ARTICLES

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NINE THESES ON AUTONOMY: MAKING SENSE OF A CONTROVERSIAL DOCTRINE

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ABSTRACT: The notion of autonomy sinks its roots in the dynamics between political sovereignty and legal sovereignty. Although autonomy, namely normative sovereignty, was perceived by the early theorists as an inseparable prerogative of the sovereign, its conceptual development took far more time than the notion of political sovereignty. Autonomy emerged at a later time in-keeping with the conception of a legal order, conceived of as a close system of rules proceeding from a fundamental rule conferring normativity to the whole system. In the process of the European integration, the notion of autonomy followed an inverse trajectory. Whereas the EU does not possess the prerogatives of political sovereignty, it developed into a normative entity independent vis-à-vis the legal orders of its Member States. But the transplant of this notion of absolute autonomy in the realm of international law could deeply affect the capacity of the EU to implement its international values enshrined in its Constitutional setting.

KEYWORDS: autonomy – political sovereignty – legal sovereignty – legal order – *offene Staatllichkeit* – values of the EU.

I. INTRODUCTION

This is not a full-fledged scholarly article. This *Article* is written in a different literary genus. It submits a number of theses, each of which could well be developed in a scholarly article.

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The reason for this choice lays in the difficulty to conceptualise the contemporary notion of autonomy without exploring its deep roots which sink at the origin of the modern political and legal thought. The notion of autonomy incorporates secular stratifications of the human experience; it is a situated at the extreme borders of the scientific analysis or even a stretch beyond it; it is an archetype of the political and legal thought strictly interwoven with others, in particular sovereignty. Frankly, too much for the capacity of the current author in a single writing. All these reasons militate in favour of collecting some sparse reflections scattered in decades and to compose them on a series of theses.

This choice has some drawbacks.

The more important one is that reasoning by theses is not a scientific methodology. It is formed of poorly argued assertions and inferences, ordered in a hopefully logical sequence. But this literary genus offers some advantage; in particular, to condense in a few pages the results of a quite complex logical construction. If the present *Article* attained this result, it could, in spite of its non-scholarly approach, add a small brick to the grand debate on autonomy.

II. Autonomy in the early theories of sovereignty

The first thesis is that the notion of autonomy of a legal order is considered, from the early theorists to contemporary scholarship, the legal equivalent of the political notion of sovereignty.

According to the prevailing view, a political community is conceptualised as sovereign if it is self-determined, namely if its political decisions does not depend from decisions taken outside that community. Analogously, a legal order is conceptualised as autonomous if its normativity does not depend from another legal order.[1]

A quite rudimentary account of this idea emerges from the early theorists which invented the notion of sovereignty. Jean Bodin defined the political sovereignty in terms of absolute independence:

[1] The notion of autonomy as an indispensable corollary of sovereignty has been theorized by the authors who first regarded the separation between international and domestic law as a legal axiom. See, in particular, H Triepel, *Völkerrecht und Landesrecht* (C.L. Hirschfeld 1899) where we find, at 7, this terse sentence: "Wenn wir nun von einem Verhältnisse zwischen Völkerrecht und Lansesrecht sprechen, so setzen wir etwas als gegeben voraus, was keineswegs ausser Streit steht, und was, wenn es nicht angefochten wird, doch leider nur zu oft unbeachtet bleibt: daß es ein Völkerrecht giebt, und daß dieses Recht etwas anderes ist als Landesrecht". This postulate is largely accepted by contemporary scholarship. See *e.g.* K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' (2021) HIJIL 47 which regard "the autonomy of the EU legal order (as) part of the very DNA of that legal order, allowing the EU to find its own constitutional space whilst interacting in a cooperative way with its Member States and the wider world".

> "... tous ceux qui relèvent d'autrui, ou qui reçoivent loi, ou commandement d'autrui, soit par force ou par obligation, ne sont pas souverains. ... Or tout ainsi que ce grand Dieu souverain ne peut faire un Dieu pareil à lui, attendu qu'il est infini, et qu'il ne se peut faire qu'il y ait deux choses infinies, par démonstration nécessaire, aussi pouvons-nous dire que le Prince que nous avons posé comme l'image de Dieu, ne peut faire un sujet égal à lui, que sa puissance ne soit anéantie".[2]

To this famous definition of sovereignty, Bodin added another one, which at first glance, seems to be akin to the modern notion of normative sovereignty:

> "Sous cette même puissance de donner et casser la loi, sont compris tous les autres droits et marques de souveraineté: de sorte qu'à parler proprement on peut dire qu'il n'y a que cette seule marque de souveraineté, attendu que tous les autres droits sont compris en celui-là, comme décerner la guerre, ou faire la paix, connaître en dernier ressort des jugements de tous magistrats, instituer et destituer les plus grands officiers, imposer ou exempter les sujets de charges et subsides, octroyer grâces et dispenses contre la rigueur des lois, hausser ou baisser le titre, valeur et pied des monnaies, faire jurer les sujets et hommes liges de garder fidélité sans exception à celui auquel est dû le serment, qui sont les vraies marques de souveraineté, comprises sous la puissance de donner la loi à tous en général, et à chacun en particulier, et ne la recevoir que de Dieu".[3]

For the purposes of the current *Article*, it is immaterial to determine the relations between these two dimensions of sovereignty, namely which power comes first, in time or in logic: the factual political power, or the normative power, namely the power to do and undo the law: a dilemma still today at the centre of the discourse on autonomy and sovereignty.[4]

Although the notions elaborated at this remote time seem at first glance surprisingly modern,[5] they considerably differ from their meaning commonly accepted today. This

[2] J Bodin, *Les six livres de la République* (1576) I, X, 155.

[3] *Ibid*. 163. In analogous terms, T Hobbes in *Leviathan (or The Matter, Forme and Power of a Common Wealth Ecclesiastical and Civil)* (1651), characterised the right to do and undo the law as the seventh prerogative of sovereignty. After saying in I, XIII that: "To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice" (Leviathan, II, XIII), in II, XVIII Hobbes added: "Seventhly, is annexed to the Soveraignitie, the whole power of prescribing the Rules, whereby every man may know, what Goods he may enjoy, and what Actions he may doe, without being molested by any of his fellow Subjects: And this is it men call Propriety. For before the constitution of Soveraign Power all men had right to all things; which necessarily causeth Warre: and therefore this Proprietie being necessary to Peace, and depending on Soveraign Power, is the Act of that Power, in order to the publique peace".

[4] These two apparently antithetical perspectives are commonly attributed to Hans Kelsen and Carl Schmitt in their classic works, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Mohr 1928) and *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (Duncker & Humblot 1922). In spite of the deep differences, these two perspectives converge on the absoluteness of sovereignty as the philosophical stone of a community. I elaborated a bit further in my book E Cannizzaro, *La sovranità oltre lo Stato* (Il Mulino 2020).

[5] The analogy between autonomy and sovereignty, and in particular the connotate of absoluteness which pertained to these two notions, is argued, expressly or impliedly, by many contemporary scholars.

notion of autonomy pertained to a person: the prince, or, later, an organ, the Parliament. It was not attached to an abstract entity: the law, or even less, the legal order.[6] Nor was it conceived of as conferring to the sovereign the exclusive power to make the law. For centuries, it is well known, law was the product of a plurality of sources, of which only a tiny fraction was produced by the will of the sovereign. Indeed, the powers of the Sovereign encountered the limits derived from natural law.[7]

III. A historical hypothesis: autonomy as an institutional tool

The second thesis is that the two notions, namely the normative sovereignty and the political sovereignty, followed a different trajectory: whilst political sovereignty asserted itself in the new world populated by entities *superiorem non recognoscentes*, the notion of autonomy has been much slower to realise all its potential.

The conceptualisation of sovereignty occurred at the dawn of the modern age, when the collapse of the medieval political organisation, based on the *fictio* of the universalism of the political power, had to give way to the harsh reality of the existence of distinct political communities, the States, each claiming its self-determination. The conceptualisation of the autonomy of the sovereign entities legal orders occurred at a later time, when the enduring ideal of legal universalism, consecrated in the belief of a universal natural law, succumbed beneath the claim of the sovereign State to monopolise what more and more emerged as a formidable instrument of governance of their community, namely law.

But why did the Bodinian normative sovereignty wait almost three centuries to materialise in a notion of autonomy as an essential ingredient of the contemporary legal orders?

My (hypo)thesis is that the notion of autonomy gradually emerged in correspondence to the process of dissolution of the model of the absolute State. This phase was featured by the fragmentation of the absolute power detained by the sovereign and the consequent

For a careful account, see C Eckes, 'EU Autonomy: Jurisdictional Sovereignty by a Different Name?' (2020) European Papers www.europeanpapers.eu 319, who accepts autonomy as an inevitable consequence of the existence of a self-determined legal order. A different stream of literature conceives of the autonomy as a relative notion. See B de Witte, 'European Union Law: How Autonomous Is Its Legal Order?' (2010) Zeitschrift für Öffentliches Recht 141: "(i)t is clearly, and necessarily, something less than stating that EU law is entirely independent from international law" (at 150); J Odermatt, 'The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?' in M Cremona (ed.), *Structural Principles in EU External Relations Law* (Oxford University Press 2018) 291.

[6] For a demonstration of the chameleonic capacity of sovereignty to evolve over time in correspondence of the evolution of the social need, while maintaining its core concept of absoluteness of the political power, I refer again to my book E Cannizzaro, *La sovranità oltre lo Stato* cit.

[7] The sovereignty of the prince "(n)'a autre condition que la loi de Dieu et de nature ne commande", see J Bodin, *Les six livres* cit. I, VIII, 122.

distribution of the various powers and prerogatives to a plurality of organs wielding a share of the previous unitary power. By no way was this process uniform. In particular, whereas the internal law-making power passed in the hands of the Parliament, the sovereign maintained for a long time the foreign affairs power. This mismatch caused a number of practical inconveniences concerning, in particular, the possible use of the external power of the sovereign to interfere with the exercise of the internal power of the Parliament.[8]

It is in this historical phase that autonomy of the domestic legal order was first theorised as a remedy to the inescapable dilemma raised by the principle of separation of powers, namely how to reconcile the domestic fragmentation of powers with the necessary unity of the foreign relations power.[9]

This dilemma was by and large discussed before and after the adoption of the *Verfassung des deutschen Reiches* (1871), whose art. 11 established that the ratification of the treaties having an impact on domestic legislation needed the previous determination by the Parliament.[10] The logical consequence was that the acts of the foreign affairs powers, which remained in the hand of the executive, could not produce effect in the domestic legal order.[11] The prevailing view was, therefore, to consider that the two classes of powers – namely the legislative power and the foreign affairs power – did not produce effect in the same legal order but in two distinct orders, respectively the State's order and the international legal order.[12] In particular, acts of the foreign affairs power,

[8] The great theorist of the separation of powers was well aware of this mismatch. The classification of powers, theorised by J Locke, included, alongside the classical law-making power and the judicial power, a quite mysterious power, which he called federative. Locke was fascinated by that power. He wrote: "[This whole body] therefore has the power of war and peace, leagues and alliances, and all transactions with individuals and communities outside the commonwealth. This power might be called 'federative', if any one pleases. So the thing be understood, I am indifferent as to the name", see J Locke *Two Treatises of Government* (1689) XI, 146.

[9] The impact of the principle of separation of powers on the previous state of the relations between international law and domestic legal order was clearly defined by G Jellinek, *Gesetz und Verordnung* (Mohr 1887) 343: "während in absoluten State der Herrscher die rechtliche Macht hat, alle von ihm abgeschlossenen Verträge auch auszuführen d.h. alle jene staatsrechtlichen Verfügungen zu treffen, durch welche das akzeptierte Verspechen erfüllt wird, ist in konstitutionellen Staat das Staathaupt in dieser Hinsicht beschränkt".

[10] Art. 11 reads: "Der Kaiser hat das Reich völkerrechtlich zu vertreten, im Namen des Reichs Krieg zu erklären und Frieden zu schließen, Bündnisse und andere Verträge mit fremden Staaten einzugehen, Gesandte zu beglaubigen und zu empfangen.

Zur Erklärung des Krieges im Namen des Reichs ist die Zustimmung des Bundesrathes erforderlich, es sei denn, daß ein Angriff auf das Bundesgebiet oder dessen Küsten erfolgt.

Insoweit die Verträge mit fremden Staaten sich auf solche Gegenstände beziehen, welche nach Artikel 4. in den Bereich der Reichsgesetzgebung gehören, ist zu ihrem Abschluß die Zustimmung des Bundesrathes und zu ihrer Gültigkeit die Genehmigung des Reichstages erforderlich".

[11] This was the stand of P Laband, O Meyer and G Jellinek. See *e.g.* P Laband, *Das Staatsrecht des deutschen Reiches* (5th edn Mohr 1911-1914, first edited in 1886) II, 137.

[12] In response to P Zorn, 'Die deutschen Staatsverträge' (1880) Zeitschrift für die gesamte Staatswissenschaft 25, G Jellinek, *Die rechtliche Natur der Staatsverträge. Ein Beitrag zur juristischen Construction*

in particular the ratification of international treaties, only produced effect in international law. To produce effect internally, a deliberation of the Parliament was necessary. In other words, to safeguard the integrity of the internal legal order and the prerogatives of the Parliament, it was necessary to insulate the domestic legal order from the pernicious interferences of international law: a field which was assigned to the executive power.[13]

These events, namely the distribution of the hitherto unitary law-making power among different organs of the State, might have contributed to the development of the modern notion of autonomy. In spite of the very sophisticated doctrine developed by the theorists of that time, this notion cannot be conceived of as of a logical imperative, but was rather the product of historical contingencies closely connected with the progressive emergence of the modern State: a complex entity composed by a variety of functions and prerogatives. In other words, autonomy was the remedy to the mismatch between the complex organisation of the modern State in domestic affairs and the enduring monolithical idea of the State under international law.

IV. The triumph of autonomy

The third thesis, in a sense a follow-up of the second, is that, at an uncertain moment in history, the notion of autonomy broke away from the notion of political sovereignty and was regarded as an essential characteristic of States' legal orders.

Seemingly, this occurred at the turn between the nineteenth and the twentieth Century, where autonomy was conceptualised to indicate the insulation of the State legal order and, hence, the monopoly or quasi-monopoly of the State in law-making.[14]

At that time, the institutional mismatch between international law and internal law turned into a full-fledged legal ideology on the theoretical distinction between international and domestic law and autonomy became the hallmark of the dualist doctrine.[15]

This distinction between international law and domestic legal order was based on the need to ensure the autonomy of State's law from the influence of international law, at

des Völkerrechts (A Hölder 1880) wrote: "die Ratification is also der Act, durch welchen der Staat den schliesst und insofern hat Zorn recht, die Ratification der Vertrage mit der Sanction der Gesetze in Parallele zu stellen. Ganz unrichtig ist es jedoch, wenn er in der Ratification auch den nach Innen das Rechtcostituirenden Imperativ, den Gesetzebefehl, welcher den Staatsangehörigen die Beobachtung des Vertrages befiehlt, erblickt" 53.

[13] The Labandian thesis, mainly aimed to prevent treaties from subverting the emerging principle of the separation of powers, which can be defined as institutional dualism, was lately transformed into the structural notion of autonomy of domestic legal order, which preluded to the modern conception of dualism. See H Triepel, *Völkerrecht und Landesrecht* cit. and, in Italy, D Anzilotti, *Il diritto internazionale nei giudizi interni* (Zanichelli 1905).

[14] See P Laband, *Das Staatsrecht des deutschen Reiches* cit.

[15] See J Rendl, 'The Sphere of Intervention: EU Law Supranationalism and the Concept of International Treaty' (2023) European Papers www.europeanpapers.eu 1333.

that time still imbued with natural law.[16] The struggle for the autonomy of State's law were part and parcel of the struggle for the positivisation of law and its transformation into a legal science which proceeds from a *Grundnorm*, the philosophical stone on which to construe a self-determined legal order. In this conceptual system, autonomy was a logical qualification of the law created by a fundamental rule which autopoietically establishes the normativity of a domestic legal order.

Yet, it would be an error to regard autonomy as a corollary of dualism. The emancipation of international law from the natural tradition produced a new monism proudly positivist, which developed in the first half of the XX Century and expressly designed to confer to international law the rank of a full-fledged legal science. In spite of their many differences, these two archetypes of the modern thought[17] shared the idea that law does not exist in nature but is the product of a fundamental rule which establishes a legal order and bestows normativity upon it: a normativity which is peculiar to that legal order.[18]

The only difference is that dualism accepted the existence of a plurality of legal orders, based each on its own principle of exclusivity, whereas monism postulated the return to the universality of the legal experience. In this sense, also a monist legal order does not depend on any external rule and, therefore, is autonomous. The reason why some authors automatically link autonomy with dualism lies in the simple fact that autonomy is a relational notion and, as such, it is hinged upon the premise of the existence of multiplicity legal orders. But the autonomy of a legal order is the indispensable postulate on which both dualism and monism are grounded.

V. A change of paradigm: Absolute autonomy v *offene Staatlichkeit*

The fourth thesis is that in the second half of the twentieth century the notion of absolute autonomy lapsed in decline. The new Constitutional movement in the aftermath of World War II (WWII) radically changed the *Zeitgeist* and, with it, also the role of autonomy in shaping the relations between domestic and international law.

[16] The struggle against natural law, which posited the interpenetration between the law of Nations and the law of the State, was a common trait in the early dualist theories. See D Anzilotti, *Il diritto internazionale nei giudizi interni* cit. D Anzilotti wrote: "Incerto di sé e dell'esser so, preoccupato più di estendere il proprio contenuto che di determinarlo, il diritto internazionale ha voluto affermare il suo dominio anche ove gliene mancavano i titoli, comprendere, alterandoli, rapporti e materie che non gli spettano, e che gli spettano soltanto sotto determinati aspetti o condizioni".

[17] See E Cannizzaro and B Bonafè, 'Beyond the Archetypes of Modern Legal Thought: Appraising Old and New Forms of Interaction Between Legal Orders' in M Maduro, K Tuori and S Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press 2014) 78.

[18] The obvious reference is the celebrated theory of H Kelsen, ultimately restated in H Kelsen, 'Der Begriff der Rechtsordnungin' (1958) Logique et Analyse 150.

The new Constitutions, adopted by States which had experienced the consequences of nationalist ideologies, included provisions aimed at attenuating the conception of a domestic legal order as a legal monad.

In particular, art. 24 of the German *Grundgesetz* and art. 11 of the Italian Constitution, of two States which endured the fascist doctrine based on the cult of the idea of nation, heralded this change and adopted an analogous conception of the relations between domestic law and international law, quite diverse from that which dominated in the precedent eras.

First, these provisions, and others which replicated the same ethical inspiration, conceived of international law not as a clearing house granting a balance between States' interests, but rather as the proper legal order to address the common concerns of the international community. Consequently, they granted to international law rules a prominent rank in the domestic legal dynamics.

Second, and perhaps even more importantly, they developed a new model of international relations based on peace and global justice and conceived of international law as the necessary legal instrument to attain it.[19]

In other words, the Constitutions of the post-WWII changed the view of the classical dualist conception of international law as a necessary evil threatening the orderly set of the domestic powers and prerogatives, and conceived, instead, international law as the indispensable legal order for implementing the external values of the new Constitutional systems.

In this conceptual turf, autonomy, premised on a notion of legal order as a legal monad, seemed to have lost, at least partly, its *raison d'être*. Why vindicate the autonomy of a domestic legal order if it determines its fundamental principles and values at least partly, through a process of dynamic interaction with the international legal order?

Of course, there is not a univocal answer to these questions. As long as normativity is considered as proper to a given legal order, it is quite difficult to identify conflict rules capable to unequivocally settle conflicts among norms belonging to diverse legal orders.

This difficulty can persist even if the rules of conflict of two legal order converge on the same result, as occurs, for example, where domestic legal order grant priority of international law over conflicting internal rules. In such a situation, the supporters of autonomy could maintain that the higher rank of international law is the consequence of a free determination of the domestic law: a determination which encounters limits and

[19] The formula of *offene Staatlichkeit* is attributed to K Vogel, *Die Verfassungsentscheidung des Grundgesetzes für die internationale Zusammenarbeit* (Mohr 1964) 42, and largely used in the German scholarship. See also C Tomuschat, 'Die staatsrechtliche Entscheidung für die internationale Offenheit' in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (CF Müller 1992) 483 ff. More recently, B Fassbender, *Der offene Bundesstaat. Studien zur auswärtigen Gewalt und zur Völkerrechtssubjektivität bundesstaatlicher Teilstaaten in Europa* (Mohr Siebeck 2007); T Giegerich and S Berenike (eds), *Der 'offene Verfassungsstaat' des Grundgesetzes nach 60 Jahren* (Duncker & Humblot 2010).

can be revoked at all time. Conversely, the supporters of the idea that domestic legal orders are embedded in a universal legal order ultimately based on international law, maintain that the higher rank of international law is the acknowledgment of the existence of a universal legal order encompassing the States' legal orders.

Be that as it may, there is a third option between these two paralysing theoretical schemes. By integrating international law within its dynamics, the new Constitutionalist movement aimed to attain an ambitious objective, namely to ensure interdependence of the two legal orders with a view to relativising the eschatological concept of autonomy and to defuse its pervasive impact on the legal experience.

VI. Reverse autonomy

The fifth thesis is that, at the peak of its theoretical decline, autonomy seems to have relived its green age but on a new and unexplored direction.

In a number of jurisdictions mostly inspired by the principle of primacy of international law, this principle was used to in a reverse way. Instead of invoking the autonomy of the domestic legal order to oppose interferences coming from international law, domestic courts used the autonomy of the international legal order to limit the domestic effect of international rules.

The most obvious example comes from the European Court of Justice's (ECJ) case law on direct effect of agreements concluded by the EU with third States.[20] The ECJ grounded the lack of direct effect on the nature of the agreements concerned, whose rights and obligations will remain, in principle, confined to the international legal order and, therefore, unenforceable by domestic remedies, but only by the quite rudimentary remedies provided for by international law. The rationale underlying this doctrine is that it would be illogical to confer to international rule in domestic legal orders more effectiveness than in its own international order.[21]

In the same vein, US judges limited direct effects of human rights treaties in their jurisdiction based on the assumption that these treaties were stipulated to produce their effect in the international legal order only.[22]

Noteworthy, this and analogous doctrines are premised on the assumption that the rules of international law must primarily be implemented by the secondary rules of

[20] The obvious reference is joined cases 21/72 to 24/72 *International Fruit Company* ECLI:EU:C:1972:115, restated in the subsequent case law in which the Court even toughened its position. See *e.g.* case C-377/02 *Van Parys* ECLI:EU:C:2005:121; case C-308/06 *Intertanko* ECLI:EU:C:2008:312; joined cases C-401/12 P to C-403/12 P *Vereniging Milieudefensie* ECLI:EU:C:2015:4; joined cases C-404/12 P and C-405/12 P *Stichting Natuur* ECLI:EU:C:2015:5.

[21] I refer to my contribution E Cannizzaro, 'The Neo-Monism of the EU Legal Order' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Brill-Nijhoff 2012) 35.

[22] See U.S. Supreme Court judgment of 29 June 2004 n. 03–339 *Sosa v Alvarez Machain et al.* and also U.S. Supreme Court judgment of 29 March 2008 n. 6-984 *Medellín v Texas*.

international law and according to the process determined by them. In this conception, domestic legal orders cannot be conceived as the proper legal environment where international law must be implemented. In other words, the enforcement of international rules using domestic means would go beyond what is requested by international law and would manipulate the autonomy of international legal order.

This trend in practice can be conceptualised according to different models. Looked at from the perspective of the domestic legal orders, it can be qualified, paradoxically, as a particular variant of monism. The underlying assumption is that international law is part of domestic legal order indeed, but in its entirety, including the secondary rules and its own process of enforcement. Consequently, the implementation of international law on the basis of domestic secondary rules and process of enforcement would transform it and confer to it a degree of effectiveness which it does not possess.

Conversely, looked from the perspective of the international legal order, it may be conceptualised as an expression of autonomy. Indeed, it is for international law to determine its means of implementation. The process of enforcement of international rules through domestic process would interfere with this autonomous choice of a different legal order.

In a more systemic assessment, these doctrines are distorting the gist of monism, namely that the implementation of international law through domestic law is precisely the essence of the principle of integration of the two orders.

VII. Autonomy of the EU *vis-à-vis* its Member States

The sixth thesis is that autonomy was the perfect doctrine to assist the transformation of the EU from an international organisation (IO), acting as an agent of its Member States, to a full-fledged legal order, normatively independent from its Member States, in spite of the lack of the prerogatives of political sovereignty.

The autonomy of the EU has been forged by the case law of the ECJ after this model, namely as a legal order self-determined and self-contained, established by its own *Grundnorm* and endowed with its own normativity.[23] Without retracing path already over-explored, these traits emerge from the early cases where the ECJ assumed that the founding treaties, in spite of their legal nature as an international source, established, in an indefinite moment of time, a new legal order which cut its ties from its original source and acquired the status of normative autonomy.

The reasons of judicial policy behind this choice are quite clear. Autonomy has been the tool that conferred normative sovereignty to the EU *vis-à-vis* its Member States: a powerful tool capable to ensure the uniformity of EU law, which, under certain conditions, could attain its purposes without the medium of the Member States. Unsurprisingly,

[23] See J Lindeboom, 'The Autonomy of EU Law: A Hartian View' (2021) European Journal of Legal Studies 271.

then, the autonomy of the EU legal order was first experimented in its relations with the Member States legal orders, which conceived of the EU as a creature of their common will whose action was to be kept under their strict control. Autonomy, and its two pillars of direct effect and primacy, were thus the indispensable tool to unleashed EU law from the normative control of their Member States and to make out of it a formidable instrument to pursue the purposes of the Treaties.

This is an uncommon situation, since the claim for autonomy of a legal order has been historically premised on the political sovereignty of an entity, whereas in the EU system that claim is disconnected from other prerogatives of sovereignty.[24] Far from being a systemic oddity, this notation highlights the crisis of sovereignty as the source of the full panoply of powers and prerogatives of entities *superior non recognoscentes*. In a systemic perspective, the autonomy of the EU legal system *vis-à-vis* its Member States fragments the unity of the notion of sovereignty and offers a new model whereby an entity, albeit politically dependent from its Member States, can nonetheless be normatively autonomous from their legal order.

VII. Autonomy *vis-à-vis* international law

The seventh thesis is that the claim for autonomy of the EU *vis-à-vis* the international legal order appears as a relic of a by-gone era.

The claim of autonomy *vis-à-vis* international law was advanced by the ECJ to protect the EU legal order from normative interference that could be "liable to adversely affect the specific characteristics of EU law…".[25] This argument was mainly spelled out in two directions: to prevent external judicial bodies to interpret EU law and to ensure that external rules purporting to produce effect, directly or indirectly, within the EU legal order are subject to the EU system of judicial review.

Both these preoccupations are technically unfounded.

The first is based on a misconception of the task assigned to an agreement-based judicial body when settling disputes among its parties governed by international law. The jurisdiction conferred to an international judge to settle a dispute based on international law necessarily includes the power to decide on incidental issues necessary to pronounce its award.

By determining the meaning of a domestic legal provision international judges do not usurp the interpretive activity of the domestic judges. They decide a preliminary issue whose decision is necessary to settle the dispute and for which their possess inherent jurisdiction. Speaking in more general terms, provisions of a State's legal order are daily

[24] This premise seems to be common to many commentators. See *e.g.* 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 1.

[25] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 178.

interpreted by foreign and international judges and arbitrators adjudging disputes governed by private and public international law. Otherwise, the jurisdiction of international courts and tribunals would be disrupted at its roots.

Nor more well founded is the second preoccupation underlying the claim for autonomy. In *Kadi*[26] the ECJ ruled that it is not for the European judicature to review a resolution of the SC in light of the international *jus cogens*, but it is for that judicature to "ensure the review, in principle the full review" of European acts implementing SC resolution in light of the EU fundamental rights.

This ruling is technically controversial and politically unwise. From a technical perspective, the domestic judges undoubtedly possess the competence to review international law against international standards of review, among which *jus cogens*. The application of international law entails its validity in its own legal order. An invalid rule of international law cannot be an integral part of the EU law.

From a judicial policy perspective, the use of a domestic standard of review, instead of an international one, is at odds with the principle of *Völkerrechtsfreundlichkeit* which pervades the EU legal order.[27] It further legitimises other legal orders to do the same, albeit based on quite different and possibly antithetical standards of review. The adoption of a common standard of review based on *jus cogens* would offer the additional advantage to promote the progressive development of the *jus cogens* towards a universal standard of review which ensure a protection of fundamental rights equivalent to that ensured in the EU.

The radical autonomy which inspired this ruling appears to herald a waiver of the ECJ to exert a leading role in the developing the international standards of review aspirationally equivalent to the European standard.

VIII. Autonomy v *Völkerrechtsfreundlichkeit*

The eighth thesis is that the claim of autonomy *vis-à-vis* international law is at odds with the principle of *Völkerrechtsfreundlichkeit* which has inspired from the very beginning the relations between international law and the EU legal order.

The case law of the ECJ offers a number of examples. The ECJ determined that international law is an integral part of EU law[28] and enjoys primacy over secondary EU

[26] Joined cases C-402/05 P and C-415/05 P *Kadi* ECLI:EU:C:2008:461 para. 326.

[27] See further the 8th thesis in section IX below.

[28] Case C-181/73 *Haegemann* ECLI:EU:C:1974:41 para. 5. This passage echoes the analogous phraseology in U.S. Supreme Court judgment of 8 January 1900 n. 895-892 *The Paquete Habana*, which is universally considered as an expression of openness of the US legal order *vis-à-vis* international law. See RA Wessel, 'International Agreements as an Integral Part of EU Law: *Haegemann*' in G Butler and RA Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart Publishing 2022) 21; M Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance* (Oxford University Press 2013).

legislation; that EU law should be interpreted consistently with international law;[29] that direct effect of international law does not depend on reciprocity;[30] that agreements with third States must be interpreted consistently with international *jus cogens*;[31] that the system of external action, must be guided by the EU international values;[32] that these values functionally enlarge the principle of conferral, the philosophical stone of the European integration.[33]

The principle of *Völkerrechtsfreundlichkeit* seems to have inspired the drafting of arts 3(5) and 21(1)(2). In particular, art. 21(2)(h) mandates the EU to "promote an international system based on stronger multilateral cooperation and good global governance". Arguably, an international system based on good global governance needs to include a robust judicial function to settle disputes among its members. It would be contradictory to assume that international judges settling disputes between the EU and third States or IOs contribute to realize the model of international relations emerging from the founding Treaties and, at the same time, inhibit the exercise of judicial powers which are generally considered as part of their jurisdiction under international law.

From a more general perspective, these provisions mark a changing paradigm in the relationship between international law and the EU legal order. Far from conceiving of international law as merely ensuring the coexistence among legal sovereign States, they rather regard international law as the indispensable instrument to pursue the international values of the Union. This is an outwards-looking approach which tends to use international law as the main instrument to implement the external objectives, principles and values of the Union.[34]

[29] Case C-386/08 *Brita* ECLI:EU:C:2010:91 para. 41; case C-363/18 *Psagot* ECLI:EU:C:2019:954.

[30] Case C-104/81 *Kupferberg* ECLI:EU:C:1982:362 para. 17. The Court found that the legal status of international law within the EU legal order does not depend from the status recognized by other parties.

[31] Case C-104/16 P *Front Polisario* ECLI:EU:C:2016:973; case C-266/16 *Western Sahara Campaign UK* ECLI:EU:C:2018:118.

[32] Opinion 1/17 *CETA* ECLI:EU:C:2019:341 esp. para. 117, read in light of the explanations given by AG Bot in his opinion in Opinion 1/17 *CETA* ECLI:EU:C:2019:72, opinion of AG Bot, para. 173: "It is my view that examination of the compatibility of Section F of Chap. 8 of the CETA with the principle of the autonomy of EU law must be carried out taking due account of the need to preserve the European Union's capacity to contribute to achieving the principles and the objectives of its external action". See I Damjanovic and N de Sadeleer, 'Values and Objectives of the EU in Light of Opinion 1/17: "Trade for all", Above All' (2020) Europe and the World: A Law Review 1.

[33] Opinion 2/15 *on the FTA between the European Union and Singapore* ECLI:EU:C:2017:376 paras 143–144.

[34] See E Fahey and I Mancini (eds), *Understanding the EU as a Good Global Actor* (Edward Elgar 2022); E Cannizzaro, 'The Value of EU International Values' in WT Douma et al (eds), *The Evolving Nature of EU External Relations Law* (T.M.C. Asser Press 2021) 3; M Cremona, 'Values in EU Foreign Policy' in E Sciso, R Baratta and C Morviducci (eds), *I valori dell'Unione europea e l'azione esterna* (Giappichelli 2016); JE Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016); E Neframi (ed.), *Objectifs et compétences dans l'Union européenne* (Bruylant 2013).

By virtue of these provisions, the EU external action must balance the need to scrupulously respect the rules and processes of international law[35] with the need to progressively develop international law along a model consistent with its domestic values and principles.[36] These two approaches, the inward-looking, which imposes to respect international law as is stands, and the outward-looking, which lays down the lines along which the EU intends to develop international law, determine a model of reciprocal interdependence and mutual influence between the two legal orders: the farthest thing from the model of absolute autonomy.

IX. The political dimension of autonomy

The ninth and last thesis, which flows from the preceding eight, is that the essence of the principle of autonomy lies in its political effect.

In the previous sections, autonomy has been explored in its diachronic evolution. It seems to emerge that, far from being a necessary notion governing the relations between international law and domestic law, autonomy sprouted from historical contingencies. Indeed, only recently autonomy detached itself from the all-encompassing notion of sovereignty and this development occurred in a symbiotic relation with the development of the modern notion of legal order.

As all the historical notions, also autonomy is fraught with issues related to the political power. In other words, the contents and the degree of autonomy largely depend on the intensity of the perceived need to shield a legal order from external intrusions.[37]

This explains why the principle of autonomy was coherently and consistently claimed by the Court of justice *vis-à-vis* the Member States whereas the same claim toward international law appears inconsistent and self-contradictory. Autonomy *vis-à-vis* the Member States corresponds to a largely shared political interest, namely to assert the EU, an international organisation created and controlled by the Member States, as a normatively independent entity. For this purpose, it was necessary to decouple the political sovereignty, which remained in the hands of the Member States, from the normative sovereignty of the EU, albeit within the sphere of its competence. Autonomy perfectly meets this need as it is the magic word to identify, perhaps for the first time in history, an entity normatively self-determined albeit politically under the control, sometimes very pervasive, of its Member States.

[35] See art. 3(5) TEU, last sentence and art. 21(1) TEU, last sentence.

[36] See art. 21(2)(b)–(h) TEU.

[37] See M Pollack, 'The New, New Sovereigntism, or How the European Union Became Disenchanted with International Law and Defiantly Protective of Its Domestic Legal Order' in C Giorgetti and G Verdirame (eds), *Whither the West?: International Law in Europe and the United States* (Cambridge University Press 2021) 73 ff.

Conversely, a claim of radical autonomy toward international law is unnecessary to preserve the integrity of the EU legal order. In light of the trends of modern constitutionalism and ultimately of the choices made by the Treaties, in particular with the adoption of arts 3(5) and 21(1 and 2) TEU, the case law of the ECJ on autonomy is a rear-guard battle, probably aimed at preserving more its own prerogatives than those of the EU as a whole.[38]

In the view of the Court, the essence of autonomy "resides in the fact that the Union possesses a constitutional framework that is unique to it".[39] Yet precisely the EU Constitutional framework seems to be inconsistent with a number of the consequences drawn by the Court from the principle of autonomy.

These remarks lead to the conclusion that the notion of autonomy, as defined by the ECJ, is meant to protect the political order of the Union, not its legal order. This use of autonomy is consistent with his historical development. What changes is, however, the ultimate beneficiary of this instrument of protection: in the early conceptualisation of a legal order, the beneficiary was the Parliament; today it is the European judicature, the ultimate custodian of the purity of the EU legal order.

[38] Compare the different solutions to an apparently analogous problem in case C-284/16 *Achmea* ECLI:EU:C:2018:158 para. 58, and Opinion 1/17 cit. paras 127 and 128. Whereas *Achmea* concerned an international agreement among Member States, whose legal regime is established by art. 344 TEU, Opinion 1/17 concerned an agreement between the EU and its Member States and a third State. Although one could dissent from the construction of the scope of art. 344 TFEU adopted by the ECJ, one must admit that, if the agreement at hand fell within that scope, this particular application of autonomy would have a solid legal basis in the founding Treaties.

[39] Opinion 1/17 cit. para. 110.