first took place in a context in which "structuralism was dominant" and its use is related to this context. Derrida states that deconstruction is an "antistructuralist gesture" because "Structures were to be undone, decomposed, desedimented" (Derrida, 1985, p. 2). At the same time for Derrida deconstruction is also a "structuralist gesture" because it is concerned with the structure of texts. So for Derrida deconstruction involves "a certain attention to structures" and tries to "understand how an "ensemble" was constituted" (Derrida, 1985, p. 3) As both a structuralist and an antistructuralist gesture deconstruction is tied up with what Derrida calls the "structural problematic" (Derrida, 1985, p. 2). The structural problematic for Derrida is the tension between genesis, that which is "in the essential mode of creation or movement" and structure, "systems, or complexes, or static configurations" (Derrida, 1985, p. 4)

According to deconstructive readers, one of the modernisms perspectives is the distinction between speech (*logos*) and writing, with writing historically being thought of as derivative to *logos*. As part of subverting the presumed dominance of *logos* over text, Derrida argued that the idea of a speech-writing dichotomy contains within it the idea of a very expansive view of textuality that subsumes both

speech and writing. Text is thought of not merely as linear writing derived from speech, but any form of depiction, marking, or storage, including the marking of the human brain by the process of cognition or by the senses.

In a sense, deconstruction is simply a way to read text (as broadly defined); any deconstruction has a text as its object and subject. This accounts for deconstruction's broad cross-disciplinary scope. Deconstruction has been applied to literature, art, architecture, science, mathematics, philosophy, and psychology, and any other disciplines that can be thought of as involving the act of marking. In deconstruction, text can be thought of as "dead", in the sense that once the markings are made, the markings remain in suspended animation and do not change in themselves.

4:4 *Discourse Analyses as Method of Text Analyses*

The purpose of a discourse analytic is not to "get behind" the discourse in the analyses, as it often is defined. It is to comprehend what meaning texts actually has and how reality actually is constructed behind the discourse. The starting point is that it is not possible to reach reality outside the discourse, which is why the discourse itself is the studied object. The main goal is to work with what has been written, and to examine what patterns there are in the statements as well as what social consequences different and conflicting discursive images of reality can have. The phenomenological tradition points out the

importance of remembering the role of the researcher in this context. It is a self-evident fact that I am much closer to one discourse than another and it is crucial to remember this fact so that own values and notions do not overshadow the analyses. While working with discourses close to one self it is particularly difficult to see them as *discourses* and socially constructed meaning systems that could be different in another context. Being individually part of a certain culture, some certainties and convictions are shared with the studied material, and it is those certainties one wishes to expose. It is important to try to alienate oneself from the material, however this is not a solution to the problem, this is only a initial approach that is significant. Every scientific material with a social constructivist approach can only be an interpretation. (Winther-Jørgensen. M Phillips. L, 2000 p. 28)

It is difficult to give a single definition of Critical or Discourse Analysis as a research method. Indeed, rather than providing a particular method, Discourse Analysis can be characterized as a way of approaching and thinking about a problem. In this sense, Discourse Analysis is neither a qualitative nor a quantitative research method, but a manner of questioning the basic assumptions of quantitative and qualitative research methods. Discourse Analysis does not provide a tangible answer to problems based on scientific research, but it enables access to the ontological and epistemological assumptions behind a project, a statement, a method of research, a system of classification. Discourse Analysis will enable to reveal the hidden motivations behind a text or behind the choice of a particular method of research to interpret that text. Expressed in today's more trendy vocabulary, Critical or Discourse Analysis is nothing more than a deconstructive reading and interpretation of a problem or text while keeping in mind that postmodern theories conceive of every interpretation of reality and, therefore, of reality itself as a text. Every text is conditioned and inscribes itself within a given discourse, thus the term Discourse

Analysis. Discourse Analysis will, consequently, not provide absolute answers to a specific problem, but enable us to understand the conditions behind a specific "problem" and make us realize that the essence of that "problem", and its resolution, lie in its assumptions; the very assumptions that enable the existence of that "problem". By enabling us to make these assumption explicit, Discourse Analysis aims at allowing us to view the "problem" from a higher stance and to gain a comprehensive view of the "problem" and ourselves in relation to that "problem". Discourse Analysis is meant to provide a higher awareness of the hidden motivations in others and ourselves and, therefore, enable us to solve concrete problems - not by providing unequivocal answers, but by making us ask ontological and epistemological questions.

Discourse Analysis can be applied to any text, that is, to any problem or situation. Since Discourse Analysis is basically an interpretative and deconstructing reading, there are no specific guidelines to follow. One could, however, make use of the theories of Jacques Derrida, Michel Foucault, Julia Kristeva, or Fredric Jameson, as well as of other critical and postmodern thinkers.

My choice of Discourse Analysis has been based on my knowledge interest in social constructions and the fact that this is a method that can make a document analyses more exiting and colourful. A method that allows the user to think about what is said in the documents, how it is said and how it could be said differently opens possibilities to find what orders and logics abide in the legislation of migration law. Discourse analyses shows the "discourse"; a field for what is socially and culturally accepted as "true", "common sense", "god" etc. The boundaries of the discourse also show what is not possible to say or write in a given context. In other words, what is not said is just as important as what is said. In my opinion, Discourse analyses is therefore

the best method, to answer my questions about the normative intentions in the European directives concerning migration law.

Concerning the other issues; How these normative intentions are recoded, interpreted and expressed in national law; Discourse analysis gives a possibility to create categories of what is important in a given discourse. In the case study I have considered how the discourse has been reconstructed from an EU-directive to national law. This shows a difference in discourse between member states and therefore also what “truths” are constructed in that context.

Postmodern theories have made many changes in social science. They have expanded the type of material that we use in research and also made us look at the materials in a different way. The point of this has been to change the hierarchy of knowledge and contents, so that it no longer can be any ranking between empirical materials. Legal texts are no longer more “true” or closer to reality, than a newspaper. They show and indicate the same social constructions in society. This means that these materials and objects of study can be analysed by the same analytical framework.

The most important thing to remember in discourse analyses of texts is that “texts exist in reality, at the same time as texts only represent reality” (M. Alvesson, 2002 s 28)

This way of thinking has lead to that the postmodern scientist have had an increased scepticism towards definitive categories and their meaning. The postmodern scientist focuses on working with creativity and searches for openings rather than definitive truths or a description of how something is “in reality”.

The content and form of the text is ruled by historically and culturally set rules (Lindgren, Andersen, 1996, s 329). The discourse analyses means to problemize the essence itself in a phenomenon. Instead of asking how a state is constructed it is more interesting to empathize the effects of this construction (Hultqvist) and the creations of reality

in which cultural truths are a foundation for constructions of reality. But the worlds and its constructions do not appear by themselves, something needs to be done by the researcher, a dramatization of empirical observations in an interesting angle and perspective.

Social Science can give different historical descriptions. Realism and empiricism see representation as a product of the actual object, while constructivism sees the object as a product of the representation. From a constructivist point of view, EU legislation or the implemented legislation in national law is only a product of the representation. For these reasons discourse analyses can still be controversial in social science. Nevertheless, it is a more increasing method because of its possibilities to give our notions a more productive role. Instead of perceiving ideas as reflections of the material reality, we can perceive that these ideas and interpretations need a language that organize the social reality. Discourse analyses focuses largely on discursive relations that are a form of linguistic expressions more than relations between groups. This makes discourse analyses a study of social phenomenon where the language is in focus, hence the study of legal text with discourse analyses. Regardless of what perspective of discourse analyses we choose to pursue the common denominator is the perception of language and use of language. Language doesn't render social reality but contributes to forming it.

A discourse analysis within social science is perceived by some as both a theory and method. This perspective is associated with overall concepts that distinguish social relations and language in text. Discourse analyses can also be seen as a perspective that is focused on issues of power and identity but defuses the role of social actors. But discourse analyses can also be viewed as a method, a way to analyse texts. What is specific with discourse analyses compared to other text analyses methods is that discourse analyses includes a context in the analyses (Coulthard 1996, chpt. 1).

Norman Fairclough was one of the first to integrate a linguistic perspective and social science in discourse analyses. Critical Discourse Analyses (CDA) is often associated with Fairclough and is an example of the second generation discourse analyses that is not as narrow in its definition of “discourse” as previous perspectives. An example of the evolution of discourse analyses is that it has become expanded towards an orientation in social practice.

“Critical discourse analyses sees discourse – the use of language in speech and writing – as a form of “social practice”. Describing discourse as a social practice implies a dialectic relationship between a particular discursive event and the situation, institution and social structure that frame it; the discursive event is shaped by them, but it also shapes them (...) Discourse is socially constitutive as well as socially shaped; it constitutes situations, objects and knowledge, and the social identities between

people and groups of people. It is constitutive both in the sense that it helps sustain and reproduce the social status quo, and in the sense that it contributes to transforming it." (Fairclough & Wodak 1997 p. 258)

Consequently, Fairclough is using a three dimensional concept of discourse and he is making a difference between discourse as text, discursive practice and as social practice (Fairclough, 1992, p. 73) When *discourse* only is text, the starting point becomes strongly linguistic, like in the study of grammatical structure of texts. However, as mention previously in the theoretical chapter, this text analyses represents a rather shallow understanding of the relation between text and society. Fairclough therefore expands his discourse method with a macro sociological perspective to the concept of *discursive practice* so that he can fully understand the connection between text and socio-cultural processes and structures through a combination of text analyses and socio analyses. Discursive practice, or social practice is about how texts are produced, spread and distributed and how texts are consumed. This method examines how normative intensions in the European directives I am studying are recoded, interpreted and expressed in national legislation, and how the national legislation is consumed.

Discourse as social practice is a widening and expansion of the concept of discourse. The social practice means partly that the relations between text and discursive practice are related to something external, for example other discursive practices, and partly to non-discursive fields like political conditions (Fairclough, 1992, p. 237)

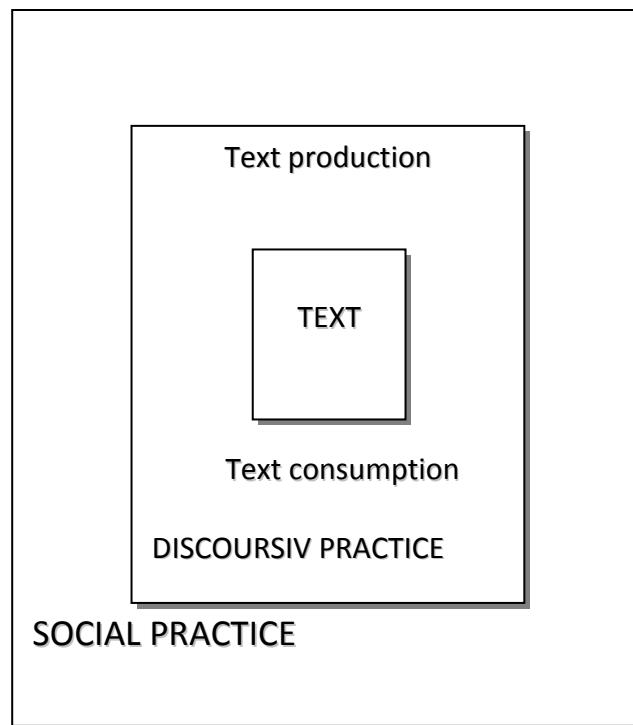
Fairclough's way of defining a discourse represents a fairly pragmatic attitude. The extent and proportion of the discourse is determined by which or how many dimensions that are used in a study. Fairclough claims that discourse contributes to the construction of; social identities, social relations as well as knowledge and meaning

systems. Discourse has therefore three functions that I will be concentration on; an identity-function, a relationship-function and a ideological-function and when discourse is analysed there are two dimensions that need focus; *the communicative event* – the usage of language in legal documents, and *the discourse order* - the sum of the different *types* of discourses that are used in a social domain (Fairclough 1995 p 56) A discourse type is made up by different discourses and genre. A genre is a usage of language that is linked to and constitutes a certain social practice, the legal language. And the discourse order is the order of the legal system, its legal culture.

Every case of language usage in a communicative event that has three dimensions. Fairclough has a particularly useful and complex three-dimensional model to represent this. The three dimensions of a communicative event are;

- If the event is a text (text, writings, pictures)
- If it is a discursive practice (production and consumption of texts)
- If it is a social practice

The model and its central components are an analytical framework that becomes very useful in empirical research about communication, texts and society. All three dimensions are drawn into a concrete discourse analyses of a communicative event. This means that empirically I am studying,



Fairclough three-dimensional model for discourse analyses (Fairclough 1992 p73)

1.) the characteristic of the text, (*text*) 2.) the producing and consuming processes that are linked to the text, (*discursive practice*) 3.) the broader social practice that the text is a part of (*social practice*)

This model will give a comprehension in the analyses of what normative intentions the EU legislator has, and create an understanding of the habitus, consequently the legal culture and what strategies abide in the process of implementation of EU-directives.

4:5

Selection of Documents and Sampling

The selection of documents has been rather difficult. Not the selection process itself, use certain kind of documents you decide the course of the study. Narrowing down the study is necessary to make it achievable , but narrowing down a field of study like EU creates a problem of validity. How can you analyse a immense macro structure just by analyzing a few directives and making a case study between two EU countries? I approach the dilemma by applying research questions that my material can answer and try to generalize not by claiming to describe reality but to make categories about how reality is constructed by the normative intension creating a discourse.

The selection of documents is based on the knowledge interest, which in this project is the EU harmonization of migration law. To answer the research question I have chosen to analyze the documents in the following way.

The treaties of Europe have a long history, it would be very interesting to approach a study of harmonization in a chronological way and study how the harmonization of migration law has changed over time and what this could mean for the integration of Europe. This was my plan from the beginning. However I have chosen to approach the study empirically from a more current design to concretise the subject of migration itself and not get puzzled by its historical picture in Europe.

What this means practically is that I am not taking all the previous treaties into account, as an alternative I am concentrating on the treaties that are currently regulating migration law and that are enforced. This means that the Amsterdam treaty creates a general view on the current legal state of migration law in Europe. The Lisbon treaty also plays a role to some extent on the European level and its effects are discussed.

4:6 *Case Study*

A case study is an intensive study of a specific context. There is no single way to conduct a case study, and a combination of methods (e.g., text analyses, unstructured interviewing, direct observation) can be used. Case studies emphasize detailed contextual analysis of a limited number of events or conditions and their relationships. Yin defines the case study research method as an empirical inquiry that investigates a contemporary phenomenon within its real-life context (Yin, 1984, p. 23)

Case studies combine different methods to compile a holistic understanding of individuals, households, communities, markets or institutions.

Case studies are often very “user friendly” in many scientific studies as an alternative course together with other research methods. Case studies can be more or less ambitious and detailed. The purpose of a case study is simply to take a small piece of a global course and with the help of the case make a representation of reality. Another suggestion is that case study should be defined as a research strategy, an empirical inquiry that investigates a phenomenon within its real-life context. The profit of this approach is that I don’t have to get in to a very immense and detailed description, but can in a limited space give the reader a concept of how something is and proceeds. This however means that the possibility of giving conclusions is more difficult, the conclusions may seem circumstantial.

4:6:1 *Two Countries as Comparative Case Studies*

During the design phase of case study research, I have determined what approaches to use in selecting single or multiple cases to examine in depth and which instruments and data gathering approaches to use. When using multiple cases, each case is treated as a single one. Each case conclusions can then be used as information contributing to the whole study, but each case remains a single case (T. May 1997, p. 46) Exemplary case studies carefully select cases and carefully exam-

ine the choices available from among many research tools available in order to increase the validity of the study. Careful discrimination at the point of selection also helps erect boundaries around the case. It must be determine whether to study cases which are unique in some way or cases which are considered typical and may also select cases to represent a variety of geographic regions, a variety of size parameters, or other parameters (R. Ejvægård, 2003 p. 37) My case study is mostly done for the reason and possibility of comparison between cases, in this context being two European member states. The member states represent the comparative case study. I have performed an intensive study of a specific legal context in two countries and then made a comparison on this explicit matter. Comparisons and comparative case studies are common within social science, although not unproblematic. Within research in international politics it is the most common research method. The method is challenging for the simple reason that it is not without notice you make a comparison between different societies and diverse social phenomenon. It may appear as a comparison is made between two apples when instead its between an apple and a pear, and this comparison has nothing to do with the research questions (R. Ejvægård, 2003 p. 41). There are a few things I have considered when making the comparison. The importance of starting from units that are comparable. Trying to generalizing the phenomenon that are to be compared and transcribing patterns in a equivalent way and describing similarities as well as dissimilarities (R. Ejvægård, 2003 p. 41). Many sociologists of law may be curious as to why I have not chosen to do a study using the method of comparative law. Indeed, some writes have suggested that comparative law has such problems that what solves them is to in fact become sociology of law (Hall, 1963 ch. 2)

Comparative law, - the comparison of different legal systems of the world, (Zweigert & Kötz, 1987 p. 2) - offer the example of a scholarly

endeavour that has developed explicit conceptual frameworks for comparison between state legal systems. The “idea of legal families” implies that different state legal systems or central elements of legal doctrine within them (e.g. legal reasoning and interpretation), can be seen as containing enough similarity to make a comparison productive. At the same time, it suggests that these comparable systems or system elements seen as a group can be distinguished from others for certain analytical reason, as qualitative more remote (Cotterrell, 1997 p 14) The main conceptual method of comparative law seems insufficient for the suppose of sociology of law, since what is required for the latter is a conceptual framework allowing comparison, not legal doctrine as such, but of legal ideas and practices regarded as inseparable from a broader social context (Cotterrell, 1997 p 14) One of the continuing problems of comparative law has been an inability to display the theoretical value of doctrinal comparison separated from comparative analyses of the entire political, economic and social matrix (Friedman 1975, p. 201) Comparative law seams unable to provide viable frameworks for comparison of laws or legal systems treated as aspects or elements within a political society (Cotterrell, 1997 p 14) My case study is analysed by a conceptual framework allowing comparison between legal cultures that are indivisible in a specific social context.

4:7 *Main Legal Instruments from EU on Asylum*

The central role is played by the European directives and regulation that specifically deals with migration law. The main legal instruments that touch asylum policy and that are to be implemented in national law. The choice of documents that are implemented in national law is essential to be able to answer the research questions.

The main asylum instruments are Regulation (EC) 343/2003 ("Dublin Regulation"), Directive 2003/9/EC ("Reception Conditions Directive,"), The Asylum Procedures Directive (Council Directive 2005/85/EC) and Directive 2004/83/EC ("Qualification Directive"). These legislative instruments guarantee a minimum level of protection and procedural safeguards in all member states for those who are genuinely in need of international protection, whilst preventing abuses of asylum applications which undermine the credibility of the system and place additional administrative and financial burden on member States. These four instruments together with the treaties, aim towards a common objective – to level the asylum playing field and lay the foundations for a Common European Asylum System in line with the objectives set at the Tampere European Council.

The Amsterdam treaty is the result negotiations that on June 2, 1995, which was forty years after the signing of the Treaties of Rome. After the formal signing of the Treaty on October 2, 1997, the Member States engaged in a long and complex ratification process. Finally the European Parliament endorsed the Treaty on November 19, 1997, and after two referenda and 13 decisions by national parliaments, the Member States finally concluded the procedure. Since the Tampere meeting meant a start in striving after a unified European Migration Law the title IV "Visa, Asylum, Immigration and Other Policies Related to Free Movement of Persons" articles 61 to 69, where presented in the Treaty of Amsterdam (EC-Treaty). It was now clear that the European Union has five years to lay a common ground for a unified migration policy.

The Amsterdam Treaty did not settle all institutional questions once and for all. Work is still in progress on reforming the institutions to make them capable of operating effectively and democratically in a much enlarged EU. The most pressing issues here are the composition of the Commission, the weighting of Member States' votes, and qualified majority voting. These questions are addressed in the Treaty of Lisbon.

The Treaty of Lisbon (also known as the Reform Treaty) is a continuation of unifying Europe. The harmonization of migration law continues in the Lisbon treaty in the section "Area of freedom, security and justice". There are five chapters: "General provisions", "Policies on border checks, asylum and immigration", "Judicial cooperation

in civil matters", "Judicial cooperation in criminal matters and policy cooperation " (Treaty of Lisbon, article 2, points 63-68) The treaty of Lisbon is not yet enforced therefore I consider it only as an empirical document that can illustrate the intentions of the EU, but it cannot be discussed in reference to implementation of EU-law, since it has no legal effect. In order to enter into legal force, the Treaty of Lisbon must be ratified in all Member States. Since Ireland rejected the treaty, the future is still uncertain for it.

4:7:2 *The Tampere Meeting* *Presidential Conclusions*

As mentioned before the European Council held a meeting on 15 and 16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the European Union. The European Council stated that they are determined to develop the EU as an area of freedom, security and justice by applying the Treaty of Amsterdam. This meeting was a strong political message to repeat the importance of the unification of migration law and a number of policy orientations and priorities which was to make this area a reality (Tampere, Presidential Conclusions 1999 p. 1)

The so-called Tampere milestones were set, and they were to give directions to a future integration of migration law.

4:7:3 The Reception Conditions Directive

The Treaty of Amsterdam (1997) committed Member States to a range of measures designed to establish minimum standards for asylum procedures and policies across the Union by 1 May 2004 as a first step towards a common European asylum system. The Reception Conditions Directive is a key element of this package, laying down minimum standards for the reception of applicants for asylum. This is intended to lessen discrepancies between Member States' support for applicants, and places certain obligations on Member States towards applicants and it also places certain obligations on applicants themselves. Provisions include minimum standards on information, documentation, education, healthcare, accommodation, withdrawal of reception conditions as well as extra provisions for children and vulnerable individuals (europa.eu/).

The Directive is being implemented both by the introduction of new legislation as well as reliance on existing legislation. Much of the Directive is concerned with the provision of housing and other essential living needs for asylum seekers and their dependants whilst their claims are exceptional.

The Directive sets a deadline of 6 February 2005 for member states to take all necessary steps to comply with its provisions. Much of the Directive does not require implementation because equivalent statutory provision is already made. Even in those areas where there is not, many of the Directive's provisions are already applied in practice, although they must now be given statutory effect. In policy and operational terms therefore, it is not anticipated that implementation will have a significant impact. ("Council Directive 2003/9/EC")

The Asylum Procedures Directive (Council Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status) is one of the four building blocks of the first stage of the Common European Asylum System. The Asylum Procedures Directive aims to ensure that throughout the EU, all asylum procedures at first instance are subject to the same minimum standards. Subject to some exceptions, the Directive guarantees the opportunity of a personal interview for asylum applicants as well as the basic principles and guarantees for the examination of claims. These guarantees *inter alia* include comprehensive information about the procedure at the start of the process, a motivated decision on the asylum claim, access to legal assistance and interpretation services, and the Member States' duty to meet special needs of unaccompanied children. The Directive provides that all asylum decisions in the systems of 26 participating Member States shall be subject to judicial enquiry. It also enhances the capacity of Member States' asylum authorities to decide quickly on the applications of persons who legitimately seek refugee protection in the EU (europa.eu/).

At the same time, the Directive is flexible enough to allow Member States to tackle fraud and misuse of their systems. It also leaves sufficient space for Member States to preserve the particularities of their national asylum procedures like the possibility to apply border/airport procedures or limitations to the principle of suspensive effect of the appeals. The Directive also provides for the notions of the safe third countries, safe countries of origin and European safe third countries. The Asylum Procedures Directives is based on Article 63(1) (c) and

(d) of the Treaty establishing the European Community. The Directive is binding for all Member States except for Denmark (according to a protocol attached to the Treaty Denmark is not bound by the measures taken under title IV of the Treaty).

The Directive reflects the conclusions of the European Council in Tampere of 15-16 October 1999, which called for the establishment of a Common European Asylum System which should include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. The adoption of the Directive also means that future legislative instruments in the field of asylum will be adopted by Qualified Majority voting in Council and co-decision procedures with the European Parliament. With regard to those Member States who have not notified complete implementing measures until the date of the expiry of the deadline for transposition, the Commission is entitled to take appropriate procedural steps, according to the power conferred to it by Article 226 of the Treaty establishing the European Community (Tampere, presidential conclusions). Having in mind the objective to establish a level playing field and a system which guarantees to persons genuinely in need of protection access to a high level of protection under equivalent conditions in all Member States while at the same time dealing fairly and efficiently with those found not to be in need of protection, the Commission adopted on 6 June 2007 a Green Paper on the future Common European Asylum System (CEAS). In this Green Paper the Commission outlined the main policy issues at stake and invited constructive suggestions from all stakeholders to take these issues for-

ward. After a public hearing which took place on 7 November 2007, the Commission will now synthesize the results of this broad consultation with the results of an evaluation of the implementation of the existing Directives, in order to present in mid-2008 a Policy Plan describing the work that will have to be carried out in the very near future for the construction of the CEAS by 2010.

4:7:5 *The Qualification Directive*

The European Union Qualification Directive is the first supranational instrument to seek to harmonize complementary protection (termed ‘subsidiary protection’ in the EU). Though it has shifted complementary protection beyond the realm of *ad hoc* domestic practices to a codified administration, it establishes a protection hierarchy that unjustifiably differentiates between the rights and status accorded to Convention refugees vis-à-vis beneficiaries of subsidiary protection. This article traces the development of the Qualification Directive by examining preparatory documents and drafting records. It discusses changes to the categories of persons granted subsidiary protection as well as to the substantive rights attaching to that status. In particular, it criticizes the narrowing-down of originally-proposed categories of persons eligible for subsidiary protection, arguing that omitting to provide for known groups of extra-Convention refugees does not eliminate them, but simply creates new categories of unprotected persons. It also highlights the absence of any international legal basis on which to base distinctions between the rights granted to Convention refugees vis-à-vis beneficiaries of subsidiary protection. It concludes

that the Qualification Directive represents a regional, political manifestation of the broader legal concept of complementary protection, and as such does not provide a model for emulation at the international level (europa.eu/).

4:7:6 *The Dublin Regulation*

In accordance with the Dublin Regulation, Member States have to assess, on the basis of objective and hierarchical criteria, which Member State is responsible for examining an asylum application lodged on their territory. The system is designed to prevent "asylum shopping" and at the same time to ensure that each asylum applicant's case is processed by only one Member State. Where another Member State is designated responsible under the criteria in the Regulation, that State is approached to take charge of the asylum seeker and, consequently, to examine his/her application. If the Member State thus approached accepts its responsibility, the first Member State must transfer the asylum seeker to that Member State. (EUR-Lex 343/2003/EC) In the case where a Member State has already examined or begun to examine an asylum application, it may be requested to take back the asylum seeker who is in another Member State without permission. It must then complete the examination of the application and take appropriate measures to return the asylum seeker to his/her country of origin.

An asylum application is to be examined by only one Member State. Any Member State may decide to examine an asylum

application, even if such examination is not its responsibility under the criteria of this Regulation. . (EUR-Lex 343/2003/EC)

The situation of a minor must be in dissociable from that of his/her parent or guardian lodging an asylum application. The criteria for determining the Member State responsible are to be applied in the order in which they are presented in this Regulation and on the basis of the situation when the asylum application was lodged. Where the asylum seeker has a family member who has been allowed to reside as a refugee in a Member State, that Member State will be responsible for examining the asylum application. Where the asylum seeker has a family member whose asylum application is being examined under a normal procedure in a Member State, that Member State will be responsible for examining the asylum application. Where the asylum seeker is in possession of a valid residence document or visa, the Member State which issued the document will be responsible for examining the asylum application. Where the asylum seeker is in possession of more than one valid residence document or visa issued by different Member States, the responsibility for examining the asylum application will be assumed by the Member State which issued the residence document conferring the right to the longest period of residency or, where the periods of validity are identical, the State which issued the residence document having the latest expiry date. Where visas are of different kinds, the same rule is to be applied; issued the visa having the latest expiry date where the various visas are of the same type.

Where the asylum seeker: has irregularly crossed the border into a Member State, that Member State will be responsible for examining the asylum application, unless it can be shown that the applicant has been living for a period of time in the Member State where the asylum application was made before making his or her asylum application; was not subject to a visa requirement, the Member State in which he

or she lodges his or her application will be responsible for examining the asylum application; has remained unlawfully for six months or more on the territory of a Member State, that State will be responsible for examining the asylum application. A Member State which has knowingly tolerated the unlawful presence of a third-country national on its territory for more than two months will be responsible for examining the asylum application. Where no Member State responsible for examining the asylum application can be designated on the basis of the criteria listed, the first Member State with which the asylum application was lodged will be responsible for examining it. In addition, the Regulation makes provision for a criterion for asylum applications submitted by several members of a family to be examined together (EUR-Lex 343/2003/EC).

Any Member State, even where it is not responsible under the above criteria, may for humanitarian reasons examine an asylum application at the request of another Member State, provided that the applicant consents.

Where a Member State with which an asylum application has been lodged considers that another Member State is responsible for examining the application, it may call upon the other Member State to take charge of the applicant. The Member State responsible for the asylum application is required to fulfill specific obligations, in particular the obligations to take charge of the asylum seeker and to complete the examination of his or her application (EUR-Lex 343/2003/EC).

A request to take charge should provide all the information for the Member State requested to determine whether it is actually responsible. Where the State requested accepts that it should take charge, a reasoned decision stating that the application is inadmissible in the State in which the asylum application was lodged and indicating the State to which application should properly be made is sent to the

applicant. This decision may be appealed, but without suspensive effect. The Regulation sets out the practical administrative arrangements for taking charge of an applicant (notification of decisions, time limits, the necessary checks, etc.) The reasons given by the applicant in support of his or her application shall only be forwarded if strictly necessary.

Member States may, on a bilateral basis, establish administrative arrangements, such as exchanges of liaison officers, simplification of the procedures and shortening of the time limits, in order to increase the effectiveness of administrative cooperation.

4:7:7 *The Schengen Acquis*

During the 1980s, a debate opened up about the meaning of the concept of free movement of persons . Some Member States felt that this should apply to EU citizens only, which would involve keeping internal border checks in order to distinguish between citizens of the EU and non-EU nationals. Others argued in favor of free movement for everyone, which would mean an end to internal border checks altogether. Since the Member States found it impossible to reach an agreement, France, Germany, Belgium, Luxembourg and the Netherlands decided in 1985 to create a territory without internal borders. This became known as the "Schengen area". The name was taken from that of the town in Luxembourg where the first agreements were signed. This intergovernmental cooperation expanded to include 13 Member States in 1997, following the signing of the Treaty of Amsterdam, which incorporated into EU law on 1 May 1999 the

decisions taken since 1985 by the Schengen group members and the associated working structures.

The Schengen area gradually extended to include every Member State and there where measures adopted as a part of cooperation under Schengen. The main measures include:

- the abolition of checks at common borders, replacing them with external border checks;
 - a common definition of the conditions for crossing external borders and uniform rules and procedures for checks there;
 - separation in air terminals and ports of people travelling within the Schengen area from those arriving from countries outside the area;
 - harmonization of the conditions of entry and visas for short stays;
 - coordination between administrations on surveillance of borders (liaison officers and harmonization of instructions and staff training);
 - the definition of the role of carriers in measures to combat illegal immigration;
 - requirement for all non-EU nationals moving from one country to another to lodge a declaration;
 - the drawing up of rules governing responsibility for examining applications from asylum seekers (Dublin Convention, replaced in 2003 by the Dublin II Regulation);
 - the introduction of cross-border rights of surveillance and hot pursuit for police forces in the Schengen States;
 - the strengthening of judicial cooperation through a faster extradition system and faster distribution of

- information about the enforcement of criminal judgments;
- the creation of the Schengen Information System (SIS). (EUR-lex Schengen agreement)

All these measures, together with the decisions and declarations adopted by the Executive Committee set up by the 1990 Implementing Convention, the acts adopted in order to implement the Convention by the authorities on which the Executive Committee conferred decision-making powers, the agreement signed on 14 June 1985, the convention implementing that agreement, signed on 19 June 1990, and the protocols and accession agreements which followed, constitute the Schengen *acquis*

A protocol attached to the Treaty of Amsterdam incorporates the developments brought about by the Schengen Agreement into the EU framework. The Schengen area, which is the first concrete example of enhanced cooperation between thirteen Member States, is now within the legal and institutional framework of the EU and thus comes under parliamentary and judicial scrutiny and attains the objective of free movement of persons enshrined in the Single European Act of 1986 while ensuring democratic parliamentary control and giving citizens accessible legal remedies when their rights are challenged (Court of Justice and/or national courts, depending on the area of law).

5 *Analytical Framework*

5:1 *The European Union's Normative Intentions Towards a Harmonized Migration Law*

Normative has a particular meaning in academic disciplines. Generically, it means “*relating to an ideal standard or model*” (National Encyclopedia) In practice, it has strong implication of relating to a *typical* standard or model. *Normative* statements in philosophy, confirm how something should or ought to be, how to value something, which things are good or bad, which actions are right or wrong. Normative is usually contrasted with positive (i.e. descriptive, explanatory) when describing types of theories, beliefs, or propositions. Positive statements are falsifiable statements that effort

to describe reality. An agent's intention in performing an action is their specific *purpose* in doing so, the *end* or *goal* they aim at, or intend to accomplish. Whether an action is *successful* or unsuccessful depends at least on whether the intended result was brought about. Other consequences of someone's acting are called *unintentional*. Intentional conduct can furthermore be just thoughtful and deliberate goal-directed.

In sociology of law, as an academic discipline, the expression "normative" is used to portray the way something ought to be done according to a value position. As such, normative argument can be conflicting. For example, from one normative value position the purpose of the criminal process may be to repress crime. From another value position, the purpose of the criminal justice system could be to protect individuals from the moral harm of wrongful conviction.

Some scholars see a shortage of reflexivity as a problem in the conceptual context and abstract the debate about "normative power Europe". Some claim that this approach does not actually observe whether the EU "has normative power in the relational sense". Seeing as normative power refers to a correlation and implies a ability "to shape the values of others", 'the distinction in connection to the EU as a civilian power and other forms of normative power should be analyzed more carefully" (Diez 2005, p.636). Diez also states that a self-reflection made by the EU legislator could move towards "rescuing the idea of normative power Europe" from becoming a "self-righteous project that maintains to know what Europe is and what others should be like" (Diez 2005, p. 621). In order to consider whether the conceptualizations of the EU as a "normative" are simply co-optations in the arrangement of those in power (Sjursen 2006, p. 169-170)

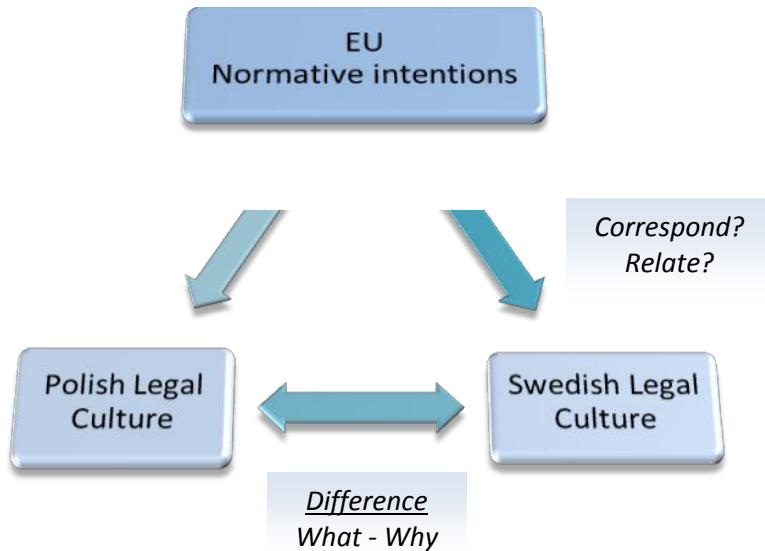
This is why it is essential when describing the EU's international role to conduct "systematic empirical investigation" (Vasilyan 2007 p. 2) and to have a theoretical framework.

The current convention on the Future of Europe is the culmination of a decade extended anxiety about EU's legitimacy. The problems experienced in ratifying The Treaty of Maastricht in subsequent referenda, awoke fundamental questions about the ultimate goals and methods of European integration. The consequential necessitate to publicly legitimise the EU has prevented the key political actors to take on a purely pragmatic approach, in which the EU's expansion is simply the incremental result of *ad hoc* calculations of national advantage. European politicians can no longer avoid strategic-oriented action or normative argument relating to the purpose, underlying values, future shape and desirable structures of what Jacques Delors once called '*un object politique non-identifié*'. Even academics have begun to realize that the integration process depends on not only functional competence or its persistence of national economic or defence interests, but also on ideals and perceptions in society. As a result, description and explanation have shown less easily distinguishable than earlier positivistic and behaviouralist models assumed. (Bellamy & Castiglione, 2003, p.1) There have been efforts by both academics and politicians to complement and even modify the EU's market orientation through a positioning towards the ideals of liberal democracy and proposals for a written constitution, a Charter of Rights and the reinforcement of the European parliament (Pinder 1990, p. 284; Habermas 1999, p. 46-59). The EU's evolution as both a 'polity' and 'regime' has been an on-going process of multiple negotiations over the normative issues raised by integration (Wallace 1985, p. 453-72; Wallace 1996; Elgström and Jönsson 2000 p. 684-704) Many theories of European integration eliminate normative and 'regime' considerations from their accounts of the 'polity'-building processes, at the same

time as certain theoretical and empirical analysts of EU institutions and policy-making suggest normative ‘regimes’ that are unsuccessful to deal with the *sui generis* characteristics of the Euro-‘polity’ (Bellamy & Castiglione, 2003, p.14)

Despite their important differences, the (until now) central theories of European integration, neofunctionalism and liberal intergovernmentalism, share a common objective to offer scientific descriptions that diminish the independent role of both the EU’s ‘regime’ and normative ideals (Bellamy & Castiglione, 2003, p.23)

In truth the attempt to describe what normative intentions EU has regarding migration law is a much wider study and question than the one I am presenting in this chapter. In fact, one could lean towards the intergovernmentalism perspective and make it about power dynamics of member states striving to effect as much as they can in the political arena, and do as much as they can to include their normative aim in the EU’s general chart, or a study of how these normative intentions come to be present.



Instead, I have chosen to perceive the EU as a political system, where their normative intentions are the tools of executive power. I aim to illustrate them by the following document analyses of first, the general vision on migration in the EU treaties. The abiding treaty (Amsterdam) and a view on the future treaty, Lisbon. The role of the Lisbon treaty is to show in which direction the normative intentions of the EU are going. To make this analyses more interesting I am at the same time, describing and analysing the text as well as comparing the treaties to each other to observe the changes of direction that have occurred in the EU. Secondly I will see, a view of the normative intentions in the EU directives (the main legal instruments in the migration field)

The Amsterdam treaty already clarifies without any doubt that EU is to have a common migration law, and it was stated that the internal border control should not exist. The treaty of Amsterdam is “integrating the Schengen acquis into the framework of the European Union (1997)” (EC treaty) The Amsterdam treaty begins with the statement that:

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN COMMUNITY. (Art. 1 EC-treaty)¹⁰ (*Underlining's made author 2008*)

A community can be many things, but the normative inclination with a community is a ”society”, a “centre of population”, a ”commune“ a “neighbourhood” , (National encyclopaedia) these are merely some examples. They all predispose that we no longer are sovereign

¹⁰ The Amsterdam Treaty is referred to as EC-treaty (TREATY ESTABLISHING THE EUROPEAN COMMUNITY)

The Lisbon Treaty is referred to as the EU-treaty (TO THE TREATY ON EUROPEAN UNION AND TO THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY)

states but a European society, a European population. The intention of the EU has been to harmonize member states and the main method or the most straightforward option is to do that by unifying regulation. Harmonization is dynamic and this is its most appealing feature. The instruments of harmonization aim at change, in particular improving and establishing consistent conditions for the operation of legal principles (Hesselink, 2006 p. 50).

The Amsterdam treaty shows the intentions of European politics today but if we look at the Lisbon treaty, we can see that the development of EU's political system is deepening the harmonization and implying further unification.

The title of the Treaty shall be replaced by 'Treaty on the Functioning of the European Union'. the words 'Community' and 'Euro-pean Community' shall be replaced by 'Union' and any necessary grammatical changes shall be made, the words 'European Communities' shall be replaced by 'European Union' (EU-treaty art. 2) (Lisbon-treaty) *Underlining's made by author 2008*

It is evidently stated that EU is continuing on its road to harmonize and the definition of Europe as a community has now changed to "Union", which is a much more central concept. A union describes a amalgamation, fusion and a blending. A merger and coming together. The concept itself refers to a total unification (National encyclopaedia) It also represents a view on Europe, not as a community of states and common markets but a Europe with an internal society and position. The Lisbon treaty marks this clearly "the words 'common market' shall be replaced by 'internal market'" (EU-treaty art. 2 g)

Internal, means something not only for Europe but also for the world outside Europe, the more we "close" the European society the

more we demonstrate Europe as one society to the world outside. This is one of the reasons why a common migration policy and border control is central to the European internal society. Without a common policy, we are not equal in our managing of third country nationals, at the same time as we claim ourselves to be an internal commune. Especially since it further is stated that Europe no longer is formed by “countries”, but states, which pushes us closer to a federalist perspective.

In the second recital, the word ‘countries’ shall be replaced by ‘States’ and in the last recital, the words ‘HAVE DECIDED to create a EUROPEAN COMMUNITY and to this end have designated’ shall be replaced by ‘and to this end HAVE DESIGNATED’ (EU-treaty, art 10) *Underlining’s made by author 2008*

The member states have to unify regulations without concern for their own requirements. In the treaties, we can find that there are steps to ensure that the EU member states have to follow the treatise.

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty (EC-treaty art. 10)

Some EU regulations as directives, recommendations and decision can be implemented with regards to national regulations and traditions, but treaties are abiding supranational law, and define the legal

status and position of the European Union, so if we are looking for the general normative intentions of the EU, the treaties are a good place to start. The treaties address all the areas that the EU regulates. The general intentions that we find in the preambles of the treaties regards therefore all the following articles. In the preambles, it is possible to say that we can find universal tendencies and patterns of unification as a common principle. However, each treaty also states what abides in a the fields where EU has exclusive competence or shared competence. Migration law is one of these areas and the normative intentions of the EU are significant in relevance to how the directives concerning this field are created.

The perspective, or angle the treaty takes, in regards to migration law, is not from a individual perspective, that is to say, from the perspective of the migrant and his rights/obligations, but from a collective societal perspective with empathize on the concern for the European community. The perspective takes its beginning in how to ensure “an area of freedom, security and justice” (EC-treaty, art. 61) within the EU, and a plan how to ensure this.

In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

(a) within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of Article 62(2) and (3) and Article 63(1)(a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the

Treaty on European Union; other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63;

(c) measures in the field of judicial cooperation in civil matters as provided for in Article 65;

(d) appropriate measures to encourage and strengthen administrative cooperation, as provided for in Article 66; measures in the field of police and judicial cooperation in criminal matters aimed at a high level of security by preventing and combating crime within the Union in accordance with the provisions of the Treaty on European Union. EC-treaty, art. 61)

(Underlining's made by author)

The Lisbon treaty has a more detailed and extended chart for common migration, since it is based on that the intentions of the Amsterdam treaty have been completed. However the Lisbon treaty still refers that the Union shall create a common migration policy; “The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows” (EU-treaty art. 63a) which is an inclination that the EU has yet to create one. So the intensions of the Amsterdam treaty are still being realized.

The measures to ensure the expansion of harmonization in the migration field are more distinguished in the treaty of Amsterdam under Title IV, Visas, Asylum, Immigration And Other Policies Related To Free Movement Of Persons. Articles 61-69 EC treaty. These articles *inform* the member states what they shall and are obliged to do in the following five years. Before a directive takes form the various member states have a possibility to effect the outcome of the directive in political negotiations. There is a dialectic between structure and

agency, EU and members states, as external structures are internalised into the legal culture, while the actions of the member state externalize interactions between actors into the relationship in the field. Consequently, using Bourdieu's words, we have a dialectic between "externalizing the internal", trying to effect political decisions on the EU level, and "internalizing the external", imposing an implementation of EU-directives. Bourdieu claims that language and written text, like in this case a treaty, is not just a method of communication normative intentions to member states, it is also a mechanism of power. The language used is selected to the rational position in a field or a social space. When we see a holder of symbolic capital, as EU, use this power to in opposition to a member state that holds less, and seeks to change the member states structure, we see an exercise of symbolic violence. Since EU has enough symbolic capital, member states come to experience symbolic power as legitimate. There is a resistance to the symbolic power, and there are Euro sceptics, as we recently have seen when Ireland voted "no" to the Lisbon treaty, but so far, they are not strong enough to be enough of a opposition to politically delegitimizes EU.

Other instruments to certify harmonization and be evidence for EU's intention in this field are other regulations like the directives mentioned in the previous chapters. The directives regarding migration substantiate and verify the intentions of the treaty and oblige the member states to implement these intentions by insuring new regulations regarding migration in their national policies.

A common policy on asylum, including a Common European Asylum System , is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community (COUNCIL DI-

RECTIVE 2003/9/EC art. 1) (*Underlining's made by author*)

The directives are not so firm and determined in their form, rather they suggest a common foundation for all member states regarding their migration law. The step from intention to law is not so apparent and more a implication on what minimum standards shall abide in member states, refereeing back to what was stated at the Tampere meeting on 15 and 16 October 1999, based on that the “European Council agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951” (COUNCIL DIRECTIVE 2003/9/EC art. 2) And it is stated that this is a step towards a unified regulation concerning migration policy. Consequently, it is significant to consider that it is not an intention and claim from the EU to have a common regulation but a *step* towards one. We are still only moving in the direction of a common policy. And “the establishment of minimum standards for the reception of asylum seekers is a further step towards a European asylum policy” (COUNCIL DIRECTIVE 2003/9/EC art 4)

The movement towards a common policy has been in process ever since, as mentioned before, the Tampere conference. This was the step that boosted the idea of common migration law further. The normative intentions of EU towards the harmonisation of migration regulation was defined at the Tampere meeting, and the goals stated in that context have been intact until the Lisbon treaty where we can see patterns of a more strict and uniform harmonization and more supranational decisions. Nevertheless, Tampere meeting established a strong political message in regards to what direction EU-law as well as national law should lead.

The European Council is determined to develop the Union as an area of freedom, security and justice by making full use of the possibilities offered by the Treaty of Amsterdam. The European Council sends a strong political message to reaffirm the importance of this objective and has agreed on a number of policy orientations and priorities which will speedily make this area a reality (Presidency conclusions Tampere European council , 1999) (*Underlining's made by author 2008*)

This strong political message has lead to that all member states have implemented the EU-directives concerning migration law to be able to insure that the five year program of the Amsterdam treaty will be enacted. But does this mean that the normative intention of the EU have been meet? Even though the political statement from EU is strong in form, the content of the legislation is vague which makes it unproblematic for EU- member states to implement and not to difficult for them to accept. This leads a reflection on whether or not the normative intentions concerning a *common* migration policy are, in fact, realized just because directives are implemented. The "field of power", refereeing to the "EU legislator"¹¹ struggles with the control of the "exchange rate" for the forms of cultural and symbolic capital (Bourdieu 1987, p. 816) and struggles to make the national fields acknowledge the values in EU's normative intentions as symbolic capital and thereby good. This is a way for EU to ensure a harmonization in a continuum.

¹¹ See the process of legislation and institutions as well as procedures involved in chapter 2

In the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union (A. A COMMON EU ASYLUM AND MIGRATION POLICY point 15 Tampere)

“In the long term” does not necessarily mean that all member states have to create a common migration policy directly, they have a right, by the treaty, to adopt the directives in regards to their own traditions and needs, they cannot however go against the intentions of the EU.

The EU member states have an agenda to follow and have to enact certain legal procedures and practical efforts in the national stats legal system. The way they accomplish this shows whether or not EU’s normative intentions are endorsed and what possible differences there are between member states. To be able to follow all the suggestions of the EU, each country has to have a system that is capable of managing the purpose principles of the EU scheme.

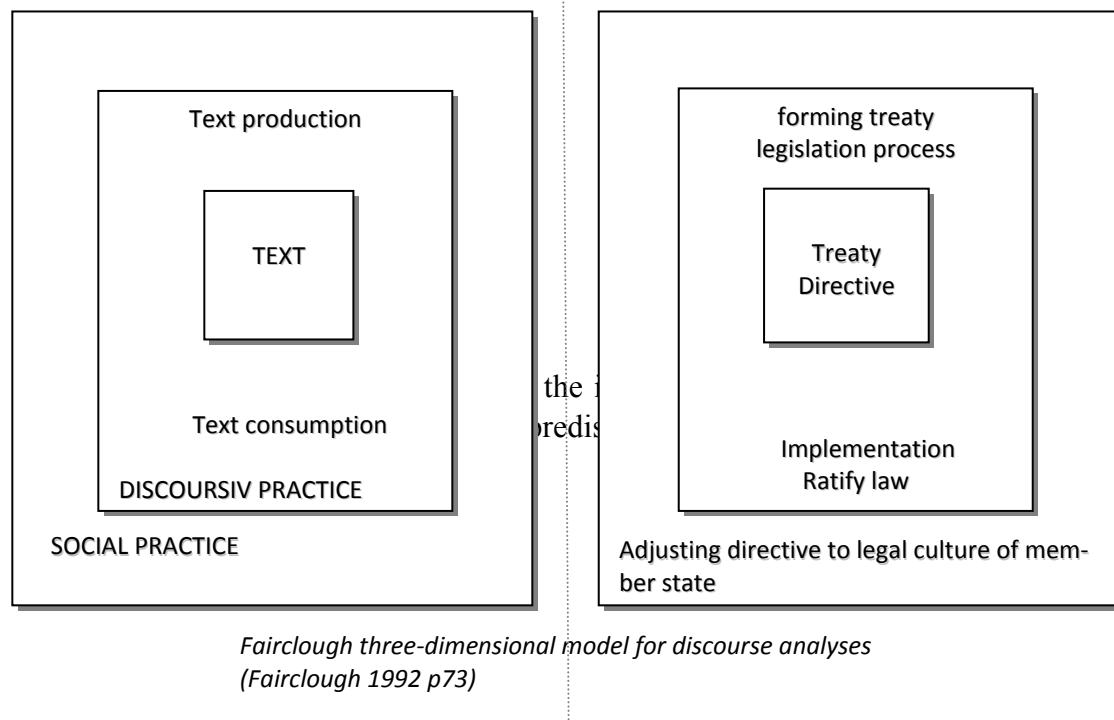
This System should include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. To that end, the Council is urged to adopt, on the basis of Commission proposals, the necessary decisions according to the timetable set in the Treaty of Amsterdam and the Vienna Action Plan. The European Council stresses the importance of consulting UNHCR

and other international organisations. A. A COMMON EU ASYLUM AND MIGRATION POLICY point 4 Tampere)

The discourse of the European Union clearly shows that the normative intention is to harmonize European regulation regarding migration law. The harmonization process doesn't necessarily have to be rapid but it clearly has to go in the direction of a common policy.

Fairclough three-dimensional model can be applied to describe the disposition of the analyses in this framework.

The model itself is an analytical framework that is practical in describing the disposition in the text analyses and what role the text has in this study. The three dimensions represent communicative actions that are studied in three different levels. 1.) the characteristic and meaning of the treaties and directives 2.) the producing and consuming processes that are linked to the *text*, the implementation of the regulation in member states, (*discursive practice*) 3.) the broader *social practice* and legal culture that the text is a part of (Fairclough 1992 p73)

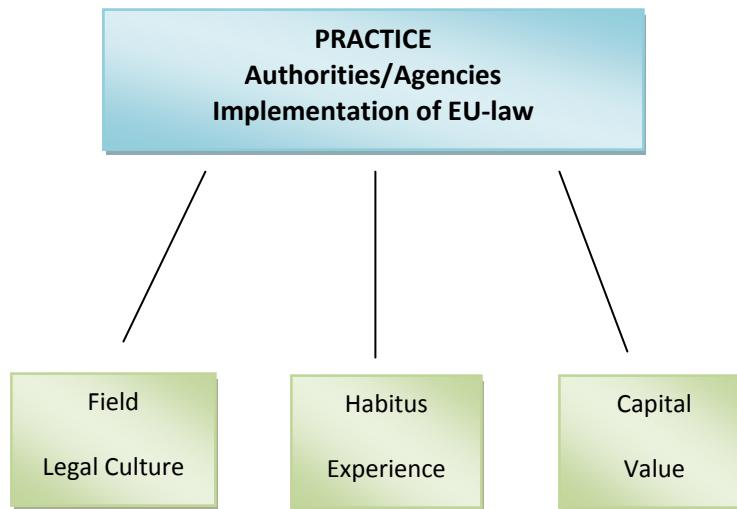


other perspectives to the claim that EU law is normative an inclines how something has to be. The traditions of natural law has always claimed otherwise and in reference to them a discourse analyses or critical reading of text would be pointless. Their view is that the use of indefinites and goal attaining definitions as well as the in chronological presentations (or the “juridical future”) is designed to express the generality or omnitemporality of the rule of law (Bourdieu 1987, p 820) Philosophers within the natural law tradition subscribe to the trait in order to claim that juridical texts are not normative but rather descriptive, and that legislators simply identify what is, not what ought to be, that they utter what is just or justly distributed according to what is written as an objective property into things themselves: “The legislator prefers to describe legal institutions rather than establish rules directly” (Kalinowski, 1964 p. 33)

What is important in the deconstruction of this discourse? Especially in the context of our research question? Derrida's methods of textual analyses, engage discovering, recognizing, and understanding the underlying and unspoken as well as implicit assumptions, ideas, and frameworks that form the basis for thought and beliefs to facilitate what involves a “a certain attention to structures” (Derrida, 1985, p. 3) Perceiving this from a social constructivist perspective, the structures, being socially constructed, intend to build and assemble a perception of Europe as a social realm and domain, as well as an alliance. The text radiates positive inclinations and advocates a fondness and affection towards Europe as a society. Harmonization is reputable and reliable because it ensures protection, well being and welfare. The purpose of the discourse analyses is not to “get behind” the discourse and discuss what benefits diverse societal and political groups have by these intentions. It is to comprehend what meaning these texts actually have, and how legal cultures in member states are structured by consequence of this discourse.

5:2 *Discovering Legal Culture in an EU Comparative Perspective*

This chapter elaborates around the possibilities of how I have studied legal cultures. Legal cultures will not be defined empirically, that is to say, what the legal culture of Poland and Sweden include and comprise of, and it is not defined to the extent that we can talk about a reality of legal culture in a EU member state, but presents a possible theoretical model for the purpose of studying legal culture.

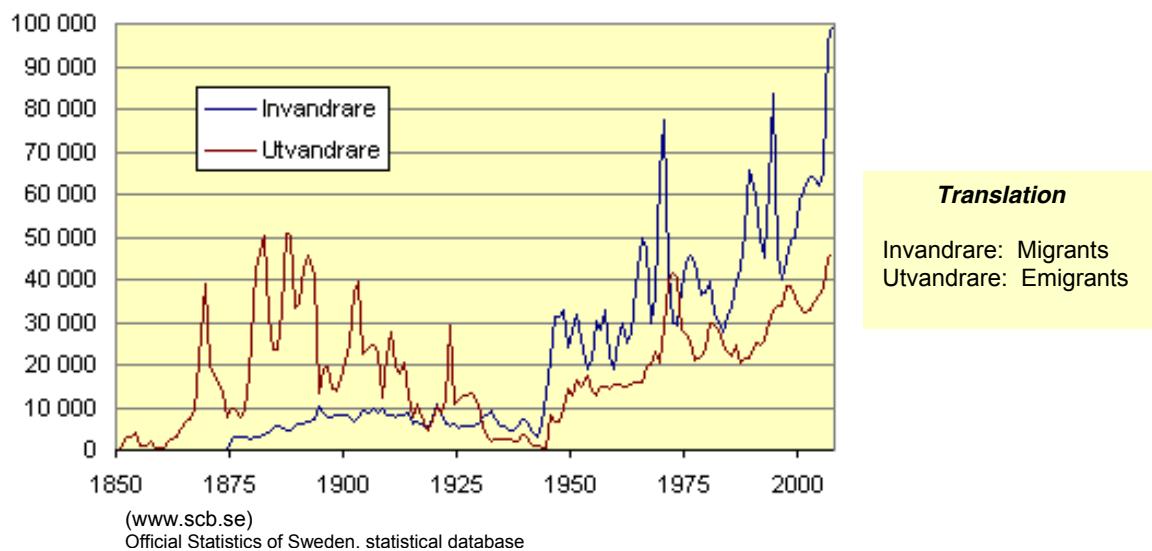


The form of the juridical corpus itself, notably its degree of formalization and normalization, seems very dependent on the relative

strength of “theoreticians” and “practitioners”, of law professors and judges, of exegetes and legal specialists, within the power structure of the field at a particular point in time, and upon their respective abilities to impose their vision of law and of its interpretation (Bourdieu 1987 p. 822) It is for that reason that we have to explain how the habitus of the legal culture in each case study, each member state is structured.

5:2:1 *The Practice of Migration Law in Sweden*

The migration field in Sweden has a long history in comparison with some other countries in Europe. Compared to Poland, Swedish traditions and organization have a modern history and a large scale account of migration. I will not be giving a historical account of Sweden’s migration history at this stage (or Poland later), more a short description and introduction to the Swedish migration experience, so that we can describe and comprehend the habitus and by that the legal culture in more detail.



Since 1930, migration has been larger to Sweden than emigration. During the years 1851 - 1930 approximately 1,5 million Swedes emigrated. 1,2 million of these people, 23 percent of Sweden's population emigrated to North America. The main cause of this emigration where the different standards of living condition between Sweden and the US, Sweden was not a prosperous country at this time (Ohlsson & Lundh, 1994. p. 11) After the second world war, Sweden had a swift from being a country of emigration, to a country that had migration. From the end of the 1940-ties to the middle of the 1970-ties, Sweden had a large scale of labour migration. From the 1980-ties foreword Sweden increased their field of migration to humanitarian aid and opened their borders to asylum seekers. Today Sweden has an rather large population of migrants. An example of the amount of immigrants in Sweden can be taken from the Swedish Migration Board. In the year 2007, 99 485 immigrants settled in Sweden (migrationsverket).

The amount of immigrants in Sweden has required an organization and regulation to handle and administrate the phenomenon. The Swedish political agenda and ideology, along sides EU normative intentions have an immense effect on the result and outcome of the legal culture, and the migration field, since other fields influence eachother. However, these agencies are the ones that are applying Swedish and EU-law in practice and constitute the Swedish migration *field*, consequently they form the legal culture *in practice*.

The Swedish Migration Board is the major authority responsible for migration in Sweden. They are the agency that apply the implemented EU-directives in Swedish law, and are accountable for;

- permits for people visiting and settling in Sweden
- the asylum process, from application to a residence permit or to a voluntary return home
- citizenship affairs

- helping out with repatriation
- international work in the EU, UNHCR and other collaborative bodies
- ensuring that all the relevant public authorities work together . satisfactorily.

The Swedish Migration Board cooperates with, Sweden's embassies and consulates abroad, which process applications for entry visas, work permits and residence permit, the police, who are responsible for border controls and who ensure that certain of those refused entry are turned away, the National Courts Administration and the three Migration Courts and the Migration Court of Appeal, which reviews Migration Board decisions if an applicant lodges an appeal, the County Administrative Boards who confer with the municipalities about the reception of asylum-seekers that have been granted residence permits, the Swedish Municipalities and County Councils who receive asylum-seekers that have been granted residence permits, the County Councils who provide health care for asylum-seekers, voluntary organisations and aid bodies, whose work includes helping those refugees who have been granted residence permits in Sweden but who nevertheless wish to return home.

The Migration Board is a link in the migration chain and therefore has the greatest responsibility, authority, structure and they are also accountable for to keep the chain together
www.migrationsverket.se¹³.

Legal, Financial and Administrative Services Agency (Kammarkollegiet) The Legal, Financial and Administrative Services Agency is the oldest public authority in Sweden. It dates back to 1539 when Gustav Vasa recognized a "chamber" to handle tax collection and the review of public accounts. Today its tasks cover a widespread area

¹² The Swedish Migration Board homepage

¹³ The Swedish Migration Board homepage

and primarily engage actions that necessitate competent legal and economic expertise. The Legal, Financial and Administrative Services Agency in addition offers financial management services to other government authorities. These include numeral of different services from invoice processing to the secondment of financial managers. They do not have an immense role in the migration field, but contribute authorized interpreters and translators for migrants (www.kammarkollegiet.se)¹⁴

The County Administrative Board (Länsstyrelsen) The 1 of July 2007 the county administrative board gained responsibility for the field of integration of migrants as a consequence of the that the agency of integration in Sweden was cancelled. The county administrative board has a task to ensure that the municipalities take in asylum seekers that have acquired a resident permit and see to that they have a high-quality and proper introduction to the Swedish community. The county administrative boards have the operative responsibility for negotiations and agreements with municipalities concerning the reception and introduction in every county. They shall also coordinate the regional and local cooperation, as well as follow up introduction of migrants in the county. The County Administrative Board is a government authority that exists in close proximity to the people in each county. The County Administrative Board has a unique position in the Swedish democratic system. Sweden comprises 21 counties, which are in turn divided into municipal areas. The County Administrative Board is an important link between the people and the municipal authorities on the one hand and the government, parliament and central authorities on the other. The work of the County Administrative Board is led by the County Governor (www.lst.se)

The County Administrative Board is charged with a range of tasks, including:

¹⁴ The County Administrative Board homepage

- implementing national objectives
- coordinating the different interests of the county
- promoting the development of the county
- establishing regional objectives
- safeguarding the rule of law in every instance

Ombudsman against ethnic discrimination, DO¹⁵ is a government agency with nearly 50 employees. The ombudsman is Katri Linna, who has been appointed by the Swedish government. DO works to prevent and stop all forms of ethnic and religious discrimination in society (www.do.se)¹⁶

The National Board of Health and Welfare (Social styrelsen) The is a government agency under the Ministry of Health and Social Affairs, with a wide range of activities and many different duties within the fields of social services, health and medical services, environmental health, communicable disease prevention and control and epidemiology. The Government determines the policy guidelines. In the field of migration, the biggest role of the National Board of Health and Welfare is to provide social care and economical help to immigrants and to aid the other agencies in some issues. *Migration Court of Appeal* is court where a migrant appeal if their application is rejected by the Swedish Migration Board. The single largest category of decisions of the Swedish Migration Board that are appealed against are those relating to applications for asylum. This system applies to most decisions of the Swedish Migration Board that are appealed against. An asylum application is submitted to the Swedish Migration Board, which will either grant it or reject it. If the Swedish Migration Board grants the application, a residence permit will be issued.

¹⁵ Diskriminerings ombudsmannen, translation; Ombudsman against ethnic discrimination

¹⁶ Ombudsman against ethnic discrimination homepage

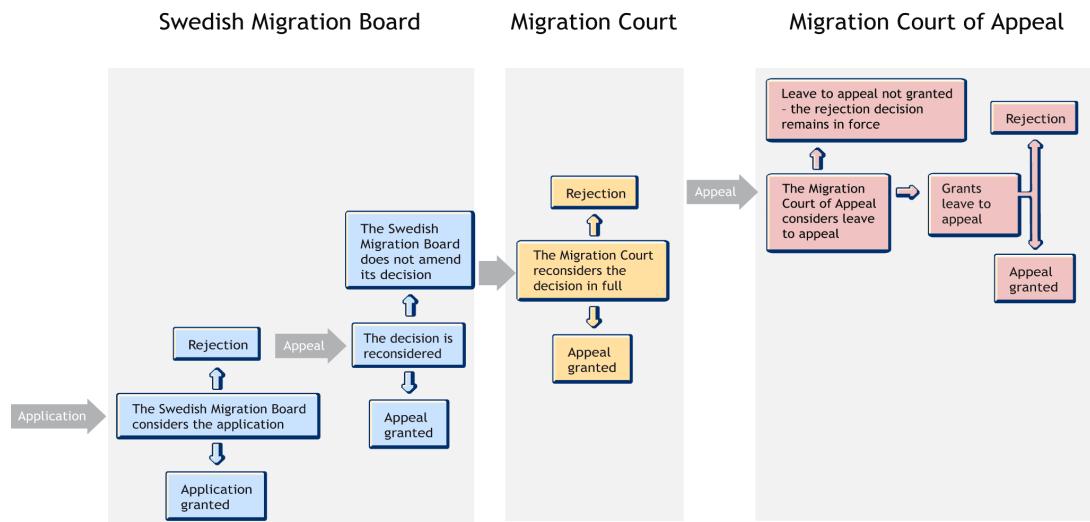


Figure taken from the Migration Court of Appeal
http://www.domstol.se/upload/Arende/Migration/fran_ansokan_till_avgorand_eng_stor.gif

In the event of rejection, the Swedish Migration Board will also make a decision on refusal of entry or, if the person who made the application is in Sweden, on deportation. A decision of the Swedish Migration Board to reject an asylum application and simultaneous decision on refusal of entry or deportation can be appealed against. Appeals are submitted to the Swedish Migration Board, which will first reconsider its decision. If the Swedish Migration Board does not amend the decision, the appeal is forwarded to a Migration Court. In the Migration Court, the Swedish Migration Board is the opponent of the person who applied for asylum. The asylum seeker will often be represented by public counsel. If the Migration Court of Appeal does not grant leave to appeal, the decision of the Migration Court will remain in force and it will not be possible to appeal further. However, if leave to appeal is granted, this means that the case will be considered and determined by the Migration Court of Appeal. The decision will form a precedent and thereby provide guidance for decisions of the Swedish Migration Board and the Migration Courts in

similar matters. The Migration Court of Appeal is the supreme instance and its decisions cannot be appealed against in Sweden. However, the Migration Court of Appeal has to take EU-law into account (www.domstol.se)¹⁸-

Apart from these agencies, Sweden has a vast political agenda concerning migration. The ruling party in Sweden appoint a minister of integration as well as a minister of migration.

There are also NGO's¹⁹ working with migrants in Sweden, and their work is very important for they, in a sense, supervise the work of national institutions and have a greater focus on the individual. They are a big part of the field of Swedish migration. However, they fall out of the scope of analyses since the focus lies on national institutions because they are complied to apply and implement EU-law. The current Swedish migration law that governs all agencies and authorities is entitled *Utlänningslag* (2005:716) (SFS 2005:716) and has implemented the EU-directives concerning migration.

5:2:2 *The Practice of Migration Law in Poland*

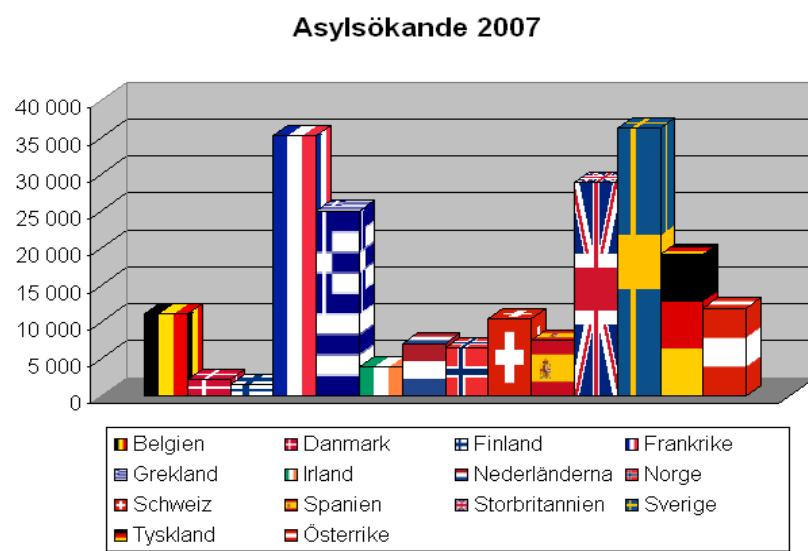
Poland's migration history is not resembling the Swedish . Poland has a immense diaspora all over the world. Poland has been an emigrant country form a long period, and can be defined so until this day.

¹⁷ Swedish courts homepage

¹⁸ Swedish courts homepage

¹⁹ Non govermental organization

The polish emigration even has a name; Polonia, the name for Poland in Latin and Romanian languages, that refers in modern Polish to the Polish diaspora. There are around 15–20 million people of Polish ancestry living outside Poland, making the Polish diaspora one of the biggest in the world. Reasons for their displacement vary from border shifts to forced resettlement to political or economic emigration. When one searches for information concerning “polish migration” the number of scientific articles concerning Poles that emigrate cannot be compared to the works done on migration to Poland. Nevertheless, Poland has migration flows, and reports made by the ministry of internal affairs claim that migration in Poland will be a big political issue in the future. The EU directives have to be implemented in this act. However today the flows are so much smaller that they cannot even be compared to other EU member states. The figure below from the Official Statistics of Sweden, statistical database, show that Poland is not even taken into account when we compare migration flows in diverse EU-member states.



However this is why it is so interesting to have Poland as one of the case studies, since it has such a different migration process and history, but still has to implement the same EU directives as Sweden. Just as Sweden is required to have an organization and regulation to handle and administrate the phenomenon of migration, so has Poland. Poland also has to have actors that are applying Polish and EU-law in practice and constitute the Polish migration *field*, that subsequently form the legal culture *in practice*. Poland also has NGO's working with migrants in Poland and there have been insinuations from the Helsinki Foundation for Human right, that in fact, the NGO's have much more practice in this area than the national institutions. It can be understood why this criticism occurs. But before I mention the grounds for this problem in the next chapter, we need to describe the national institutions work.

Ministry of Interior an Administration is, as the name itself implies a political organization. A ministry is a political office, department where actors are a part of the political field. The Ministry of Interior an Administration in Poland do not deal directly with migrants and application of migration law, they give directives to the other agencies that have a direct appointment in the matter. The Ministry of Interior an Administration is also responsible for the implementation of EU-law in polish regulation and the minister of Interior an Administration is the actor responsible for negotiations with the EU. They have a specialized department within the ministry, *the department of Migration Policy* (within the Ministry of Administration and Interior) in charge of coordination of migration policy (www.mswia.gov.pl)

Ministry of Labor and Social Policy has previously mostly been responsible economical aid and work permits for migrants, but has, with the increasing harmonization of EU-law and new EU-directives expanded their program and formed new departments within the ministry.

Department of Migration, that is responsible labour migration and all issues pertaining to the coordination between the Polish social security system and systems of other states, to include the EU Member States and the states of the European Economic Area.

The Committee for Migration is a new agency (*within the ministry of Labor and Social Policy*) that exists from February 2007. Their main intention is to coordinate tasks and agreed actions of the public administration in relation to the migration policy and monitoring of migration policy initiatives on the EU level. (www.mpiips.gov.pl)

Head Of The Office For Foreigners, has the biggest role and responsibility for migration in Poland. This is the central authority of governmental administration competent in relation to entry of migrants in the territory of the Poland, the transit of migrants through Polish territory, the residence in and leaving it, granting refugee status to migrants, granting asylum, tolerated stay²⁰ and temporary protection with reservation for the competencies of other authorities as provided for in the laws. The Minister of internal affairs from the Ministry of Interior an Administration exercises supervision over the Head of the Office.

Today the current Polish migration law regulating the work of agencies and authorities where we can find EU-directives is entitled; USTAWA o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej.

²⁰ "Tolerated stay" is the polish definition for residence permit

5:3 Measuring Practice to Assess Legal Culture

What can you explore when you want to study legal culture in a comparative perspective? The answer to this question is long with numerous possibilities. In another sense, it depends on the area of interest. National legal culture, as such, is almost an infinite field, and even if the research is narrowed down, to a certain legal field of interest and the legal culture of that field, you still find an endless amount of variables to study. Studying European Legal Culture, as some scholars attempt, is an even greater task with more exertion since there is not one European legal culture but many, consisting of and affected by, the juridical fields of member states. My attempt is therefore just one example out of many, where I have chosen to study the field of migration law in a comparative European perspective. In chapter 3, I developed and discussed the problems of trying to label one legal culture in comparison with another. In the method chapter it was mentioned that to be able to make a comparison between cases it is important to conclude whether to study cases which are unique in some way or cases which are considered typical. My cases can only be described as typical, since if they are unique is an empirical question that is difficult to answer without taking into account the rest of the member states. Unique refers to a single case that doesn't have any patterns like another, while typical could be more of an representation of a certain case. Even if one studies and compares two legal cultures it can occur that the comparison has nothing to do with the research questions. Therefore you have to have units that are comparable. This does not mean that they have to be identical, because in my case that

is an impossibility. However the variables chosen in reference of making the comparison, have to be able to generalize the phenomenon that is compared and transcribe patterns in a corresponding way, as well as describe similarities and dissimilarities (R. Ej vegård, 2003 p.) Since I am dealing with agencies or/and authorities that exercise and practice migration law in Sweden and Poland it is within them that we can find what legal culture abides in each case. The juridical field has authority, of its own towards itself. The most crucial influence, in this case, is the authority to decide in part, what and how decisions will be in a specific context, case, or conflict. (Bourdieu, 1987 p 807) In the juridical field (the legal culture), there are practices within legal systems that are patterned by tradition and experience of legal custom and professional usage. The experience within this juridical field operates as a structure of actions, as *habitus*. The concept of habitus relies on a theory of action, which is why in Bourdieu's words, I have to studied the practice. There are different practices to study in an agency dealing with migration law, but I cut down these practices because the relevance of the practice in this context, is to describe the field, consequently I have distinguished the following; How the agencies are structured and what experience they meditate in the legal documents they use.

The agencies structures involve what functions they have in relation to exercising migration law and in what extent the member state is organized. This shows the "habitus in practice" member states can have in regards to migration law. Is it a juridical field where member states have tradition and experience of legal custom and professional usage concerning migration, or not?

Bourdieu tells us that we need to see the field, the legal culture, as a setting in which agents, agencies and authorities, have their social positions located. The social position are determined by a societal and political context, that is never the same in two different fields

(Bourdieu, 1984). The field of migration in Sweden is ruled by a political context that, in fact, gives the field a high level of autonomy. The agencies are not dependent on what political party wins the elections, other than if the ruling party changes the legal regulation abiding in the field. In Poland the migration field is supervised by the Minister of Internal affairs, giving the field a different context and agent depending on what political ideology Poland chooses. The level of independence and autonomy is an important factor, as well as variable, when it comes to understanding the legal culture of a member state. When trying to assess, if a member state has strong vs. weak legal culture, a well grounded starting point would be to analyze the *autonomy* of the practice in the juridical field. Apart from the fact that a strong legal culture has experience, strong organization, tradition, practice and familiarity, as well as, transparency, there also has to be a high level of autonomy for the field to establish a legal culture with rules, norms and customs intended for the agents to abide by. If the level of autonomy is low, the field will be so dependent on the influence of other fields, that it will be difficult to establish and form a habitus, and the legal culture will be weak. The autonomy of the field also has an impact on the symbolic capital of the field. If the autonomy and self-government of the field is high, the symbolic capital and values will have a strong connection to the legal culture abiding in the field. If the autonomy is low, the symbolic capital will be dependent on influences from other fields and of what is “politically correct” to normatively value as “the right” goal of the migration agencies. The strong and sovereign field will have an internal symbolic capital that in fact protects the conduct and work of the field, to the extent that influences, power and authority from the EU may have a lower impact on the practice of that agency. The position of each agency in the field is a result of interaction between the specific rules of the field, agencies habitus and agencies capital. Agents in the juridical field are en-

gaged in a struggle with those outside the field to sustain acceptance for their conception of the relationship between law and society. The more autonomy, norms and traditions a field has, the more conflicting this struggle becomes, because the strong field will emphasize that their conception and understanding is the accurate one. From a social constructivist perspective, for example Berger and Luckman's, each field has a notion that their legal culture is the "true" one. Their discourse is the truth. Consequently the stronger a legal culture with a more ingrained habitus of a field is the greater, further reliable and absolute the social construction becomes in that field, and their efforts concerning migration measures develops into the preeminent method for the agency. The conclusion does not change when it regards implementation of EU directives. A strong legal culture recodes and reinterprets EU-directives to a much larger extent, than a weak legal culture, since the directives are recoded to fit to the socially constructed truth of the legal culture. This will however only happen if the directives go against this truth. If the EU- directives follow, the same pattern or essentially have the same foundation as the national migration law. There is no need to recode and adapt the directives if the national law already has an evolved legislation in the migration field, which corresponds to the normative intentions of the EU. However, if the legal culture is weak and has no advanced legislation in the migration field, they will not only need to implement the directive in a immense extent, but they have no habitus, no starting point in legal tradition and custom to recode the directive into. The interpretation and recodification of directives is consequently diminutive. To study the practice of recodification empirically is another way to assess if a legal culture is strong vs. weak, and the cases I have chosen shows the above-mentioned phenomenon noticeably.

5:4

Diversities in Legal Culture of EU-member States

If we continue in the theoretical and analytical framework of Bourdieu's perspective, the starting point is not to assess *if* there are diversities in legal cultures, but *what* the diversities are. The foundation of Bourdieu's theory lies in the assumption that *no* field is like the other (Bourdieu 1977). Bourdieu's theoretical concepts simplify a hypothesis and an empirical analyses , since ones you have chosen to define legal culture as a juridical field, from the perspective of Bourdieu's theory, *it will be unique* (Bourdieu 1977) In regards to Bourdieu, there is consequently no need for empirical proof that one field differs from another. Bourdieu's claim is that no field can ever repeat itself, even the same field has a dynamic and transforms constantly. Two juridical fields can as a result, never have the same habitus, and symbolic capital. These are traits that develop in the singularity of the context they originate from. In this circumstance it is not interesting that the juridical fields are by theory different, but what the dissimilarities are and how they are relevant in a comparative perspective in regards to harmonization of EU-law. Lawrence Friedman also brings up this situation when he claims that "each country may have its own legal culture and no two are exactly alike" (Friedman, 1975 p. 199). All fields are connected to their habitus. The juridical field on the EU-level has as a goal to incorporate EU-law in the fields of Sweden and Poland. The habitus of the Swedish legal cultures, and the habitus of the Polish legal culture show what potential clashes, if any

at all, as well as, differences there can be in the incorporation of EU-law. The habitus is Bourdieu's way of discussing legal cultures. So to take into account the diversities in member states legal culture we have to consider their habitus. Discourse analyses is a model way to uncover the habitus, since habitus refers to a perception of "the social" as a discursive construction. A discursive theory is often correlated with texts but also of an analyses of social fields. Laclau and Mouffe's theoretical approach to discourse analyses establishes a suggestion that the process of struggle in a field concerning the meaning of texts is established and fixed so that we can see how some meanings become perceived as natural, and a custom. The discourse in the field of migration in each case study is, as a result, "a fixation of meaning in a specific domain" (Laclau & Mouffe, 1985).

In the field of migration, we have defined that the legal framework of the legal culture can be found in the agencies and authorities that apply migration law. These authorities have implemented EU-directives in national legislation and depending on their legal culture, they have implemented, recoded and interpreted these directives in a certain way. The Swedish legislation (Utlänningslag) is not a new legislation, but has been applied in Sweden for some time. The legal education in Sweden includes teaching migration law as a part of the program and students are obligated to study migration law as a part of their legal learning.

In view of the fact that the Swedish society has a rather large group of migrants, as well as experience of migration for a long time, this regulation has been altered and improved, in addition to, adjusted to societal needs on numerous occasions. Sweden has a very well developed and equivalent legislation to what the EU-directives imply as "minimal standards". Sweden has much more than minimal standards, and they do not in any way differ from the ordinance of EU (See Utlänningslag 2005:716) A member state is allowed to have a more

detailed legislation, than what is contained by the EU-directives, but not one that is against the minimum standards requested in the directive. When studying the Swedish legislation Utlänningslag 2005:716 and the alteration made in SFS 2006:219, it is clear that the Swedish legislation has implemented EU-directives, but mostly in form and not content. What I mean with this is that the alteration after the directives and Schengen as well as the Dublin treaty occurred, Sweden has adapted this regulation and refers to that they take on the form and rules that EU has settled when it comes to immigrant moving throughout Europe, and thereby Sweden, and all the regulation concerning border control. So the supranational regulation as Schengen and Dublin, have been incorporated in Swedish procedure. However, Schengen are very formal measures, in practice it only means for example, new conduct of procedures at border control. Concerning the practical outcome of Dublin, this treaty only gives Sweden one more ground to evaluate reception conditions, whether to give asylum or not. If an reception application is not consistent with the Dublin regulation, Swedish authorities, in this case the Swedish migration board, doesn't even have to examine the application. However, when it comes to the directives concerning, minimum standards of reception of asylum seekers, minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted and the directive on minimum standards on procedures in Member States for granting and withdrawing refugee, all these minimum standards were already in the Swedish legislation, and there is a clear interpretation that the agencies that are appointed by the Swedish government, have the executive power to decide in migration cases (Utlänningslag 2005:716 as well as 2006:219). This means that Sweden has not changed their customs or professional norms or organizational structure, the socially constructed truth of the

Swedish discourse and thereby the habitus remains in a way, intact. The accountable authorities mentioned previously, have not changed any content in their responsibilities, apart from the fact that Sweden doesn't have their own legislation on the territories taken over by the Schengen and the Dublin convention. The changes made are minimum, regards mostly supranational law and are subordinated to the contract Sweden has with EU-as a member state. There have been some changes in the language, and concepts to clarify that Sweden has implemented the EU-directives. To summarize, Sweden has mostly changed the regulation in regards to Sweden's responsibility for immigrants towards (outwards) Europe. For example, we find a sentence in the legislation that directly connects to "the citizens of the Union" [....."about the citizens of the Unions and their families right to free movement and stay within a member states territory".....] (*Translation made by author*)

Sweden has consequently a strong legal culture, the habitus is evolved with strong ingrained traditions and experience and there are young law students who learn the migration system and share the experience, habitus of the field. One of the reasons for this is that Sweden has an "old legal culture" and evolved practice as well as a political agenda, where it is politically correct to be concerned about migration and integration questions in Sweden, migration issues have symbolic capital.

Concerning Poland the practice is very different. The legislation concerning migration in Poland is very new. There have been regulations in Poland regarding migration previously but their form has been to large extent only based on rules of "who stays and who goes", and the legislation has not been a part of a immense governmental structure with authorities as well as an imperative political agenda, as in Sweden. The Polish corresponding agency to the Swedish, The Head Of The Office For Foreigners, is a new organization compared to the

Swedish. The Swedish Migration Board, started in 1969 under the name “Statens invandrarverk“, The Government Immigration department” (Translation by author) but changed name in the year 2000 to The Swedish Migration Board. For Poland that has a communist government until 1989, it is impossible to have had a corresponding authority in the years that Sweden established their. Today the Head Of The Office For Foreigners, under the supervision of the Ministry of Internal Affairs and Administration generate the new regulation in relation to migration. When studying the legal acts relating to migration where the EU-directives are implemented, there is a striking resemblance to the original document. The directives are almost *translated* into the national codification, not recoded. Here we see, as stated in the former chapter, that the recodification is diminutive and not very extensive (See Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej, Statue of granting foreigners protection within the terytory of Poland (*Translation made by author*) Another interesting aspect is the Head Of The Office For Foreigners mostly refers to EU-regulation when they describe their actions and organizational responsibilities in their statute (See Zarządzenie Nr 82 Prezesa Rady Ministrów Z Dnia 3 Sierpnia 2007 R. W Sprawie Nadania Statutu Urzędowi Do Spraw Cudzoziemców).

Polish Migration looks very different than the Swedish, the number of asylum seekers is much lower and they come from different countries than the Swedish asylum seekers. After 1989 Poland became a sort of “incubator” in which a new, not tested political model of migration started to form. There were two processes forming it, the transformation of the political system after the downfall of communism and European integration (Wainer, 2005, p 4).

Poland neither had the time or opportunity to create politics of migration in a natural cycle like the western EU member states. Poland is still a country of emigration rather than migration. The Swedish offi-

cial of statistic declare that over 7500 Poles applied for a residence or working permit in Sweden, just during 2007. Polish citizens emigrate mostly to EU member state to find better economical opportunities on the labour market (Wainer, 2005, p 4). However, this does not mean that they don't have any migration or asylum seekers. Wainer claims that the development of polish migration policy has to be separated in three phases; 1990-1997 – the opening of borders and entering the international structures, 1998-2001 – strengthening the “polish legal model” in negotiations with EU and 2001-2003 preparations for EU membership (Wainer, 2005, p 10). At every above mentioned level there where new regulations suggested concerning migration law. At every level Poland also came closer to the EU regulation. Poland has to this day, *not* developed a doctrine of migration, which would be an indispensable condition in the settlement of the migration policies of the country (Wainer, 2005, p 6). The political elites are according to Wainer, not interested in the concept, mostly because the lack of need for immense political actions, unstable values on the matter between political party members and a minimal amount of migrants in the country.

Poland actually first encountered the problem of global migration flows in 1990 when Sweden returned a small group of migrants seeking asylum to the city of Szczecin, Poland, with the argument (according to the Dublin Treaty) that this group crossed the Polish-Swedish border with no visa or documentation (Wainer, 2005, p 11).

What we do find in the polish legal documents where EU-directives are implemented, is that Poland has a strong emphasize on addressing the problem of the eastern border. Some scholars claim that Poland has become a transit country to western Europe and this needs a strong border control, and thereby a strong legislation and the only reinterpretation to the “Polish needs” in the legal regulation. The

rest of the articles in the EU-directives are more or less copied into the polish legislation.

The Helsinki Foundation for Human Rights observes the evolution of migration issues in Poland and reports on current status. The resent report gave a rather tough criticism. The report mentions that at this time, polish law, does not regulate the prospect or legal aid to refugees that ask for asylum. They claim that there are many NGO's working with help for refugees in Poland, however there are almost no governmental organizations that handle and individual based help for the asylum seeker. The claim that one of the main reasons for this, is that migration law is not thought at the universities within the legal education. Which means, that there are no legal specialist that can offer help to the refugees, and in practice there is a very diminutive chance of an asylum seeker getting legal consultation. The Helsinki Foundation for Human Rights observe that this legal field is slowly coming into the educational system because of the new EU-directive, the Procedures Directive.

In a legal culture, the agents are the legal professional working within the field with a specific habitus. Since there is no educational system in Poland yet that can provide experience and knowledge of migration law it is difficult to talk about a legal culture at all. The legal culture is formed by the agents in the field, but to be able to create a "culture" of traditions and experience, there has to be a habitus. The habitus in the case of Poland's migration field is vague, if at all existent. This confers yet again that the legal culture of Poland can be valued as a *weak legal culture*. One of the reasons for this is that Poland still has a "young" legal culture. For now the profession has no real symbolic capital, and is probably not valued as the most popular field to work in for lawyers.

I want to underline that the reason why I bring up the critic from the Helsinki Foundation for Human Rights, is not to criticize Poland

or in any way value their organization concerning the migration field. As mentioned before, if there is a very small migration in a country, this topic does not get a high value in the political discourse and agenda which makes it easy to understand why there is no elaborated outline. The reason why I have given examples from the Helsinki Foundation for Human Rights, is that it is a reliable reference and gives an illustration of the phenomenon of weak legal culture that I am discussing.

5:6 *Harmonizing European Migration Law, A Quest before its Time? - Final Discussion and Reflection*

Thus, what can we say about European Integration versus European legal Cultures? What is there to say about the integration of very different legal cultures in a common European society by the harmonization of EU-law? If the final reflection is formed like this, we can only come to the conclusion that the answer lies in the political ideology of each individual, or that scientifically, it is an empirical question. This PhD thesis has elaborated and built a hypothesis with the *intention of how* to study that empirical phenomena, namely what happens in practice, and what are the results of harmonization of EU law.

The normative intentions of EU-law is to harmonize the European society, and under the rule of law, have a unified European approach to migration. Ever since the Tampere meeting this has been the goal of EU. Seeing that Europe is a people of various cultures with a dynamic historical past it is only natural that these intentions are understood in diverse conducts and interpreted in different ways. Even though the EU-member states have a political aspiration to belong to the European Union, the actuality of differentiation between member states cannot be changed at a fast rate. The national law of member states is a reflection of the structures that abide in the society. One of the classical scholars in sociology of Law, Eugen Ehrlich stated that;

At the present as well as any other time, the centre of gravity of legal development lies not in legislation, nor in judicial decision, but in society itself" (Ehrlich, 1936 p. 20)

This very sentence expresses the essence of the role for Sociology of law, to in this case, show that comprehending the society itself, is the only way to understand harmonization of EU-law. I have tried to lay a foundation for how we can come to understand legal cultures, and that through an understanding of them we will recognize why there is a difference in interpreting and recoding EU-directives in a specific case. Through this consideration it is possible to reach a better communication between a member state and EU. The differences found in the legal cultures of my case studies show that EU as a supranational power, even though created by EU member states, has intentions before its time. By only regarding and examining the treaties of EU and their normative intentions, it is easy to fall into the inaccurate notion, that the EU community is a society with similar requirements and aspirations. Sometimes we can observe a insistent

objection, like the outcome of the election in Ireland, where we saw a “no” for the Lisbon treaty. But most of the time it is necessary to examine and study a certain context like the migration field in a member state to recognize and comprehend the framework of harmonization in practice. If we do not approach harmonization in this way, it is probable that the process of harmonization will at a certain point become an abstract exercise that does not have a national correlation, or more important, legitimization.

Although both European and national legislators share the legislative responsibilities, neither of these bodies has final responsibility for the whole. Also, there is no superior political authority which has the final say on who is responsible for what, ie no overarching authority over the European and national legislators. The European Court of Justice may however determine the extent of harmonization when determining cases. Harmonization can be seen as a step towards unification and, in a way, harmonization aims or strives towards unification and this is the appeal of harmonization, it takes into account the local factors yet applies general principles to make a consistent framework of law (Hesselink, 2006 p. 50).

Harmonization is usually not comprehensive but is relatively partial. That is, harmonization of law doesn't seek to create a sole authority of law on a particular subject. This is because measures to harmonize law cannot go further than that which is necessary (Hesselink, 2006 p. 49) Harmonization also is unsystematic. The Directives of the European Union do not focus on or contain comprehensive regulation of the entire law. The Directives regulate some very specific issues and they regulate them only for particular situations or circumstances (Hesselink, 2006 p. 50). Harmonization generally takes place on two levels of governance, the overarching body and the each of the members individually. Taking the European Union, the two levels are the European level and national level. But

there is also the level of agencies that practice the implemented law. To further this study it would be very interesting to continue the thought of differences between member states and studying legal cultures in a comparative perspective. The model presented in this study should be explored, and the best way would be to test it in a study of how the “law in practice” differs in Poland and Sweden.

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