ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

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INTRODUCTION: THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

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ABSTRACT: The autonomy of EU law is a source of ample connections between EU law and legal theory. This *Special Section* contributes to the mutual enrichment between EU constitutional law and legal theory – which traditionally have been mostly disconnected disciplines – by bringing together new, theory-informed perspectives on the autonomy of EU law and European integration from both EU lawyers and legal theorists. The ten *Articles* in this *Special Section* are grouped together in three categories, focusing respectively on philosophy of law, legal theory and legal history, and legal doctrine and the role of the European Court of Justice. Together, they provide a plethora of contrasting and complementary legal-theoretical views on the autonomy of EU law and the EU legal order, within the broader context of European integration. With this Special Section, we aim to contribute to the legal-theoretical analysis of EU constitutional law, hoping that many others will follow in our footsteps.

KEYWORDS: autonomy – legal theory – legal philosophy – EU legal order – EU constitutional law – European integration.

I. THE AUTONOMY OF EU LAW AND LEGAL THEORY: BRIDGING THE DISCONNECT

This *Special Section* aims to bring together two worlds that have been mostly – and unfortunately – disconnected: EU constitutional law and legal theory. On the one hand, EU constitutional lawyers typically do not rely on the insights from analytical jurisprudence and other

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types of legal philosophy and theory. On the other hand, legal philosophers traditionally have focused on State law,[1] and have mostly neglected both international law[2] and EU law[3] as distinct types of law. This is regrettable because, in our view, both disciplines could benefit tremendously from mutual enrichment. This *Special Section* contributes to such mutual enrichment by bringing together new and fresh theory-informed perspectives from both EU lawyers and legal theorists on the autonomy of EU law and European integration.

From the early 1960s, the autonomy of the EU legal order has been central to the creation of the doctrines of direct effect and primacy and the process of "constitutionalising" EU law. *Internally*, therefore, the doctrine of the autonomy of EU law is central to the special nature of the EU legal order as a "domestic" legal order common to the Member States, distinct from ordinary international law. The main logic of internal autonomy is to transform EU law into a self-referential, coherent and complete system of norms.[4] At the same time, the corollaries of autonomy, in particular the doctrines of primacy, direct effect and sincere cooperation have been key in not only establishing a "new legal order", but also in creating links between the EU legal order and the already existing legal orders of the Member States.

In recent years, increasing attention has been given to the *external* dimension of the autonomy of EU law. The autonomy of EU law has been instrumental in protecting the internal institutional and constitutional structure of EU law against normative interference by public international law and the legal frameworks of other international organisations. In this regard, the exclusive jurisdiction of the European Court of Justice (ECJ or Court) to decide on the definitive meaning of EU law has been a recurring imperative in the Court's case law.[5] Externally, therefore, the autonomy of EU law has been a mechanism to further constitutionalise the connections between the national and EU legal orders, and to ensure that these connections are normatively autonomous from external legal sources.[6]

[1] See *e.g.* J Raz, 'Why the State?' in N Roughan and A Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017).

[2] In recent years, some legal philosophers have taken a greater interest in international law. For some notable examples, see *e.g.* M Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2010) EJIL 967; L Murphy, 'Law Beyond the State: Some Philosophical Questions' (2017) EJIL 203 (and the replies to this article in the same issue); and the various contributions to both S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) and K Gorobets, A Hadjigeorgiou and P Westerman (eds), *Conceptual (Re)Constructions of International Law* (Edward Elgar 2022). For a recent overview with further references, see J Tasioulas, 'Philosophy of International Law' *Stanford Encyclopedia of Philosophy* (12 May 2022) plato.stanford.edu.

[3] For some notable exceptions, see *e.g.* J Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Clarendon Press 1992); N MacCormick, *Questioning Sovereignty: Law, State and Practical Reason* (Oxford University Press 1999); P Eleftheriadis, *A Union of Peoples* (Oxford University Press 2020), and various contributions to J Dickson and P Eleftheriadis, *Philosophical Foundations of European Union Law* (Oxford University Press 2012).

[4] See *e.g.* K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' (2021) HJIL 47.

[5] See *e.g.* Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454; case C-284/16 *Slowakische Republik v Achmea BV* ECLI:EU:C:2018:158; Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341.

[6] See *e.g.* J Lindeboom, 'Why EU Law Claims Supremacy' (2018) OJLS 328.

While "autonomy" has featured in a large number of publications over the years,[7] not many studies have analysed the doctrine of autonomy from the perspective of legal philosophy and legal theory.[8] This is unfortunate but also quite remarkable, since the autonomy of EU law is a particularly well-suited doctrine for a combined constitutional–jurisprudential analysis. Not only is autonomy a cornerstone of EU constitutional law, the meaning and implications of the autonomy of EU law also directly relate to central discussions in the philosophy of law and legal theory.

Legal philosophy, for example, focuses on various questions pertaining to the nature of law and legal orders, including the puzzle of how legal orders can emerge in the first place.[9] As mentioned above, in EU law the doctrine of autonomy took centre stage in the transformation of the Treaty of Rome from "merely" a treaty establishing an international organisation towards a full-fledged supranational legal order. The emergence of an autonomous EU legal order, in other words, is an empirical case in point for legal-philosophical discussion.

Other questions in legal philosophy and theory also connect to important issues in EU constitutional law and the doctrine of autonomy in particular. These include the questions of how a legal order relates – legally, politically, socially and morally – to other legal orders,[10] whether the validity and content of law is independent from principles of morality,[11] and what, if any, is the basis for the obligation for both legal officials and ordinary citizens to follow the law.[12]

[7] Just to mention a few recent examples: K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' cit.; C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review 19; N Nic Shuibhne, 'What is the Autonomy of EU Law, and Why Does That Matter?' (2019) NordicJIL 9; T Molnár, 'Revisiting the External Dimension of the Autonomy of EU Law: Is There Anything New Under the Sun?' (2016) Hungarian Journal of Legal Studies 178; R Barents, *The Autonomy of Community Law* (Kluwer Law International 2003).

[8] See however, C Eckes, 'The Autonomy of the EU Legal Order' cit.; P Eleftheriadis, *A Union of Peoples* cit. ch. 1; J Lindeboom, 'The Autonomy of EU Law: A Hartian View' (2021) European Journal of Legal Studies 271.

[9] See *e.g.* HLA Hart, *The Concept of Law* (3rd edn Oxford University Press 2012) ch. 4; S Shapiro, *Legality* (Harvard University Press 2011) 36–40.

[10] On the relationship between the EU and national legal orders from a legal-theoretical perspective, see *e.g.* NW Barber, 'Legal Pluralism and the European Union' (2006) ELJ 306; and J Dickson, 'How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations between, Legal Systems in the European Union' (2008) Problema 9.

[11] The tension between moral and positive readings of EU law is visible in e.g. Opinion 2/13 cit. See in this regard J Lindeboom, 'Why EU Law Claims Supremacy' cit. However, a positive understanding of the structure of the EU legal order is not necessarily value-neutral, since it may be considered a means to attain morally valuable ends. See to this effect K Lenaerts and JA Gutiérrez-Fons, 'High Hopes: Autonomy and the Identity of the EU' (2023) European Papers www.europeanpapers.eu 1495.

[12] The obligation for national legal officials to follow EU law is central to questions concerning the primacy of EU law and the duty of sincere cooperation. See e.g. the refusal of the German Federal Constitutional Court to follow the ECJ's judgment in case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000 in BVerfG, Judgment of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 (*PSPP*).

From a reverse starting point, several legal aspects of the autonomy of EU law are particularly suitable and interesting for robust legal-theoretical analysis. One could think, among others, of the nature of foundational international agreements (as treaties under international law and/or constitutional foundations of a *sui generis* entity), the nature of internal autonomy of EU law (in relation to the partial integration of the legal orders of the EU and its Member States), the function(s) of external autonomy of EU law (in a system which ought to be *Völkerrechtsfreundlich*[13]) and the hierarchy between norms both within the EU legal order and in relation to national and international legal norms.

The autonomy of EU law, therefore, is a source of ample connections between EU law and legal theory. In our view, the lack of substantial intellectual interaction between legal philosophers and EU lawyers is a missed opportunity. With this *Special Section*, we aim to contribute to the legal-theoretical analysis of the autonomy of EU law, and EU constitutional law more generally, hoping that many others will follow in our footsteps.

II. Overview of this *Special Section*

This *Special Section* provides a plethora of contrasting and complementary legal-theoretical perspectives on the autonomy of EU law within the broader context of European integration. Instead of purporting to offer a "definitive" discussion of the topic, it primarily aims to offer food for thought and inspiration for new lines of research.

The ten *Articles* to this *Special Section* can be grouped together in three categories, focusing respectively on philosophy of law, legal theory and legal history, and legal doctrine and the role of the European Court of Justice. In the remainder of this introduction, we briefly outline each contribution.

A first set of *Articles* analyse the autonomy of the EU legal order from the perspective of the philosophy of law.

The *Article* by Pavlos Eleftheriadis criticises the "structural" nature that is often associated with the special characteristics of the EU legal order, including in particular primacy. Eleftheriadis argues that the idea of a new legal system which either sits next to or is hierarchically superior to the legal systems of the Member States is paradoxical and self-defeating. This mistaken view, according to Eleftheriadis, is based on monist and/or pluralist theories of law building on the works of Hans Kelsen, HLA Hart and Neil MacCormick. Eleftheriadis argues that legal systems cannot conflict or overlap. He concludes that the primacy of EU law is an interpretive, not a structural, doctrine. The EU treaties are common treaties of public international law which ought to be incorporated into the national legal orders. This interpretive approach to primacy entails that violations of EU law

[13] This "openness" is required by the Treaty on European Union, which in art. 3(5) contains an obligation to strictly "observe", and even further "develop" international law. See E Kassoti and RA Wessel, 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union' in P García Andrade (ed.), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant lo Blanch 2023).

are not just unlawful in Brussels or from the perspective of EU law, but are unlawful from all relevant points of view – both national and EU.

George Letsas follows with an *Article* providing for a Dworkinian understanding of the autonomy of EU law. An account of autonomy based on Hartian positivism is of little to no practical significance, because nothing really hangs on questions like how many legal systems there are in the EU (1, 27 or 28?), or whether there are "EU legal officials" in addition to legal officials of the Member States' legal systems. The autonomy of EU law, however, is highly relevant if it is understood in evaluative terms, as the political duty of courts to seek to impose principled coherence upon relevant legal materials, drawing on the values of European integration. Letsas contends that the autonomy of EU law, understood in evaluative terms, is a strong indicator of the merits of Dworkin's court-centric theory of law. In this sense, autonomy may be considered an EU-specific formulation of Dworkin's notion of integrity.

In her *Article*, Pauline Westerman argues against the conception of legal orders as autonomous "buildings". The "building metaphor" compares legal orders to buildings because they are, among others, "freestanding" and based on "foundations". To this effect, she critiques two pervasive assumptions in legal philosophy, namely that the will and consent of sovereign States is to be regarded as a "social fact" categorically distinct from "(legal) norms", and that legal orders are distinct systems demarcated by independent criteria of validity. Westerman argues that the overlap between the EU legal order and the international and domestic legal orders supports a conceptualisation of a legal order as a "network" or "web". In this web, so-called "actants" carrying deontic statuses – which include but are not limited to persons or institutions – are nodal points connected by rules. According to Westerman, rules distribute and proliferate power among actants, which gives them an interest in sustaining the current legal order. Thus, the doctrine of direct effect and the preliminary reference procedure have contributed to the resilience and success of the EU legal order by building a higher degree of "valency" of the "web" of the EU legal order. The autonomy of EU law may be regarded as a doctrinal reflection of this increased resilience and success of the EU legal order.

The second set of *Articles* take a broader, legal-theoretical and legal-historical perspective on the autonomy of EU law.

Written in the form of nine theses, Enzo Cannizzaro's *Article* provides a historical overview of the political and legal meaning and functions of the notion of autonomy of law. Starting with the political theorists of the early modern period, he explores the roots of autonomy as the legal equivalent of the political notion of sovereignty. Cannizzaro then tracks the changing functions of autonomy through the eighteenth, nineteenth and twentieth centuries. He argues that autonomy is the product of historical contingencies related to the emergence of the modern State. As such, autonomy was the perfect doctrine to assist the ECJ in developing the normative independence of the EU legal order *vis-à-vis* the Member States. However, Cannizzaro rejects the ECJ's use of autonomy to shield the

EU legal order from normative interference by public international law, which he claims is unnecessary to preserve the integrity of the EU legal order.

Jakob Rendl analyses the autonomy of the EU legal order from the perspective of Pierre Pescatore's reference to the "sphere of the Community's intervention", within which EU law may justifiably intervene in the Member States' domestic legal orders. This sphere of intervention challenges the radical division between international law and national law. Rendl relies on Habermas' reflection on Kant's cosmopolitan right to show that the EU's sphere of intervention aims to directly protect the legal status and rights of individuals. In terms of international treaty law, the EU's sphere of intervention can be explained by a specific category of international treaties, the "intervention treaty", which breaks through the divide between national and international law and establishes a special connection between the national and the international sphere. In the last part of his *Article*, Rendl relates the concept of intervention treaty to Weiler's account of the EU's political messianism, and analyses this messianism in terms of realising a covenant among States based on non-discrimination and reciprocity.

The *Article* by Justin Lindeboom analyses debates in the early American republic from the perspective of contemporary EU constitutionalism. US antebellum constitutional theory focused on two interrelated issues: the nature of the federal order that had been created by the ratification of the US Constitution, and the final arbiter in constitutional questions. Lindeboom argues that the "nationalist" interpretation of the US Constitution advanced among others by Chief Justice John Marshall essentially purported to demonstrate that the Constitution had created an "autonomous" federal legal and political order. Comparing US antebellum constitutional debates to contemporary debates in EU constitutionalism, Lindeboom claims that proponents and opponents of an autonomous American federal order used highly similar arguments to the proponents and opponents of the autonomy of the EU legal order. Unlike in contemporary EU constitutionalism, however, the monism–dualism distinction – a product of early twentieth century legal thinking – was not known to US antebellum constitutionalism. How the early Americans conceptualised the legal relationship between the federal and State legal orders may cast a different light on the nature of the EU legal order as well, and may reinforce a distinctly federal perspective on the EU and its legal structure.

The third set of *Articles* focus on the role of the Court of Justice and legal doctrine in the construction and interpretation of the doctrine of autonomy.

Damjan Kukovec's *Article* argues that autonomy can be understood as a single, universal, organising meta vision in terms of which all that the ECJ does has significance. Autonomy, on this view, is defined as the idea of a new legal order with its own distinct ontological and axiological character. The *Article* relies on Isaiah Berlin's parable of the fox – who knows many things – and the hedgehog – who knows only one big thing, as well as Ronald Dworkin's theory of law as integrity. According to Kukovec, autonomy is always present in the case law of the EU courts, even if it is not expressly mentioned,

because the autonomy of EU law fundamentally informs the Court's substantive legal reasoning and decision-making. Autonomy ensures the coherence and predictability of the Court's decision-making and the consistent development of EU legal principles. It is the Court's "one big thing", which has made the EU legal system what it is today.

Jacob van de Beeten examines the autonomy of EU law from the perspective of the distinction between *project* and *system*, drawing on the work of Paul Kahn. Projects consist of the execution of a deliberate plan guided by a substantive idea or goal. A system, by contrast, does not appeal to realising a substantive idea or goal, but rather aims to maintain its own order as a goal in itself. According to van de Beeten, the autonomy of EU law expresses a systemic understanding of the EU legal order. Autonomy, in other words, is not necessarily connected to the objectives and values of the EU legal order. The relationship between autonomy and the objectives and values of the EU legal order is only contingent. Judgments such as *Kadi* and *Opinion 2/13* show, according to van de Beeten, that the Court's case law expresses a structural bias towards the system of the EU legal order, irrespective of the substantive ideas and goals underlying European integration.

Christina Eckes' *Article* focuses on the Court's case law about the autonomy of EU law in regard to the specific case of the Energy Charter Treaty (ECT). She examines the compatibility of the current ECT and its reformed text with the normative and regulatory autonomy of the EU. Eckes distinguishes between the normative autonomy of EU law and the regulatory autonomy of the EU institutions. Normative autonomy means that the legal validity and interpretation of EU legal norms does not depend on legal norms external to EU law. Regulatory autonomy refers to the EU institutions' ability to determine their own course of action, among others as an international actor. According to Eckes, the dark side of combined normative and regulatory autonomy of the EU the limitation of parliamentary control. It strengthens the role of the European Commission as the EU's negotiator and limits public debate and accountability. Eckes not only demonstrates that the ECT is incompatible with both the normative and regulatory autonomy of the EU, but also emphasises that the complex competence division between the EU and the Member States makes policy changes difficult to implement. This status quo bias creates tensions with the substantive values and commitments of the EU, including in particular the green transition.

The final *Article* to this *Special Section* is an epilogue by Koen Lenaerts and José Gutiérrez-Fons. They engage with several of the points made by the other contributors to this *Special Section* so as to argue that the principle of autonomy is intrinsically linked to the values on which the EU is based. Therefore, Lenaerts and Gutiérrez-Fons contend that autonomy is not an end in itself or a tool for judicial self-empowerment. Instead, the autonomy of the EU legal order is the basic means to preserve and protect the values of Article 2 TEU, which define the EU's identity as a legal order common to the Member States. Furthermore, Lenaerts and Gutiérrez-Fons argue that the values in art. 2 TEU do not counteract the national identity of the Member States, because the Member States may make their own constitutional choices, as long as they do not call into question these

same values and the identity of the EU legal order as such. Finally, Lenaerts and Gutiérrez-Fons argue that the autonomy of EU law does not deny the EU's ability to interact with the wider world, as long as the EU's international obligations do not call into question these same values and identity of the EU legal order. For Lenaerts and Gutiérrez-Fons, both internally and externally, autonomy is not an end in itself, but an essential means to protect the substantive values on which the EU is built.