ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

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DOES ANYTHING HANG ON THE AUTONOMY OF EU LAW?

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ABSTRACT: Jurisprudential accounts of the autonomy of EU law have struggled to offer a compelling account of its unique features. Nevertheless, I argue that Ronald Dworkin's court-centric methodological approach is better-suited than Hartian positivism to shed light on the notion that EU law is autonomous. This is because most questions about the autonomy of EU law, when asked from a positivist perspective, are of little or no practical significance and philosophical inquiry will inevitably be inconclusive. By contrast, the autonomy of EU law is routinely employed as a normative principle helping EU courts to decide the issue of which party should win the case at hand. It is better understood as a shorthand reference to a political requirement, namely that EU courts ought to identify the main values behind European integration and to build – as opposed to find in the extant legal materials – a coherent body of principles.

KEYWORDS: Hart – Dworkin – interpretivism – legal positivism – legal systems – adjudication.

This *Article* seeks to explore the relevance of general jurisprudential theories to the question of whether, and if so why, the autonomy of EU law matters. Legal philosophy aims to help us understand better the complexities of legal practice. But it has struggled, in my view, to offer a compelling account to the many complexities of the EU legal order. I begin by seeking to identify the sources of this difficulty and argue that they are not simply to do with the unique specificities of the EU. I move on to suggest that, despite the differences in institutional setting, Dworkin's legal philosophy is better suited than Hartian positivism to shed light to the idea that EU law is autonomous. My main

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contention is that autonomy should be 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.

There is, no doubt, an inherent and widely noted difficulty trying to theorize about the EU legal order in jurisprudential terms. Part of the difficulty lies in the unique specificities of the EU; sitting uneasily between the traditional paradigms of national and international law, it requires us to extend the canonical jurisprudential theories, all of which were focused on these two paradigms. This takes some intellectual effort and in the last few decades there has been significant contributions seeking to make that extension.[1] But that is hardly the whole story. There is a deeper difficulty, and it is to do with the political context that gave rise to the canonical jurisprudential tools at our disposal. During the second half of the 20th century, the field has been fortunate to witness breakthroughs within its two main philosophical traditions: legal positivism and natural law. Both breakthroughs took place in the Anglo-American world and, though very different in origin and orientation, both were developed against a very different political background to the one in which Europe found itself after the end of the Second World war.

The first breakthrough occurred in the tradition of legal positivism and it was the publication of H.L.A. Hart's *The Concept of Law* in 1961.[2] Hart's positivism brought two radically different strands to bear to law. One was the longstanding liberal tradition in England, best exemplified by the work of John Stuart Mill. It is a tradition that highly values the idea of a general right to liberty and is sceptical about government restrictions aimed at the common good. The other strand, very noticeable in Hart's methodology, was Oxford's "linguistic turn" in the 40s. This was in large part due of the influx of logical positivists influenced by the Vienna Circle, following the rise of Nazism, as well as Wittgenstein's reception in England. These two strands, English liberalism and logical positivism, were in clear tension with one another. Logical positivists thought that moral and political judgments have no truth value, being expressions of emotions. English liberalism, by contrast, was built on moral assumptions about the objectivity of some value, such as utility, liberty or peace. And in post-war England, liberal values had triumphed politically: the Nazis had been defeated and parliamentary sovereignty had proven a reliable guardian of people's liberty for centuries: no revolutions and no dictatorships.

Hart was able to connect the above two strands by arguing that conceptual analysis can produce a morally neutral account of what law is, one that – it is just so happens –

[1] See, among many others, the edited collection by J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012). I had a stab at extrapolating the main jurisprudential theories to some issues raised by EU law, G Letsas, 'Harmonic Law: The Case against Pluralism' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) PAGE.

[2] HLA Hart, *The Concept of Law* (Oxford University Press 1961, 3rd edn 2012).

puts us in a very good position to spot threats to liberty.[3] He didn't, of course, argue *from* the value of liberty *to* the truth of legal positivism. But his theory was nevertheless striking in the emphasis it placed on the social conventions practiced amongst state officials, captured by his technical idea of a Rule of Recognition. The Rule of Recognition, he thought, is a practice amongst official whereby they converge in treating certain norms as legally binding. Hart's emphasis on conventions was of course no accident. Conventions have been a core feature of the British political system and its unwritten constitution for centuries. The informal and uncodified nature of the British constitution privileges heavily the legislative and the executive branch, at the expense of courts. It is hailed by many as a contributing factor to Britain's political stability and liberal culture. But it is worth noting that this feature, still prevalent today, sits at the polar opposite of the European Union's (EU) heavily codified and bureaucratic nature. The EU was built gradually, through carefully negotiated and drafted treaty agreements, ever expanding in scope and membership, and the role of the European judiciary has been pivotal in securing the effectiveness of these agreements. The institutional structure of the EU simply could not have come about so quickly and efficiently on the basis of convention, tradition or informal understandings between government officials, in the way the British political system now does, after centuries of institutional practice. The saga of Brexit and the continuing friction between Britain and the EU about their future institutional relation is a good reminder of this contrast.

The second breakthrough was Ronald Dworkin's rights-based account of law, culminating in the publication of his book, *Law's Empire* in 1986.[4] A generation younger than Hart, Dworkin received his philosophical training when logical positivism had already started to fall into disrepute. William Van Orman Quine's *Two Dogmas of Empiricism* caused irreparable damage to the idea that there are linguistic truths, discoverable through conceptual analysis (Dworkin told me once, in conversation, that he just applied to law what Quine had taught him about language). Hart's method, according to which we can understand legal practices by analysing the meaning of the word "law", must have appeared to the young Ronald Dworkin not only outdated, but also radically flawed. It motivated him to spend the entire first chapter of *Law's Empire* attacking "semantic" theories of law. But Dworkin's main intellectual influence was, I think, the early tradition of the American philosophical pragmatism, particularly in the work of Charles Sanders Pierce, which is very different to the jurisprudential school of

[3] This was very clear in Hart's debate with Lon Fuller. Hart was bemused with the suggestion that legal positivism inevitably encourages apathy towards evil regimes. He thought that this may have been the case in Germany, but was certainly not in Britain. See HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) Harvard Law Review 593.

[4] R Dworkin, *Law's Empire* (Harvard University Press 1986).

legal pragmatism or the late pragmatism of Richard Rorty.[5] Early pragmatists emphasized the close link between philosophy and practice and the need to do philosophy as a participant to, rather than as an observer of, social practices. They rejected scepticism and the sharp division between fact and value, as well as metaphysical inquires that have no practical significance, or usefulness.

These pragmatist ideas are very much prominent in Dworkin's account of law. His court-centric approach was of course influenced by the political significance of the Supreme Court within the US constitutional architecture (particularly of the Warren Court period), and his background as a practicing lawyer. But its roots were deeper and embedded in a philosophical attitude. Judges and lawyers are political actors engaged in institutional practices of enormous significance. In the US, much more than in Europe, the character of legal argument is little different to the character of moral or political debate. It is overtly evaluative, a far cry from the formalism of the European civil law tradition and the obscure technicalities of the English common law. Dworkin saw early on that a philosophical account of law cannot leave these argumentative practices unaffected. It must be useful to the way these actors are supposed to behave and to justify themselves to others. For Dworkin, a theory of law must be constructed having in mind the question of how judges should decide cases.[6] His positivist critics sought to downplay the significance of his theory by arguing that Dworkin offered a theory of adjudication for US judges. But they missed the whole point of his radical suggestion: a theory of how judges should decide cases must precede a theory of what law is, not the other way around.

The preceding remarks do not mean to imply a *naïve* kind of historicism, reducing theories to the contingent political circumstances in which they were developed. Every theory makes a claim to universal application, and it stands, or falls based on its substance. But I do want to suggest that the project of European integration and the theoretical challenges posed by EU law are much more akin to the political circumstances that Dworkin sought to theorise than those that preoccupied Hart. This is manifested in my view in how artificial the jurisprudential inquiry into the EU becomes when framed in Hartian terms: how many rules of recognition are there in the EU and how are they ranked? How many legal orders are there in the EU: one, 27 or 28? Are national courts EU courts, or are they both national and EU? Are there EU officials who are not also officials

[5] Dworkin dismissed both these approaches and clearly distinguished his own work from these strands of pragmatism. See R Dworkin, 'In Praise of Theory' (1997) Arizona State Law Journal 353 and R Dworkin, 'Pragmatism, Right Answers, and True Banality' in M Brint and W Weaver (eds), *Pragmatism in Law and Society* (Westview Press 1991) 359. For a very interesting analysis of Dworkin's relation to philosophical pragmatism see H Nye, 'Staying Busy while Doing Nothing? Dworkin's Complicated Relationship with Pragmatism' (2016) Canadian Journal of Law and Jurisprudence 71.

[6] As Dworkin puts it in *Law's Empire* cit. 90: "Jurisprudence is the general part of adjudication, silent prologue to any decision of law".

of the EU member states? These questions make some sense only when asked from the purely academic perspective of seeking to extend Hart's theory. Outside that context they have little moral, or political significance.[7] Nothing really hangs on how many legal systems there are in Europe at the moment. One could count the EU as a self-standing legal order, separate from those of its Member States; or one could count the whole of the 27 Member States as one big legal order. Either way is acceptable, and it is futile to expect jurisprudence to take sides here: nothing practical hangs on the answer and there are no conceptual truths about what makes something a legal order.

Though many of the theoretical inquiries into the autonomy of the EU legal order have this artificial flavour, however, not all do. When the autonomy of EU law is invoked by the European Court of Justice, it has a significantly different character. The project of European integration relies heavily on the role of the judiciary, much like the US political system relies heavily on the role of federal courts. The European Court of Justice has had to deal with significant practical challenges: first, to make the EU internal market effective whilst protecting individual rights within it; second, to promote the aim of European integration whilst respecting both the constitutional identity of Member States, and the general principles of international law. EU lawyers often refer to the autonomy of EU law as "a principle" and this suggests that autonomy plays a role in a normative argument about how the European Court of Justice should decide a case, about what rights litigant parties have, be they individuals, or Member States. It played a role, for instance, in grounding the doctrines of direct effect and primacy, both of which are normatively necessary for co-ordinating the four freedoms (free movement of persons, capital, services and people). In such cases, the principle of the autonomy of EU law serves as a general proposition of political significance: in applying EU law, courts are faced with evaluative questions for which they need to construct normative answers. The practical work done by the principle of autonomy, it seems to me, is exactly the one that Dworkin assigned to the value of integrity: a legal order does not consist in the rules and edicts that the relevant institutions have enacted, but in the principles and values that underpin them, by way of justification. The European Court of Justice built a body of principles and secured a principle-based scheme of enforceable rights through first-order normative reasoning. It did so, not by applying the clear meaning of rules, or through interstitial gap-filling, but by attributing substantive values to the project of European integration and using them to define specific rights and duties.

[7] I do not mean to deny that these sorts of questions are never of practical legal significance. Whether an institutional body counts as an EU one or, instead, as state one, may be relevant to matters of procedure and jurisdiction, in the sense that there must be an established way to organise judicial recourse. My point, rather, is that these kinds of questions only get traction from the normative concern that litigation of EU law must take place in a way that is procedurally fair and serve the underlying values of European integration. The main issue, in such cases, is not theoretical, about the abstract nature of the EU legal order, but practical, about what specific rights procedural fairness grants litigants. I am grateful to Justin Lindeboom for raising this point.

This is not the place of course to defend Dworkinian interpretivism over legal positivism. My point is rather in the other direction: the practice of EU law, and the prominent role of the autonomy as its constitutive principle, is a strong indication of the merits of the Dworkinian, court-centric, approach. Some will no doubt roll their eyes at this suggestion. Formalism is very much a part of European legal thinking and most lawyers and judges do not think of their own job as evaluative in the way Dworkin suggests. Others might agree but lament the fact that European law is becoming more like American law: overtly politicised and polemical, relying less on the authority of the source of the law and more on the substance of the legal proposition put forward before and by a judge. The debate over the democratic deficit of the EU and the worries about being governed by EU technocrats, is a good indication of this attitude.

But we are, in my view, too far down the path of having a European legal practice that is essentially argumentative and evaluative. It is so, not only by virtue of the attitude of the relevant actors but also by the very nature of the project of European integration. And here, I worry that theoretical inquiry into EU law has not caught up. Much of it is still pre-occupied with whether Kelsenian, Hartian or Razian accounts can adequately capture the identity of the EU legal order and the relation between rules made by state authorities and rules made by supranational authorities. Much of it still treats the idea of state sovereignty as either a theoretical dogma or a political fact, detached from substantive values. I have no quarrel with these inquiries, and I have engaged with them myself. But they are unlikely to shed much light on the nature of EU law. Theory of EU law thrives when one looks at its doctrines in specific areas and addresses the question of whether individual rights are adequately protected therein. Dworkinians would call this doing legal philosophy from the *inside-out*: beginning with a practical question that a court faces[8] and working towards a normative answer, by drawing on the nature of EU as a progressive institution committed to the values of rights, democracy and the rule of law. We cannot place faith, as Hart did, in the thought that a conventional understanding of law will spot threats to liberty, let alone prevent them. Many risks to people's liberty now emanate from outside one's state (*e.g*. environmental risks) and supranational institutions like the EU mitigate, rather than add, to those risks. In this respect, the normativity of EU law is part of its DNA.

Does then anything hang on the autonomy of EU law? Nothing and everything is the answer. Nothing, if we understand the question in positivistic terms as a question about the identity of legal orders. This is a valid academic question, as far as it goes, but one that is unlikely to have much practical salience. By contrast, *everything* hangs on the autonomy of EU if we understand it in substantive terms, as the general proposition that

[8] A typical example is the question of whether it is justified for a union to strike in order to prevent a race-to-the-bottom of labour standards across Member States. See case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP* ECLI:EU:C:2007:772; case C-341/05 *Laval un Partneri Ltd. v Svenska Byggnadsarbetareförbundet and Others* ECLI:EU:C:2007:809.

we have to justify normatively, rather than by appeal to a source, all the EU rights and duties that European courts enforce. This task of normative justification must engage with the progressive values underlying the project of European integration (such as democracy, rights and Rule of Law) and to offer a vision of how they relate to one another; it has to impose, rather than assume, principled *coherence*, or *integrity* in the various EU Treaties, Regulations, Directives, Orders etc.[9] It must be *holistic*, inquiring into the normative relevance and weight of domestic legislation and general international law. Autonomy is therefore not so much a principle in its own right but rather an evaluative attitude that orients the various actors (judges, lawyers, officials) towards substantive argumentation regarding the legal issue in question. This means there will be as many versions of the principle of autonomy as there are EU law issues arising before courts. An attempt to catalogue the various instantiations of the principle within the case law is no doubt welcome, but there is also great value in focusing on the role of autonomy within local areas of EU law, where the normative issues are more concrete.

The suggestion that we should understand the autonomy of EU law as an evaluative attitude to adjudication, no doubt raises several objections and concerns. This is not the place to address them, but it is, I think, crucial to note that it is no objection to claim that the suggestion imposes an impossible burden on courts. Seeking to develop doctrines that fit and justify legal practice is already what courts have been doing since the very beginning of European integration. Reference to the autonomy of EU law is, in this sense, a reference to the autonomy of law as a distinct branch of political morality.[10]

[9] See on this J Bengoextea, *The Legal Reasoning of the European Court of Justice* (Clarendon Press 1993); J Bengoextea, N McCormick and L Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in G de Búrca and JHH Weiler (eds), *The European Court of Justice* (Oxford University Press 2001).

[10] For this claim see R Dworkin, *Justice for Hedgehogs* (Harvard University Press 2013).