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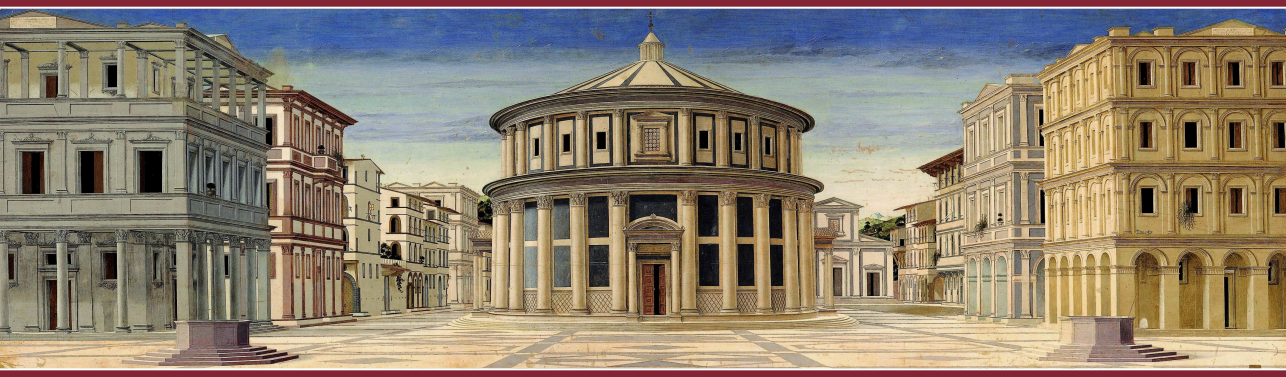

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Articles

The Autonomy of EU Law, Legal Theory and European Integration
edited by Justin Lindeboom *and* Ramses A Wessel

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ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW? – FIRST PART

edited by Enzo Cannizzaro, Marco Fisicaro, Nicola Napoletano *and* Aurora Rasi

EUROPEAN FORUM

ARTICLES

PARENT IN ONE MEMBER STATE, PARENT IN ALL MEMBER STATES: THE GOOD, THE BAD AND THE UGLY

STEFAN RAKIC* AND JIYU CHOI**

ABSTRACT: The EU is known for its commitment to protecting the fundamental rights of same-sex couples as outlined in art. 10 TFEU and the Charter of Fundamental Rights of the EU (Charter) within its value-driven principles. Nevertheless, same-sex couples still face discrimination in forming families. Only 14 out of 27 Member States allow same-sex marriage, seven offer some form of recognition, and the other six offer no recognition at all. To address this issue, the European Commission has proposed a legal instrument which would introduce uniform rules for jurisdiction and applicable law in matters of parenthood, with the goal of ensuring recognition of parental rights for rainbow families across the EU. While the European Court of Human Rights and the Court of Justice of the European Union have made significant efforts to legally protect LGBTIQ individuals, the EU's ability to act in the face of anti-LGBTIQ legal and social climates is still being questioned. This *Article* will examine the contents of the Commission's legislative proposal, its political strategy, and the practical obstacles to its adoption, including legal mechanisms and political situations in certain Member States. The effectiveness, practicability, and sustainability of the proposal will also be evaluated. The goal is to provide a comprehensive analysis of the Commission's efforts to promote and protect the rights of same-sex couples in the EU.

KEYWORDS: LGBTIQ parenthood rights – rainbow families – EU fundamental values – legislative initiative – jurisdiction – applicable law.

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I. Introduction

In the European Union, rights of same-sex couples as worthy of respect and recognition are clearly guaranteed by the principle of equality and the prohibition of discrimination on the basis of sexual orientation with an extensive legal basis in art. 10 TFEU,[1] also complemented by the Charter of Fundamental Rights of the EU (hereafter the Charter).[2]

However, in reality same-sex couples are not similarly treated as different-sex couples with respect to forming families given the legal and social discriminations. According to a report of European Parliament from 2022,[3] only 14 out of 27 Member States currently allow same-sex marriage.[4] Seven Member States afford some form of legal recognition to same-sex unions,[5] whereas some countries like Hungary and Croatia have constitutional provisions against same-sex marriage, defining marriage restrictively, as the union "between a man and a woman" under national law.[6] Further, six countries do not offer any legal recognition to same-sex relationships,[7] which means that a child cannot legally have "two women, or two men" recognised as parents.[8]

Under these circumstances, following the State of the European Union address by the President of the European Commission, Ursula von der Leyen who stated that "if you are a parent in one country, of course you are a parent in every country",[9] the European

[1] Art. 10 TFEU: "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

[2] Art. 21(1) of the EU Charter of Fundamental Rights: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".

[3] Briefing of the European Parliament of 2022 on The rights of LGBTI people in the European Union www.europarl.europa.eu.

[4] Netherlands (since 2001), Belgium (2003), Spain (2005), Sweden (2009), Portugal (2010), Denmark (2012), France (2013) Luxembourg (2015), Ireland (2015), Finland (2017), Malta (2017), Germany (2017) and Austria (2019).

[5] Slovenia (2017), Estonia (2016), Greece (2015), Cyprus (2015), Croatia (2014), Hungary (2009), Czechia (2006), and Italy (2016).

[6] Hungary: art. L(1) of the Fundamental Law: "Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children. (2) Hungary shall support the commitment to have children. (3) The protection of families shall be regulated by a cardinal Act"; art. 12 of the Constitution of Croatia: a "legally regulated union of a man and a woman".

[7] Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia.

[8] Adoption rights are still more restricted. Only thirteen EU countries guarantee legally the full joint adoption by same-sex couples: the Netherlands (since 2001), Sweden (2003), Spain (2005), Belgium (2006), Denmark (2010), France (2013), Malta (2014), Luxembourg (2015), Austria (2016), Ireland (2016), Portugal (2016), Finland (2017) and Germany (2017).

[9] European Commission, '2022 State of the Union Address by President von der Leyen' (14 September 2022) ec.europa.eu.

Commission came up with a legislative proposal (hereafter the Regulation Proposal)[10] seeking to introduce uniform rules for jurisdiction and applicable law in matters of parenthood with a goal to ensure the recognition of parental rights in rainbow families[11] across the EU.

Fully taking into account that the Regulation Proposal also concerns the question of surrogacy, and without taking away any of the importance surrounding that question, in this article, the authors will examine the Regulation Proposal solely in the context of same-sex parenthood, as experience has shown that same-sex parents are significantly more likely to encounter difficulties in trying to get their parental rights recognised, than the opposite-sex parents through surrogacy.[12]

Indeed, there is conflict between Member States regarding the issue of LGBTIQ rights. In the context of the contention that has been surrounding the efforts to further the legal protection of LGBTIQ individuals for decades, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have been the two institutions to make the most significant legal strides towards backing that protection by hard law instruments that are their rulings.[13] Nevertheless, the ability of the EU to act in the face of an anti-LGBTIQ legal and social climate is increasingly queried upon the political assessment in practice. In this context, although the proposal of the Commission is certainly expected to set in stone the framework of protection and promotion of the fundamental rights of LGBTIQ individuals, its effectiveness, practicability, and sustainability is unclear.

To analyse this question, the first section of this article will closely examine the contents of the Commission's legislative proposal and the legal solutions contained therein, as well as the political strategy toward outlining the proposal by the Commission, while the second section will be concentrated on practical obstacles to its adoption, in questioning the EU value driven policy from the point of instrumental and legal mechanisms of the Treaty on the Functioning of the European Union (TFEU) to seek an alternatives in pragmatic approaches.

[10] Proposal COM(2022) 695 final for a Council Regulation of 7 December 2022 on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood.

[11] By the term "rainbow family", we are referring to families parented by two same-sex LGBTIQ+ parents, as opposed to the notion of a "traditional" family, parented by a heterosexual couple.

[12] This conclusion becomes clear on the very beginning of every administrative procedure, involving the child, where a birth certificate or other proof of parenthood has to be provided, as having two parents of the opposite sex hardly ever gives rise to complications, while the fact that the child has two same sex parents on their birth certificate often complicated the administrative proceedings, such as seen in the CJEU case C-490/20 *V.M.A.* ECLI:EU:C:2021:1008.

[13] Such as ECtHR *Schalk and Kopf v Austria* App n. 30141/04 [24 June 2010]; ECtHR *Fedotova and Others v Russia* App n. 40792/10 [17 January 2023]; case C-673/16 *Coman and Others* ECLI:EU:C:2018:385.

II. Rainbow families' parental rights in the EU: charting progress through law and politics

II.1. From courtrooms to Commission: the evolution of LGBTIQ parenthood recognition in EU law

a) V.M.A. v Stolichna obshtina Pancharevo*: the CJEU as a trailblazer*

What precipitated the newest legislative initiative of the European Commission is the landmark CJEU ruling in the affair *V.M.A. v Stolichna obshtina Pancharevo*.[14] In this reference for preliminary ruling, the Court deliberated on the following situation: a child of two same sex parents was born in a Member State of which neither of its parents were nationals (Spain). The parents were unable to procure a birth certificate for the child from the authorities of a Member State of which one of the parents is a national (Bulgaria) for the purposes of obtaining an identity document and a passport. The reasoning of Bulgarian administrative authorities was that Bulgaria's public policy does not allow for birth certificates to refer to two parents of the same sex.

After an appeal was lodged before the Sofia Administrative Court, the latter seised the CJEU with a reference for a preliminary ruling, seeking to find out whether EU law obliges a Member State to issue a birth certificate in order to obtain an identification document for a child that is its national, and who is in possession of a birth certificate issued lawfully by another Member State, designating a same-sex couple as parents, where one of the parents is a national of the first Member State. The CJEU emphasised that EU citizenship is the fundamental status of nationals of Member States, and that a Member State national who exercised their right to free movement pursuant to the Directive 2004/38[15] (Citizens' Rights Directive, CRD) is entitled to rely on rights pertaining to EU citizenship even against their Member State of origin.[16] Furthermore, art. 4(3) of the CRD requires Member States to issue their nationals an ID card or a passport regardless of whether the new birth certificate has been drawn up for the child.

In this case, however, the CJEU noted that the child is a Bulgarian national by descent,[17] and therefore, pursuant to pre-existing case law,[18] art. 21 TFEU precludes the authorities of a Member State in applying their national law from refusing to recognise information from a birth certificate emanating from the authorities of a Member State in which the child

[14] *V.M.A.* cit.

[15] Directive (EC) 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[16] *V.M.A.* cit. para. 42.

[17] As per the admission of the referring court, who alone had jurisdiction in the matter. See paras 38 and 39 of the *V.M.A.* cit.

[18] *Ibid*. para. 44; see also case C-353/06 *Grunkin and Paul* ECLI:EU:C:2008:559 para. 39.

is born and resides since birth. Furthermore, an ID document for a child in such situation must allow them to exercise the right to move and reside freely in the EU with each parent, whose status as such has been established by the host Member State during a stay in accordance with the CRD, including the right to lead a normal family life.

The CJEU further stated that if Spanish authorities lawfully established the parent-child relationship and attested it in the birth certificate, it must be recognized by all Member States in exercising the CRD rights. Member States remain free to refuse the recognition of same-sex partnerships in national law,[19] but the civil status of rainbow families must be recognized for the purpose of exercising rights under EU law. The Court also upheld its longstanding view[20] that public policy cannot be used unilaterally by a Member State to justify a derogation from fundamental freedoms, without any control by EU institutions.

Lastly, the CJEU concluded that a child whose birth certificate designates as parents two persons of the same sex, one of whom is an EU citizen, must be considered by all Member States as a direct descendant of the EU citizen and imposed the obligation to take into account the lawfully established birth certificate from the host Member State, for the purposes of issuing identity documents, regardless of the legal status of same-sex partnerships or rainbow families in internal law.

b) Making concrete steps towards legal certainty for rainbow families in the EU

Influenced by the V.M.A. ruling, the European Commission came up with a legislative initiative to ensure the filling of this legal gap.

In its proposal, the Commission states that, while EU law requires all Member States to recognise the parenthood of a child as established in another Member State[21] for the purpose of exercising rights under the CRD,[22] it does not yet require Member States to recognise the parenthood of a child as established in another Member State for other purposes. This leads to adverse consequences for children, mainly due to differing substantive rules on the establishment of parenthood in domestic situations, and their transposition to cross-border situations. These adverse consequences would extend beyond the scope of free movement, and would affect succession, maintenance rights, the right of the parent to act as the child's representative on medical or schooling matters.

In essence, this regulation proposal represents a legal instrument of private international law, and seeks to establish rules regulating conflict of laws in matters of court (or other appropriate authority, where applicable) jurisdiction and in matters of applicable law. These collision norms are to be applied in much the same logic as those contained

[19] Stems from the principle of attribution, as provided by art. 5(1) TEU.

[20] *V.M.A.* cit. para. 55 and *Coman* cit. para. 44.

[21] Including the situations where two individuals of the same sex are designated as parents.

[22] Namely the freedom of movement.

in other EU legislation regulating private international law, such as Brussels 1 bis Regulation[23] or Rome I Regulation.[24]

In operational terms, the regulation proposal seems to be tailored to specifically enable the recognition of parenthood of same-sex parents across the EU, so as to overcome any potential obstacle that may arise from internal legal orders of Member States still opposing the idea of marriage equality and/or adoption by same-sex couples. Indeed, even though the wording throughout the document is such that leads to believe that opposite-sex parents also face the same issues in non-recognition of parental rights everywhere in the EU, the truth is that parental rights of opposite-sex couples are rarely, if ever, brought into question, let alone flat-out refused.[25] Furthermore, the regulation proposal seeks to heavily restrict the possibility of Member States to invoke public policy[26] and/or national identity,[27] which is in line with the CJEU case-law.[28]

Given that the underlying principle of the regulation proposal is the best interest of the child,[29] the jurisdiction rules, as envisaged by Articles 6-9, all revolve around the child as the primary subject. Therefore, the subsidiary jurisdiction criteria are based on the habitual residence of the child, its nationality, the habitual residence of the respondent, either parent, nationality of either parent, and lastly, the birth of the child. Aside from the primary provision in the matter of jurisdiction set out in art. 6, the regulation proposal provides for another three possibilities, in case jurisdiction cannot be determined pursuant to art. 6 – that of the jurisdiction based on the presence of the child (provided that the State concerned is an EU Member State); second, the residual jurisdiction – meaning that the jurisdiction will be determined in each Member State by its own laws; and third, an exceptional *forum necessitates* – in case no court of an EU Member State is found to have jurisdiction, and where proceedings cannot be reasonably brought in a third State, provided there is sufficient connection with the Member State of the court seised.

The rules of jurisdiction and applicable law are therefore conceived in order to heavily favour the legal orders of States allowing the recognition of parental rights in rainbow families. This stems from the fact that the most likely real-life scenario of the initial establishment of the parenthood in a rainbow family will, by necessity, arise in a Member State recognizing the parenthood of same-sex couples. Simply put, that means that in a situation where a rainbow family seeks the recognition of its parental rights in a Member State not

[23] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[24] Regulation (EC) 93/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

[25] A Tryfonidou, 'EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?' (2019) Yearbook of European Law 220.

[26] Art. 22(2) of COM(2022) 695 final cit.

[27] In accordance with art. 4(2) TEU.

[28] *Coman* cit. para. 44, and case law cited therein.

[29] Recitals 2, 49 and 62 of COM(2022) 695 final cit.

recognizing them in its domestic legal order, the applicable law shall be that of the Member State where the parenthood was initially (already) established, thus overriding the domestic legal requirements, or bans, of the second Member State. The proposal appears to assume an interesting attitude towards situations where the question of parenthood arises as an incidental question, within proceedings in matters not falling under the scope of the future Regulation.[30] In that case, instead of staying its own proceedings and refering the interested party to the court which would normally be competent in matters of parenthood, the proposed rule is for the would-be referring court (which is normally not competent) to determine the incidental question related to parenthood for the purposes of those proceedings, which will produce effects only in those proceedings. However, an inevitable question that comes to mind is – what happens when a court in a competent Member State determines the question of parenthood in a different way? Does it change the outcome of previously mentioned proceedings? Create a ground for introducing extraordinary legal remedies? The Commission's intention was probably to ensure better efficiency of the court proceedings, however, the success of that intention can be brought into question, given the potential pitfalls of such a solution.

The provisions on applicable law follow the same logic as the rules on jurisdiction. However, art. 16 opens the possibility to designate as applicable the law of any State, whether or not the designated State is a member of the EU. The criteria according to which the applicable law is determined are also set to heavily favour the legal systems in which same-sex parenthood is recognized. This conclusion is drawn particularly having in mind art. 17(2), in cases "where the applicable law [...] results in the establishment of parenthood as regards only one parent, the law of the state of nationality of that parent, of the second parent, or the law of the State of birth of the child, may apply to the establishment of parenthood as regards the second parent", essentially meaning the most favourable law will apply. By setting up the criteria for determining the applicable law in this way, the intention of the Commission appears to be to prevent any possibility of legal manoeuvring which would result in the applicable law being that of a State not recognizing same-sex parenthood. The regulation proposal also contains an explicit provision codifying the view of the CJEU on the use of public policy as grounds for refusing to recognize family relations in rainbow families.[31] Finally, arts 40 and 41 of the regulation proposal establish important guarantees in the interest of legal certainty – namely the prohibition of review of jurisdiction of the court of origin[32] and non-review as to substance.

[30] *Ibid*. art. 10.

[31] *Ibid*. arts 22, 31(2) and 39(2).

[32] Art. 40 of the Regulation Proposal closes a potential loophole in the regulation proposal by making it impossible to apply the test of public policy in order to review jurisdiction on parenthood matters, which could have been exploited.

Lastly, one of the main innovations of the regulation proposal is the establishment of the European Certificate of Parenthood.[33] This document is specifically designed to be used in cross-border situations, in order to circumvent any need to issue an instrument based in national law for the purposes of enabling the unhindered freedom of movement of the child with any of the parents across the EU, as well as for any other purpose requiring proof of parenthood.[34] Although the delivery of the Certificate is optional and subject to an application by an interested party, its effects appear to be immediate, without any special procedure being required, thus eliminating the main administrative problem encountered in CJEU case law.[35]

Overall, the Commission's proposal appears to be a sound step towards reinforcing the citizens' rights and legal certainty, which is why it provoked mostly positive reactions of relevant stakeholders.[36] Meanwhile, the deeper societal and political causes that brought about the proposal merit further analysis.

II.2. Political strategy of the Regulation Proposal

a) In the name of "EU citizen"

As observed above, the major question of the Regulation Proposal is accurately described in the context of the recognition of the rainbow family as a mark of respect to the fundamental values of "equality and respect for dignity and human rights" that make up the Union principles. It results from the above stated that the EU has limited legal authority when it comes to family law, as this legal domain is in the exclusive competence of Member States. However, the EU does have the power to act in relations with a cross-border element, as they presuppose the use of the freedom of movement of EU citizens, and thus necessarily are regulated by Union law. Indeed, as mentioned clearly in the explanatory memorandum to the Regulation Proposal: "[t]he need to ensure the recognition of parenthood between Member States arises because citizens increasingly find themselves in cross-border situations".[37]

The Regulation Proposal has shown the readiness of the Commission to put forward legislation of the project favouring the protection of EU citizens in cross-border situations based on the cornerstones of the rights of citizens of the EU.

[33] Chapter VI of COM(2022) 695 final cit.

[34] *Ibid*. art. 47: "[t]he Certificate is for use by a child or a legal representative who, in another Member State, needs to invoke the child's parenthood status".

[35] *V.M.A.* cit.

[36] ILGA Europe, 'LGBTI Organisations Welcome EU Parental Recognition Proposal' (7 December 2022) www.ilga-europe.org.

[37] COM(2022) 695 final cit.

Citizenship is a constitutional concept, mainly, in the context of national legal systems expressing the relation between an individual and the state.[38] Marshall defined citizenship as a "status bestowed on those who are full members of a community", and those members enjoy this status having equal rights and subsequent obligations and the protection of a common legislation.[39] While it is much more complicated to consider this classical notion of citizenship in the framework of EU legal system, due to its unique characteristics, the conception of *citizen of the European Union* has formally been at the heart of European integration project in the formation of "citizenship" since its insertion in the Treaty of Maastricht in 1992, which refers to a status in determining a set of rights and responsibilities, and the relation of individuals to the community, and to each other.[40]

Furthermore, this EU citizenship is interpreted as a legal concept as well; and as an instrument for the creation of "European consciousness" and a common sense of belonging[41] which could be qualified in the frame of the protection of fundamental rights and democracy as part of the common European ideology. Thus, citizenship *vis-à-vis* the EU in relation to individual rights by EU legislation has been protected in the context of fundamental rights, which do not depend on the nationality and status of an individual, but are universally guaranteed to individuals.[42]

Such a connection between Union citizenship and fundamental rights protection has been advocated in stressing that "the fundamental rights play a vital role [...] As an integral part of the status of citizenship, the fundamental rights strengthen the legal position of the individual by introducing a decisive aspect for the purposes of substantive justice in the case concerned. Holding their fundamental rights as prerogatives of freedom, citizens of the Union afford their claims greater legitimacy".[43] In view of this, the status of EU citizenship as a legal notion and the fundamental rights attached are exercised within the sphere of EU law and its principles. Further, this could be in a process of assimilation into the mainstream in normative framework for social inclusion.[44] To clarify, citizenship provides EU citizens with the EU standard of fundamental rights protection.

The Commission, therefore, is trying to implement the project of the recognition of parenthood within the notion of EU citizenship and its fundamental rights in cross-border situations in order to challenge national measures. Along with this discourse, there are

[38] VE Hanneke, *EU Citizenship & the Constitutionalisation of the European Union* (Europa Law Publishing 2015) 5.

[39] TH Marshall, *Class, Citizenship and Social Development* (Greenwood Press 1973).

[40] C Armstrong, *Rethinking Equality: The Challenge of Equal Citizenship* (Manchester University Press 2006) 7.

[41] A Follesdal, 'Union Citizenship: Conceptions, Conditions and Preconditions' (2001) Law and Philosophy 233.

[42] VE Hanneke, *EU Citizenship & the Constitutionalisation of the European Union* cit. 102.

[43] Case C-228/07 *Jörn Petersen* ECLI:EU:C:2008:281, opinion of AG Colomer, para. 27.

[44] N Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan 2013).

two main distinct fundamental rights of citizens of EU, which the Commission highly emphasises in the proposal: *i)* "right of equality"; and *ii)* "right to free movement", which have been constructed as basic concepts from the nascent European citizenship[45] and now both rely on the current Treaties of the EU: TEU and TFEU in conjunction with the Charter of Fundamental Rights and the Citizens' Rights Directive.[46]

The basic element of citizenship is under the equality regardless of personal characteristics regarding the rights and duties of those individuals in its community. In addition, the right to equality before the law and to equal protection against discrimination has been established as a basic human right for all human beings in a context of modern international law. In this context, there is a link between European citizenship and equality as a fundamental right, toward the path to the right to equal treatment as of equal situations and persons in the EU society.

As laid out in the previous section, the main problematic starting point of the Regulation Proposal ultimately concerns the recognition of effects of relations between members of rainbow families, and the exercise of their rights as citizens of the Union. That is largely owing to heteronormativity, as the married heterosexual family model is viewed as the norm for full citizen status in some Member States. As Richardson argued, LGBTIQ people are "only partial citizens, in so far as they are excluded from certain of these rights",[47] in being discriminated against in parenthood matters exclusively due to their sexual orientation. Therefore, the right of same-sex couples to inclusion within the premises of equal citizenship ought to transcend all context dependency in the EU principles, along with the underpinning of the tendency to improve individual rights towards more equality not only in accessing parental rights, but also in matters such as citizenship and inheritance.

The initiative of the right of equality, entailing equal treatment has already been a key element of citizenship against to the discrimination of LGBTIQ+ citizens in the EU including in "the EU LGBTIQ Equality Strategy (2020-2025)" which states that: "[t]he European Commission, the Parliament and the Council, together with Member States, all share a responsibility to protect fundamental rights and ensure equal treatment and equality for all".[48]

[45] EDH Olsen, 'The Origins of European Citizenship in the First Two Decades of European Integration' (2007) Journal of European Public Policy 40.

[46] "The right of equality and to non-discrimination" is in art. 9 TEU, arts 18, 19(1) TFEU, art. 21(1) of the Charter and CRD, art. 24; "[t]he right to free movement and residence" is in arts 20(2)(a) and 21 TEU, art. 45 of the Charter. Moreover, this perspective has been consistently emphasised in the European integration project such as in the 2010 'European Council Stockholm programme' that "the area of freedom, security and justice must, above all, be a single area in which fundamental rights and freedoms are protected". (Official Journal of the European Union, C 115/4, 4.5.2010)

[47] D Richardson, 'Sexuality and Citizenship' (1998) Sociology 88.

[48] Communication COM(2020) 698 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 12 November 2022 on Union of Equality: LGBTIQ Equality Strategy 2020-2025.

Indeed, this strategy for achieving LGBTIQ equality was released to reflect the institutions' concerns in EU policy-making, in the circumstances where some Member States unveiled national plans to curb LGBTIQ rights thereby breaching the principles of the Union.[49] And this tension drives the changes of the potential exclusions of citizens of a community characterised by the projection of the principle of equality in the field of citizenship.

Equality in the context of Union citizenship is implicit in the rights and the freedom of movement of European citizens in the European Union. Since its creation, the status of a Union citizen did grant certain individual rights, namely the right to move and reside freely within the territory of the Member States, now laid down in art. 21 TFEU.[50] Within the frame of equal treatment and citizenship of the EU combined with the freedom of movement, it allows individuals to access the same social benefits as the nationals of their host Member States, having also their family status guaranteed and recognised when exercising the freedom of movement.[51] Thus, once EU citizens exercise their freedom of movement, they are also able to enjoy the other rights derived from the Union citizenship.

Moreover, the proposal of the Commission gives rise to the questions regarding the adoption of harmonised rules in requiring support from all EU members. Thus, the project technically will not offer extra rights to individuals but only the equal rights as the other citizens without exceeding its authority. As stated, the Regulation Proposal does not aim to change the national family laws of EU member states. In consequence, with this support for a plan to recognise all families and forms of parenthood that are identified in other Member States, the family would be able to move to another Member State with the parenthood certificate recognised along with their children whose two legal parents would be recognized as such so that the entire family will enjoy all the rights and duties of citizens in a society.

[49] For instance; in Hungary since the recently adopted law in 2021, it is prohibited or limited to accessing to content of the so-called "divergence from self-identity corresponding to sex at birth, sex change or homosexuality" for individuals under 18 years old; and a disclaimer imposed on a children's book with LGBTIQ content, and in Poland, the so-called "LGBT-ideology free zones" resolutions adopted by several Polish regions and municipalities from 2019.

[50] Art. 21 TFEU provides: "1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect; 2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament; and also now and in Article 45 in the Charter: 1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States. 2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State".

[51] L Mancano, *Constructing the Person in EU Law: Rights, Roles, Identities* (Bloomsbury Publishing 2017) 313.

b) In the name of "best interests of child"

However, even though the proposal arose from the need to ensure the non-discrimination of LGBTIQ citizens, the focus of the Regulation Proposal is largely on ensuring the protection of the best interests of the child in cross-border situations: "The objective of the proposal is to strengthen the protection of the fundamental rights and other rights of children in cross-border situations, including their right to an identity, to non-discrimination and to a private and family life, and to succession and maintenance".[52]

Furthermore, the European Commission wants to portray the proposal to be in the best interests of the child. To that end, Věra Jourová, Vice-President for Values and Transparency stated "[t]his [proposal] puts some children at risk, as they would not have guaranteed access to their rights, such as succession, maintenance or decisions on schooling and education",[53] along with Didier Reynders, the European Commissioner for Justice that presented the proposal, who said that "all children should have the same rights irrespective of how they were conceived or born and of their type of family".[54] Commissioner Reynders also emphasised: "We don't want to change the national competence about the definition of the family and the organisation of the family. We just [want] to protect the rights of the child".[55]

This is because the European Commission wanted to avoid direct conflicts with certain Member States' governments regarding the LGBTIQ issues when proposing harmonisation of numerous national laws, which already occurred previously. In fact, when the EU tries to intervene in LGBTIQ issues regarding Member States' competences, some Member States, Poland and Hungary in particular, are always extremely outspoken opponents in the EU project.

In 2021, when the European Commission adopted "the EU strategy on children's rights"[56] by "putting children and their best interests at the heart of EU policies, through its internal and external actions", for instance, neither of the two countries wanted to sign the strategy paper at the EU Council in their latest strike against the welfare of sexual minorities children only saying that "LGBTIQ-children were especially vulnerable" in the strategy, but from their interpretation by citing, "school propaganda of LGBTQ activities" as a reason.[57] These vetoes were condemned by many international organisations, by stressing that all

[52] COM(2022) 695 final cit.

[53] European Commission, Press release, 'Equality Package: Commission Proposes new Rules for the Recognition of Parenthood between Member States', 7 December 2022, ec.europa.eu.

[54] *Ibid.*

[55] AS Alonso, 'Brussels Wants to Strengthen Cross-Border Rights of Parents and Children' (8 December 2022) Euronews www.euronews.com.

[56] Communication COM(2021) 142 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 24 March 2021 on EU Strategy on the rights of the child.

[57] The Hungarian minister, Judit Varga, said on Twitter that "Hungarian government remains committed to a high level of protection of children's rights & we will never let LGBTQ activists into our schools" (7 October 2021) twitter.com (accessed on 9 January 2021).

27 EU Member States are part of the UN Convention on the Rights of the Child.[58] Eventually, the Council adopted the strategy on children on 9 June 2022, with special statements by the Hungarian and Polish delegations affirming that they would agree to the protection of children, but not to any terminologies and references of EU LGBTIQ principles.[59]

When policy decisions are being made, they are characterised by competition over values and interests upon politics as the mechanism by which political priorities are set.[60] Hence, while the Commission comes to the deployment of mainstreaming of recognition of LGBTIQ issues in the face of an anti-LGBTIQ legal and social climate of conservative Member States through the proposal, it places more weight on the priority of Member States' interests within a mechanism for achieving the protection of children, in order to largely predicate acceptance and avoid meeting fierce resistance in certain Member States. The notion of the best interests of a child as "universal ethical justification" is regarded as appropriate consideration to be given to relevant social concerns pertaining to the rules of domestic politics that are concretely upheld as obligatory.

III. Concerns on the efficiency of the EU legislative mechanism

III.1. The ambiguity of "EU value driven policy"

Inheriting of "normative power" of an "ideational nature characterised by common principles",[61] the EU puts an emphasis on the importance of values and norms for conducting its policy. With a substantive notion of a constitution, as was observed, the frame of "fundamental rights" are exercising common parts of common constitutional values in internalising into its policy. And these shared values have played a key role to gather the countries that "with very different economic, geographical, and cultural identities embark on

[58] Eurochild, 'Reaction to the Veto on the EU Child Rights Strategy' (8 October 2021) www.eurochild.org.

[59] Hungary's statement: "Hungary's agreement to the adoption of the Council Conclusion on the EU Strategy on the Rights of the Child and to the references made therein to various strategies of the European Commission and the Council of Europe cannot be interpreted as a general endorsement of all actions announced, terminologies used as well references made in those strategies, especially when these actions, terminologies and references are direct connotations of the LGBTIQ Equality Strategy 2020-2025 and/or the Gender Equality Strategy 2020-2025 of the Commission"; and Poland's statement: "it is in this spirit that Poland's consent to the adoption of the Council Conclusions on the EU Strategy on the Rights of the Child should be interpreted, and its references to various strategies of the European Commission and the Council of Europe cannot be interpreted as a general endorsement of all actions announced, terminologies used as well as references made in those strategies, especially when these actions, terminologies and references directly refer to the LGBTIQ Equality Strategy 2020–2025 and/or the Gender Equality Strategy 2020–2025 of the Commission" in Conclusions 10024/22 of the Council of the European Union of 10 June 2022 on the EU Strategy on the Rights of the Child - Statements by the Hungarian and Polish delegations.

[60] J Parkhurst, *The Politics of Evidence: From Evidence-based Policy to the Good Governance of Evidence* (Routledge 2016) 72.

[61] I Manners, 'Normative power Europe: a contradiction in terms?' (2002) JCMS 239.

a shared journey of ever-closer Union".[62] Thus, within these normative and value-driven features that are "a standard of appropriate behaviour"[63] in its identity, the EU has in fact actively sought a European project.

While the principle of common value discourse ought to go beyond conflicting interpretations in the EU, there appears to be a division with regard to LGBTIQ issues in terms of "culture difference" between the so-called "Western" Member states promoting the universal liberal values and the "Central and Eastern" Member states, like Poland and Hungary, attempting to conserve their traditional values.[64] Likewise, the concept of "European values" seems like a nodal point when the cultural value relativism is interpreted by putting forth in "European Universalism"[65] or in "EU norm-monopoly".

The "European values", however, underpin a construction and integration of the EU in reinforcing its identity, as exemplified in the Copenhagen criteria of 1993, which set out the condition of joining of the EU on the principles of democracy, respect for human rights and fundamental freedoms, and the rule of law, as the first and fundamental background for EU. Thereby, the prerequisite step for belonging to the EU is to respect the "European values" which all Member States share.[66] Hungary and Poland joined the EU in 2004, in accepting the shared core values of the EU through these criteria. In this context, the question which immediately comes to mind is not about *what* the "European values" could be, but *how* the "European values" could be "valid that meet (or could meet) with the approval of all affected in their capacity"[67] as Member States.

Furthermore, in its implementation of the integration process with the values, the need for sanctioning and preventive mechanism against member states' violations of European values, namely human rights and democracy, was already discussed at the Inter-Governmental Conference (IGC) in 1996. At the time, there was a perception that Central and Eastern Europe, which was undergoing system transition and was preparing to join the European Union, needed relevant provisions to consolidate democracy if it joined the

[62] S Dermot (ed.), *Europe is our Story: Towards a New Narrative for the European Union* (The Institute for International and European Affairs 2014) 8-9.

[63] M Finnemore and K Sikkink, 'International Norm Dynamics and Political Change' (International Organization 1998) 891.

[64] By the survey of the 2019 Eurobarometer Discrimination, the attitudes towards LGBT with the Western European States generally are more accepting than the Central and Eastern European countries European Commission, 'Eurobarometer on the social acceptance of LGBTIQ people in the EU – 2019' (2019) commission.europa.eu.

[65] I Wallerstein, *European Universalism: The Rhetoric of Power* (New Press 2006).

[66] These core values are described in art. 2 TEU as a renewed commitment: "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

[67] J Habermas, *Moral Consciousness and Communicative Action* (The MIT Press 1990) 197.

EU.[68] It paved the way in establishing the procedure for the suspension of participating rights in the Amsterdam Treaty in 1999. This procedure (later envisaged in art. 7 TEU) was intended to be a key factor of a censure whereby the voting rights for Member States which are found to be in a "a serious and persistent violation" of common values may be suspended.

Facing the "illiberal behaviour" of Hungary's Fidesz since 2010 and Poland's Law and Justice (PiS) governments since 2015 against the EU principles, the EU's role in protection of values has been questioned in its members' domestic affairs. Further, it has been deemed proof of EU's political unwillingness to decisively ensure the respect of the fundamental values in "a reluctance to challenge their actions or to impose a real political cost".[69]

The observations above could reach to the larger context of the rule of law crisis within the EU. By failing to apply art. 7 TEU the first time a violation of fundamental values occurred, art. 7 TEU was essentially stripped of its efficiency, as its application requires unanimity of all EU Member States, not counting the allegedly defaulting Member State. Therefore, the only possible option that was left to compel the defaulting Member States to stop breaching fundamental values was the infringement procedure, pursuant to art. 258 TFEU. Ultimately, once the triggering of the procedure under art. 7 TEU inevitably failed, in spite of the support by the European Parliament,[70] the Commission was left with no other choice than to use the infringement procedures.

In that vein, and in the context of the deteriorating situation concerning the rights of LGBTIQ persons, Hungary has seen its "anti-LGBT" law attacked via an infringement procedure.[71] It may be expected that the same would happen should the Regulation proposal be adopted, and if a Member State refuses to apply it.

III.2. The TFEU as an unexpected obstacle

Due to the fact that substantive law on family matters remains a competence of Member States who legislate freely in matters of marriage and parenthood, there can be no intervention of EU law in that sense (for example in order to compel a Member State to recognize in its national legislation, the right of same-sex couples to marry)[72].

[68] W Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jorg Haider' (2010) ColumJEurL 390.

[69] G Búrca, 'Poland and Hungary's EU Membership: On Not Confronting Authoritarian Governments' (2022) ICON 22.

[70] European Parliament resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) as regards the situation in Poland (2018/2541(RSP)).

[71] RFI, 'EU Commission Takes Hungary to Court in Effort to Overturn LGBTQ Law' (15 July 2022) www.rfi.fr.

[72] Although the ECtHR has shown a much bolder approach, by inviting States parties to the ECHR to recognize and give legal effects, in one way or another, to same-sex partnerships. To that end, see ECtHR *Oliari and Others v Italy* App n. 18766/11 and 36030/11.

However, aside from purely internal situations, where EU law in principle does not apply,[73] the question of family relations in cross-border situations is indeed a matter where the EU law will inherently apply. The TFEU provides for the possibility of adopting measures at the EU level concerning family law with cross-border implications. Namely, art. 81(3) TFEU opens the possibility for such measures to be adopted according to a special legislative procedure. In that regard, when the relevant treaty stipulation refers to the special legislative procedure, that means that the measures concerned shall be adopted unanimously by the Council, and that the role of the European Parliament shall be purely consultative.

This stands in stark contrast when art. 81 TFEU is analysed in relation to the entire TFEU system. An important thing to remember is that this article is an introduction to Chapter 3 of the TFEU, dealing with judicial cooperation in civil matters. Further, its paras 1 and 2 provide that the adoption of relevant acts in many areas of life[74] will be done in accordance with ordinary legislative procedure, that is, with the participation of the European Parliament on an equal footing with the Council, and with the Council deciding by qualified majority voting (QMV). Given this significant constraint, and particularly paying special attention to the contentious discourse surrounding the issues of strengthening the rights of LGBTIQ citizens, it does not appear likely that this legislative proposal will be adopted anytime soon. The Treaty enables a bypass option that could, at least in theory, circumvent the necessity to ensure the Council's unanimity. The Council may decide to refer the specific legislative initiative to the ordinary legislative procedure, but such a decision must, again, be taken by the Council unanimously. Therefore, given the previous observations, to hope for such a development would be idealistic at best, and at worst, delusional.

This obstacle is caused by the functioning of the institutional mechanisms in the EU. In an effort to ensure institutional equilibrium, specifically the one between the intergovernmental component of the EU decision making process (Council) and a supranational one (Parliament), it is the citizen of the Union that suffers the most because of the inefficiency that results from a flawed legislative mechanism. What's worse, in this particular matter, there is no equilibrium between two decision-making bodies, as the role of the Parliament[75] is reduced to purely consultative, and the intergovernmental body hijacks a

[73] As per the longstanding CJEC jurisprudence such as case C-268/15 *Ullens de Schooten* ECLI:EU:C:2016:874; see also A Arena, 'The Wall Around EU Fundamental Freedoms: The Purely Internal Rule at the Forty-Year Mark' (2019) Yearbook of European Law 153.

[74] To name a few, the cross-border service of judicial and extrajudicial documents, the effective access to justice, the cooperation in the taking of evidence, and, importantly, the elimination of obstacles to the proper functioning of civil proceedings.

[75] Arguably the most pro-rainbow families institution, demonstrating a proactive approach via numerous paths, such as Resolution (2021/2679(RSP)) of the European Parliament of 14 September 2021 on LGBTIQ rights in the EU.

sensitive real-life issue for the purposes of domestic political goals.[76] It is a clear demonstration that, indeed, progressive and sound legislative proposals are often blocked at the Council level due to that power dynamic.

This shows us that despite the praised "multi-level governance" of the EU,[77] in this particular context, the TFEU will, awkwardly enough, present an obstacle to the reinforcement of the protection of fundamental rights of citizens.

III.3. The Regulation proposal at an impasse: which alternatives?

Amidst the emerging political problem regarding the adoption of the Commission's proposal, reflected in potential blocking of the Regulation Proposal by certain Member States, the need arises to find an alternative way to guarantee the degree of rights in a substantive sense that the regulation proposal aims to provide. Other than an unlikely event of amending the TFEU to the extent where it would no longer require unanimity of the Council, an alternative way to push the proposal towards the ordinary legislative procedure provided for by the TFEU, and deemed inefficient (see section III.2), the most feasible way of ensuring this objective relies on the jurisprudence of the CJEU.

In a way, the authoritative and binding properties of the CJEU rulings have already been relied upon, specifically to that end[78] within the framework of the reference for preliminary ruling. However, even if the CJEU has voiced its support towards the parental right in rainbow families, and particularly in cases when members of such families have exercised their freedom of movement under EU law, the reference for preliminary ruling can only do so much. That legal remedy greatly depends on the activities of the national (referring) courts, ever since they have been made primary courts of EU law.[79] Further, it would take years, or perhaps even decades for the CJEU case law to cover all the areas in the regulation proposal extensively enough. Each question would have to come up independently within a separate reference for preliminary ruling and would inevitably have to pass through instances of internal law of the concerned Member State (administrative, judicial). Only then could it be deliberated on by the CJEU, thereby defeating one of the objectives of the regulation proposal, which is to reduce costs and time for families that currently encounter that sort of problem.

[76] Polish Deputy justice minister, Sebastian Kaleta, confirmed that Poland would veto the European Commission's plans to guarantee the cross-border recognition of parenthood to Polish broadcaster TVP, 'Poland to Veto EU Recognition of Same-Sex Parents says Justice Ministry' (9 December 2022) notesfrompoland.com; further, it is also to be expected that Hungary will block the adoption of this regulation, and that it will also block any attempt to switch to ordinary legislative procedure. O Bonnell, 'In Italy, the Meloni Government Attacks Same-Sex Parenthood' (23 March 2023) Le Monde www.lemonde.fr.

[77] A Moravcsik, 'Europe Without Illusions' (2005) Prospect 25.

[78] *V.M.A.* cit.

[79] R Lecourt, *L'Europe des juges* (Bruylant 2008) 8.

Sound opinions are also voiced regarding the impetus coming from other EU institutions (such as the European Commission), where it is argued that this institution could (or even should) take action under the art. 258 TFEU against the defaulting Member States.[80] In this case, as Tryfonidou rightly argues,[81] the failure to recognize the family relations of rainbow families, may even amount to an infringement of relevant provisions of EU law, such as the right to private and family life, protected under art. 7 of the EU Charter, the prohibition of discrimination on the ground of sexual orientation, already protected by the CJEU case law in the *Coleman* case[82] and art. 21 of the Charter. But even so, the difficulty remains in the fact that in order to reach the same level of standards, as envisaged by the regulation proposal, the European Commission would have to engage in a "witch hunt" against non-complying Member States, which would, in turn, widen the rift between Brussels and eastern EU Member States, and potentially create a political crisis which would further undermine the existing rule of law crisis and the supremacy of EU law.[83] Therefore, realistically speaking, while there are legal avenues towards forcing the adoption of the relevant provisions through the CJEU case law, albeit not in the initially desired form, they are far from ideal and bear significant risk of adverse consequences.

The solution which would cause the least amount of tensions between the governments of Member States, appears to be the use of enhanced cooperation, among a restricted group of Member States. This option has been already widely used in international family law,[84] and would imply the using of the procedure provided by art. 20 TEU and Title III TFEU. In order to examine whether the use of enhanced cooperation would be possible in this field, this option must be checked against a number of requirements of the relevant procedure. Namely, the area in which a group of Member States wish to engage in an enhanced cooperation must not be one in which the EU has exclusive competence. This criterion appears to be satisfied, having in mind that the regulation of family relations does not fall in the scope of EU exclusive competences. Next, the criterion stating that the activity has to further the objectives of the EU appears satisfied as well, given the objective of the Commission Proposal at hand, which is to ensure equal treatment of all citizens in matters of parenthood. Finally, art. 20(2) TEU provides a condition that a

[80] A Tryfonidou, 'EU Free Movement Law and the Children of Rainbow Families' cit. 265.

[81] *Ibid*.

[82] Case C-303/06 *Coleman* ECLI:EU:C:2008:415.

[83] Polish Constitutional Court judgment of 7 October 2021 Ref. No. K 3/21, Assessment of the conformity of the Polish Constitution of selected provisions on the Treaty on European Union. It is worth noting that the legal effect of this judgement is considered compromised, which stems from the compromised legitimacy of persons claiming to currently occupy the positions of judges of the Polish Constitutional Court.

[84] Examples include, but are not limited to, the Regulation (EU)2016/1103 of the Council of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes; Regulation (EU)2016/1104 of the Council of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

minimum of nine Member States must participate in the enhanced cooperation in order for it to be instituted.

This does not mean that the Council unanimity requirement has been circumvented, as the decision to authorise enhanced cooperation must be taken by the Council unanimously. However, the fact that the "acts adopted in the framework of enhanced cooperation shall bind only the participating Member States [and] shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union"[85] indicates that, with enough smart political manoeuvring, the authorisation of the Council for may indeed be achieved more easily than for the adoption of the Regulation Proposal, which makes the enhanced cooperation the most effective mechanism for the adoption of such legislation.

IV. Conclusion

The Regulation Proposal aims to provide clear rules on jurisdiction and applicable law for cross-border parenthood cases. This would benefit EU citizens by increasing legal certainty in such matters, even beyond the freedom of movement.

The approach respects the delicate balance between the EU regulatory competence and the exclusive competences of Member States. Additionally, the creation of a European Parenthood Certificate represents an elegant solution for a practical administrative problem of a lack of a unique document to prove parenthood. Making it optional offers additional flexibility for citizens.

However, the main concern is that the Regulation Proposal will not follow the ordinary legislative procedure, which could lead to it being vetoed by one or more Member States. As already mentioned, the special legislative procedure in this case requires unanimity at the Council, which is practically impossible to achieve on an issue as controversial as the parenthood rights of same-sex couples.

It is clear that the ongoing discussions about the Regulation Proposal will address challenges posed by illiberal governments or parties that conflict with the fundamental values of the EU on LGBTIQ rights. Given that Member States' adherence to the founding values of the EU cannot be taken for granted, it is important to prioritise the integration of the principles of the EU into mainstream political discourse and discussions on integrated political standards. This includes a deeper exploration of the legal and normative frameworks that support these values. What's more, the solution identified as the most effective one – the establishment of enhanced cooperation on the matter, appears to only be a band-aid on a bullet wound. Indeed, anything short of a fully-fledged EU Regulation in this matter, with full direct applicability and direct effect, would mean failure to accomplish the key ob-

[85] Art. 20(4) TEU.

jective of the Regulation Proposal, which is to "strengthen the protection of the fundamental rights and other rights of children in cross-border situations including their right to an identity, to non-discrimination and to a private and family life, and to succession and maintenance",[86] as the enhanced cooperation in the matter would, by definition, have limited territorial effect, and would impede the exercise of fundamental rights of concerned individuals in non-participating Member States. This situation is the symptom of a systemic deficiency in the EU decision-making dynamics as established by the Lisbon Treaty, which puts the important field of family law outside of the ordinary legislative procedure. Whatever the purpose of this measure was supposed to be, one can hardly defend the argument that it should be a tool to deny fundamental rights of EU citizens, particularly having in mind the founding value of respect for human rights, enshrined in art. 2 TEU. The core values of the EU should not be sacrificed as mere normative ideals of the European project's ontology and teleology to protect so-called material strategic interest. These values must take place in material action itself to protect EU citizens.

[86] COM(2022) 695 final cit.

ARTICLES

The Interplay Between the European Investigation Order and the Principle of Mutual Recognition

István Szijártó*

Abstract: This *Article* concerns the European Investigation Order (EIO) and its relations to the principle of mutual recognition. The principle has been the engine of judicial cooperation in criminal matters between Member States of the European Union since the adoption of the Tampere conclusions in 1999. Member States rely on the principle in creating cooperation systems, thereby facilitating interaction among their criminal justice systems. Since Member States refrain from extensive criminal law harmonisation, the principle is of utmost importance. As such, a common regulatory technique was developed through which the principle is given effect in every cooperation system created so far. Although this regulatory technique was mostly followed in the directive establishing the EIO, it also introduced several novelties in the regime, notably the option to have recourse to another investigative measure, the possibility for a greater extent of communication, and the fundamental rights-based refusal ground. This *Article* argues that these rules make the EIO directive more protective of fundamental rights and show a new trend in the cooperation systems based on the principle of mutual recognition. In addition, while reviewing the applicability of these rules in other cooperation systems, it provides a proposal on how to apply them to enhance mutual trust between Member States through legislation.

Keywords: EIO – mutual recognition – recourse to another investigative measure – enhanced communication – fundamental rights – based refusal ground.

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I. Introduction

The current system of judicial cooperation in criminal matters among the Member States of the European Union (hereinafter EU) lays on the foundation of the principle of mutual recognition as implemented into the policy of judicial cooperation in criminal matters over the last two decades.[1]

The legal literature has long criticised this system, as the implementation of the principle leaves much to be desired in terms of the protection of fundamental rights.[2] This arises from the method used to implement the principle. The cooperation systems, or mutual recognition regimes established for this purpose do not enable executing authorities to deny the request for transnational judicial cooperation even if the execution of the requested measure would pose a risk to the fundamental rights of persons subject to those measures.[3]

Despite the evident risks associated with this system, the European Court of Justice (hereinafter ECJ) gave preference to the efficiency of criminal cooperation in a number of its preliminary rulings where it dismissed the claims that the quasi-automatic process of criminal cooperation would violate fundamental rights of individuals.[4] This commitment of the ECJ eventually manifested in expressly setting out the legal principle of mutual trust in its 2/13 Opinion on the EU's accession to the European Convention on Human Rights.[5]

Later, even though the ECJ has set out the principle of mutual trust, it decided in its landmark decision in the *Aranyosi* and *Caldararu* joined cases that the principle may be challenged in exceptional circumstances. It introduced the possibility of suspending a request for transnational criminal cooperation, namely the execution of the European Arrest Warrant (hereinafter EAW) due to the risk of fundamental rights violation. This constituted a step toward a system of cooperation that is based on earned trust instead of blind trust.[6]

[1] V Mitsilegas, 'The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness based on Earned Trust' (2019) Revista Brasileira de Direito Processual Penal 566.

[2] S Alegre and M Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—the European Arrest Warrant' (2004) ELJ 200; L Marin, 'The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case' (2008) Maastricht Journal of European and Comparative Law 473; E Smith, 'Running Before We Can Walk? Mutual Recognition at the Expense of Fair Trials in Europe's Area of Freedom, Justice and Security' (2013) New Journal of European Criminal Law 82; E Xanthopoulou, 'The European Arrest Warrant in a context of distrust: Is the Court taking rights seriously?' (2022) ELJ 218.

[3] V Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart 2018) 154.

[4] V Mitsilegas, 'Trust' (2020) German Law Review 69.

[5] Á Mohay, 'Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR – Case note' (2015) Pécs Journal of International and European Law 31.

[6] V Mitsilegas, 'Trust' cit. 70.

From that point forward, many scholars reflected on the possibility of building a system of judicial cooperation where trust is strengthened between Member States.[7] It is a generally accepted idea that trust between Member States can be increased either by legal or non-legal measures. The former includes the introduction of legal norms that enhance mutual trust between Member States and the latter includes measures that help judicial authorities get to know the judicial systems of other Member States which can cultivate a common understanding of criminal justice in Europe.[8] The aim of this *Article* is to complement the existing literature about mutual trust and its relation to the system of judicial cooperation via analysing the European Investigation Order (hereinafter EIO) – yet another mutual recognition regime that is mostly applied during the investigation phase of the criminal procedure. In addition, it will also serve as an addition to the literature about the EIO which mainly concerns the foundations of the EIO instead of going into in-depth analysis of its role and possible effects on the system of criminal cooperation of the Member States.

This *Article* analyses the EIO as it is the perfect tool for showcasing the legal changes that are necessary to strengthen trust between Member States. It is a mutual recognition regime – one that realises the free movement of judicial decisions issued in the investigation phase. As such, the EIO applies the regular toolbox for giving effect to the principle of mutual recognition. However, the EU legislator also introduced several novelties in the regime, notably the option to have recourse to another investigative measure, the possibility for a greater extent of communication, and the ground for fundamental rights-based refusal. I argue that these rules do not only deviate from the usual regulatory technique giving effect to the principle but also enhance the level of fundamental rights protection during evidentiary cooperation. In addition, they do so in a manner that institutionalises distrust – a measure that has been frequently called for by scholars.[9] As such, the main research question of this *Article* is whether these rules could be implemented in other mutual recognition regimes to strengthen the protection of fundamental rights and increase mutual trust between Member States.

To this end, this *Article* will not only analyse and prove the protective nature of the selected rules of the EIO in terms of fundamental rights, but it will also reflect on their applicability in other mutual recognition regimes. In the section II, this *Article* starts by introducing the EIO, then goes on to briefly describe the system of judicial cooperation in criminal matters based on the principle of mutual recognition while showcasing the similarities and differences in the regulatory framework of the EIO compared to the standard form of implementing the principle in other cooperation systems. In its sections III, IV and

[7] T Wischmeyer, 'Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"' (2016) German Law Journal 339; J Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure' (2020) EuConst 33; R Sicurella, 'Fostering a European criminal law culture: In trust we trust' (2018) New Journal of European Criminal Law 308.

[8] A Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart 2021) 129.

[9] V Mitsilegas, 'Trust' cit. 70.

V, the selected rules are analysed to point out their role in the cooperation system and to shed light on the greater protection of fundamental rights in this regime. Furthermore, each section includes an analysis of the applicability of the specific rule in other tools of cooperation based on the principle of mutual recognition. Finally, in its section VI, the *Article* concludes with a proposal for the implementation of the selected rules in other mutual recognition regimes.

II. New formulas in the regime of mutual recognition in the EIO

The EIO was created in 2014 by Directive 2014/41/EU.[10] It is a tool for cross-border judicial cooperation in the investigation phase, explicitly serving the transnational gathering of evidence.[11] The EIO was the first legal instrument based on the principle of mutual recognition to be created in the post-Lisbon era. Adopting the directive fitted the objective of implementing the principle of mutual recognition in the policy of judicial cooperation in criminal matters – a process that started in the early 2000s based on the Tampere conclusions of the European Council.[12]

Since the adoption of the Tampere conclusions in 1999, the Council passed various framework decisions which widened the scope of application of that principle in the process of criminal cooperation between Member States. First, it adopted the flagship instrument of the principle, the EAW, in its Framework Decision 2002/584/JHA, which was followed by the adoption of several other framework decisions that involved certain types of judicial decisions under the scope of the principle including orders freezing property or evidence.[13] The latter shows the willingness of the Council already in the 2000s to include evidentiary cooperation in the framework of mutual recognition in criminal matters. This

[10] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

[11] S Allegrezza, 'Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality' in S Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe* (Springer 2014) 52.

[12] V Mitsilegas, *EU Criminal Law* (Hart 2009) 116; with the adoption of the Lisbon Treaty, it became even clearer that criminal cooperation between the Member States is supposed to be based on the principle of mutual recognition. The Treaty sets out a legal basis in the policy of judicial cooperation specifically for enhancing the application of the principle; see art. 82 TFEU.

[13] Framework Decision 2003/577/JHA of the Council of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Framework Decision 2008/947/JHA of the Council of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions; Framework Decision 2008/909/JHA of the Council of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union; Framework Decision 2005/214/JHA of the Council of 24 February 2005 on the application of the principle of mutual recognition to financial penalties; Framework Decision 2008/978/JHA of the Council of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

intent was reiterated multiple times by the adoption of the framework decision establishing the European Evidence Warrant, the Stockholm Programme, and the European Commission's Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility. The latter documents demonstrated the political will and the necessity for creating a single regime of collecting evidence located abroad – a system that would incorporate the principle of mutual recognition.[14]

Eventually, eight Member States initiated the proposal for the directive establishing the EIO, a possibility provided by art. 76(b) TFEU.[15] The proposal aimed to create an overarching legal instrument for gathering evidence located abroad and replace multiple sources of EU law serving judicial cooperation during the investigation.[16] The main argument for a new legislative framework for the cross-border gathering of evidence was the fragmentation of the then-applicable framework of evidentiary cooperation, which was supposed to hamper the efficiency of cooperation.[17] In an attempt to overcome that fragmentation, the EIO was designed to cover any kind of investigative measure serving to gather evidence. In other words, the instrument was granted a horizontal scope.[18] In addition, the directive introduced the principle of mutual recognition to judicial decisions ordering the collection of evidence to further enhance the efficiency of criminal cooperation in the investigation phase.

As already well described by scholars, the principle of mutual recognition serves the efficiency of combatting crime in an EU area of free movement where different legal systems need to interact with each other.[19] Their interaction could be simplified by harmonising the criminal laws of Member States. However, they refrain from procedural harmonisation and only allow a smaller extent of approximation of their substantive criminal

[14] Framework Decision 2008/978/JHA cit. recitals (1)-(6); The Stockholm Programme of the European Council of 4 May 2010 on an open and secure Europe serving and protecting citizens, Green Paper of the European Commission of 11 November 2009 on obtaining evidence in criminal matters from one Member State to another and securing it admissibility.

[15] S Ruggeri, 'Introduction to the Proposal of the European Investigation Order: Due Process Concerns and Open Issues' in S Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe* cit. 5.

[16] The EIO directive replaces the Framework Decisions 2003/577/JHA of the Council of 22 July 2003 on the mutual recognition of orders freezing property or evidence and Framework Decision 2008/978/JHA cit. and the corresponding provisions of the European Convention on Mutual Legal Assistance in Criminal Matters of 20 April 1959, the Convention implementing the Schengen Agreement and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its protocol; see art. 34 of Directive 2014/41 cit.; R Belfiore, 'Critical Remarks on the Proposal for a European Investigation Order and Some Considerations on the Issue of Mutual Admissibility of Evidence' in S Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe* cit. 93.

[17] Green Paper cit. points 3-4.1; Recital (5) Directive 2014/41 cit.

[18] A Mangiaracina, 'A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order' (2014) Utrecht Law Review 120.

[19] V Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individuals' (2012) Yearbook of European Law 320.

laws since they aim to retain their sovereignty in adopting criminal legislation to a great extent. As a result, emphasis was placed on creating different systems of cooperation (such as the EAW or other framework decisions) that extend national enforcement capacities in combatting (transnational) crime.[20] By implementing the principle of mutual recognition in these systems of cooperation, a process of quasi-automatic recognition and execution of judicial decisions is set up, which significantly simplifies the interaction of the different judicial systems of Member States. In that framework, certain types of judicial decisions issued in one Member State are recognised and executed in another Member State without a thorough examination of the content of that decision.[21] Thus, applying the principle removes time-consuming actions from the process of cross-border criminal cooperation. Hence, when applied to the EIO, the principle essentially makes any investigative measure executable in another Member State that facilitates the free movement of judicial decisions directed at gathering evidence.

Directive 2014/41/EU applies the usual regulatory technique for giving effect to the principle of mutual recognition as it was used in various framework decisions, including the one establishing the EAW.[22] Accordingly, the EIO is a judicial decision issued or validated by a prosecutor or a judge that shall be recognised and executed based on formal assessment. Refusal grounds are limited. A unified form is used to issue the EIO. Double criminality as a prerequisite for recognition is excluded in the case of 32 offences. The deadline for recognition and execution is set, and finally, direct communication is established between the issuing and the executing authorities.[23]

Although the EIO applies the usual formula, there are a few notable novelties in the legal framework introduced by Directive 2014/41/EU. Firstly, the directive allows the executing authority to have recourse to an investigative measure other than that which was ordered by the issuing authority in the EIO.[24] Secondly, the directive provides for direct communication between the issuing and the executing authority to a greater extent than any other mutual recognition regime.[25] Finally, the directive expressly introduces a fundamental rights-based refusal ground which has also not been applied in any previous mutual recognition regime.[26]

[20] *Ibid*. 321.

[21] V Mitsilegas, *EU Criminal Law after Lisbon* cit. 125-126.

[22] T Rafaraci, 'The European Investigation Order: Fundamental Rights at Risk?' in S Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe* cit. 45.

[23] Arts 1, 5, 7, 9, 11 and 12 of Directive 2014/41 cit.

[24] *Ibid*. art. 10.

[25] *Ibid*. arts 6(3), 9(6), 10(4), and 11(4).

[26] *Ibid*. art. 11(1)(f).

III. The question of defining investigative measures and having recourse to a different one

The EIO's primary aim is to enhance the ability of judicial authorities of the Member States to acquire evidence located abroad.[27] To this end, the issuing authority may order any investigative measure to be carried out in another Member State.[28] The executing authority is obliged to recognise and execute the EIO if it was issued in accordance with the procedural rules laid down in Directive 2014/41/EU.[29]

In order to realise this horizontal scope, the directive creates an open-ended definition under arts 1(1) and 3. Reflecting on the vast scope of the directive, scholars have pointed out that the directive lacks a precise definition for investigative measures. They noted that this kind of negative approach toward the scope of the EIO can potentially harm the principle of legality. Without a strict definition for investigative measures, individuals cannot be certain what measures they may be subjected to through an EIO. They have also drawn attention to the fact that such a formulation of the scope may facilitate forum shopping, whereby the issuing authority requests an investigative measure that could not be ordered under the same conditions in a similar domestic case.[30]

To counter the aforementioned harmful effects of such a broad definition, the directive introduced limits for ordering investigative measures to be carried out in another Member State. First, the principles of necessity and proportionality constrict their availability. In addition, the directive also introduces a double-equivalency clause that further restricts the availability of investigative measures in the EIO. According to this clause, the investigative measure must be available under the same conditions in a similar domestic case both in the issuing and the executing Member States.[31] Last but not least, an EIO ordering an investigative measure that does not exist under the law of the executing Member State cannot be executed.[32]

So far, these limits serve to protect individuals and mitigate harmful effects stemming from the differences in the Member States' legal systems. However, the EIO is a tool for cross-border evidentiary cooperation, which makes it essential that it does not come to an abrupt end when an investigative measure cannot be executed for the above reasons

[27] *Ibid*. Recital (7).

[28] *Ibid*. art. 6(1).

[29] *Ibid*. art. 9(1).

[30] I Armada, 'The European Investigation Order and the Lack of European Standards for Gathering Evidence' (2015) New Journal of European Criminal Law 18; A Mangiaracina, 'A New and Controversial Scenario in the Gathering of Evidence at the European Level' cit. 120; F Zimmermann, S Glaser and A Motz, 'Mutual Recognition and its Implications for the Gathering of Evidence in Criminal Proceedings: a Critical Analysis of the Initiative for a European Investigation Order' (2011) European Criminal Law 73.

[31] Arts 6(1) and 11(1)(h) of Directive 2014/41 cit.; do note that this provision was lacking in the original proposal for the directive; see I Armada, 'The European Investigation Order and the Lack of European Standards for Gathering Evidence' cit. 17.

[32] Art. 10(5) of Directive 2014/41 cit.

under the law of the executing Member State.[33] To avoid such situations, the directive created a corrective mechanism where the executing authority may have recourse to another investigative measure.[34]

This mechanism regulated under art. 10 of the directive is interesting because it enables the executing authority to apply a different investigative measure not only in cases where the requested investigative measure is unavailable under the law of the executing Member State (either because it does not exist or is only available under stricter conditions)[35] but also in an additional third case where an investigative measure is less intrusive for the concerned person than the investigative measure requested in the EIO. However, for the sake of efficiency, a different investigative measure may only be applied if it can achieve the same results.[36] While serving the efficiency of cooperation in most instances, the third case of the corrective mechanism can be seen as a *de facto* ground for refusal to protect the fundamental rights of persons subject to the investigative measure since the issuing authority cannot opt for the execution of the investigative measure originally requested in the EIO. Instead, it may supplement the EIO with a view to secure the execution of the original investigative measure or decide to withdraw it altogether.[37]

In the cooperation systems built on the principle of mutual recognition, the margin of discretion regarding the necessity and proportionality of issuing judicial decisions subject to the principle belongs solely to the issuing authority.[38] Hence authors view the third case of the corrective mechanism as a second test of proportionality.[39] Even though introducing that second test seems to go against the logic of mutual recognition regimes, it is a welcome addition.[40] It serves as a balancing act between the efficiency of criminal cooperation and the protection of fundamental rights, since the prerequisite for having recourse to another investigative measure is that the same result can be achieved through the less intrusive investigative measure. Such an option is specifically valuable for the protection of fundamental rights considering Eurojust's case law analysis which

[33] LB Winter, 'The Proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assessment' in S Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe* cit. 76.

[34] I Armada, 'The European Investigation Order and the Lack of European Standards for Gathering Evidence' cit. 16.

[35] Art. 10(1)(a)-(b) of Directive 2014/41 cit.

[36] *Ibid*. art. 10(3).

[37] *Ibid*. art. 10(4).

[38] F Zimmermann, S Glaser and A Motz, 'Mutual Recognition and its Implications for the Gathering of Evidence in Criminal Proceedings' cit. 69; R Belfiore, 'The European Investigation Order in Criminal Matters: Developments in Evidence-gathering across the EU' (2015) European Criminal Law 317; I Armada, 'The European Investigation Order and the Lack of European Standards for Gathering Evidence' cit. 17.

[39] C Heard and D Mansell, 'The European Investigation Order: Changing the Face of Evidence-gathering in the EU' (2011) New Journal of European Criminal Law 359.

[40] Belfiore regards this rule as "a welcome consideration of the existing differences between national judicial systems", which provides more space for the protection of the individual; see R Belfiore, 'The European Investigation Order in Criminal Matters' cit. 318.

showed that the executing authorities had not invoked the fundamental rights-based refusal ground during the initial three years of practice of the EIO.[41]

III.1. The applicability of the corrective mechanism in other cooperation systems

The possibility of having recourse to another investigative measure can be effectively utilised to protect the fundamental rights of persons involved in the criminal procedure. It provides a limited margin of discretion for the executing authority to execute a different investigative measure if it finds that a less intrusive one is available to achieve the same goal. This method is particularly useful since it is the executing authority that can assess the possible harmful effects of the requested investigative measure in the context of its own criminal justice system. Hence, it is given a responsibility which it can effectively meet.

However, this corrective mechanism cannot be implemented in other tools of cooperation as the precondition of introducing such a rule is that there are at least two procedural measures that can be requested via the judicial decision that is subject to mutual recognition. This precondition is not met in any other tool of judicial cooperation such as the EAW, the mutual recognition of judgements, or the mutual recognition of freezing and confiscation orders. Since every cooperation system is established for a specific procedural aim (*i.e.* guaranteeing the presence of the suspect or accused in the criminal procedure, the execution of certain types of judgements, or asset recovery), there is currently no other tool of judicial cooperation where such a mechanism could be implemented, as the aforementioned aims can be achieved through a single procedural measure regulated in the relevant secondary sources of EU law.

As such, the corrective mechanism implemented in the EIO directive is specifically created for the process of judicial cooperation in the investigative phase where a great variety of procedural measures can be requested from the executing authority. Thus, its application in other cooperation systems is not viable due to their characteristics.

IV. An increased extent of direct communication between the issuing and executing authorities

The standard method of implementing mutual recognition in the process of criminal cooperation between Member States is characterised by measures simplifying the entire process of cooperation through unified forms used for issuing different judicial decisions subject to the principle, shortened deadlines, limited grounds for recognition, and most importantly an obligation to recognise and execute judicial decisions if they are issued in

[41] Eurojust, 'Report on Eurojust's Casework in the Field of the European Investigation Order' (November 2020) www.eurojust.europa.eu 32.

the proper form. In this toolbox, we can find a strict limitation on the extent of communication that can take place between the issuing and the executing authorities, embodied by the unified form used to issue judicial decisions, such as the EAW or the EIO.

A unified form not only limits the content of the judicial decision to the basic information but also restricts communication between authorities. In this framework, the executing authority may not request additional information about the underlying criminal procedure.[42] As demonstrated in various mutual recognition tools such as the EAW, the mutual recognition of financial penalties, and orders freezing and confiscating property, communication is only provided in cases when the execution of the judicial decision is at stake. According to the relevant secondary sources of EU law, when a refusal ground seems applicable, the executing authority must clarify the circumstances of the case relevant to the execution of the judicial decision to avoid its refusal.[43]

Of course, the EIO directive also applies the above rule.[44] However, the strict limitation of communication was loosened in the directive in two additional instances. According to art. 6(1)(a)-(b), the executing authority may consult the issuing authority if it has reason to believe that the EIO is not proportionate or necessary to the purpose of the proceedings or it would not be available in a similar domestic case under the law of the issuing state. In addition, art. 10(4) obliges the executing authority to inform the issuing authority if it decides to apply a different investigative measure than that which was requested in the EIO.[45]

On the one hand, art. 6(1) enabling the executing authority to make an inquiry regarding the EIO to the issuing authority seems difficult to apply since the executing authority is not in a position to properly assess the proportionality or necessity of the investigative measure ordered in the EIO. Apart from that, the executing authority may make an inquiry if it has reason to believe that the investigative measure would not be available in a similar domestic case in the issuing Member State. This also puts the executing authority in a difficult situation, since to assess such a requirement, the former would need to be an expert in the criminal justice system of the issuing Member State, which is an unrealistic expectation. Hence, it can be objectively stated that the fulfilment of neither of these requirements can be effectively scrutinised by the executing authority save in exceptional cases when the non-compliance is very tangible (for example, when a covert investigative measure is ordered in a procedure that was initiated due to a minor offence).

[42] V Mitsilegas, 'Mutual Recognition, Mutual Trust, and Fundamental Rights after Lisbon' in V Mitsilegas and M Bergstromal (eds), *Research Handbook on EU Criminal Law* (Edward Elgar Publishing 2016) 151; also see Eurojust, 'Report on Eurojust's Casework in the Field of the European Investigation Order' which describes the problem of excessive requests for additional information upon receiving the EIO form, which is contrary to the functioning of the current system of criminal cooperation based on the principle of mutual recognition.

[43] Framework Decision 2002/584/JHA of the Council of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States art. 15(2); Framework Decision 2005/214/JHA cit. art. 7(3); Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders arts 8(2), 13(2), 19(2), and 22(2).

[44] Art. 11(4) of Directive 2014/41 cit.

[45] *Ibid*. arts 6(3) and 10(4).

On the other hand, the executing authority is obliged to inform the issuing authority about its decision to have recourse to another investigative measure. Upon receiving that information, the issuing authority is enabled to supplement the EIO to secure the execution of the originally requested investigative measure. In this process, supplementing the EIO can be considered a means of direct communication between the authorities. Although it resembles the communication between the executing and issuing authorities when the former decides to apply a refusal ground regulated in other tools of cooperation, it is worth analysing as a novelty, especially since it also applies to the third case of the corrective mechanism concerning less intrusive investigative measures described in the previous point of the *Article*.

First and foremost, it should be emphasised that the directive and its preparatory documents lack the reasoning for this specific rule. Thus, the nature of the supplementary information provided by the issuing authority is unclear. However, it can be deducted from the objective of the corrective mechanism, that is to avoid such situations where the EIO is rejected due to the unavailability of the requested investigative measure under the law of the executing Member State. If an efficiency-based approach is used, the issuing Member State may supplement the EIO in a way that could provide more specific information, which could prove to be enough to meet the procedural standards to execute the original investigative measure.[46]

While in the first two cases the corrective mechanism seems to solely serve efficiency, the third possibility to execute a different investigative measure concerns the protection of the individual's fundamental rights. As such, a purely efficiency-based approach cannot be applied here. Since this possibility introduces a second check for the proportionality and necessity of the investigative measure,[47] communication between the authorities should – in theory – concern these requirements and the capacity of the investigative measures in question to reach the objective of the EIO.

An interesting question regarding these rules is what their purpose is. Do they intend to enhance the rate of executed EIOs? An increased extent of direct communication is bound to hamper the execution of the EIOs. On the one hand, there are cases where the aim of direct communication is obviously to provide a possibility to the issuing Member State to secure the execution of the original investigative measure requested in the EIO. On the other hand, the second check of proportionality installed at the executing Member State inevitably draws out the process of executing the EIO if the latter Member State decides to avail itself of this possibility. Consequently, I am inclined to believe that the

[46] Such an argument is provided in Recital (10) of Directive 2014/41/EU cit. which explains the option to have recourse to another investigative measure in a situation where the procedural standard to execute an investigative measure is that the suspicion against a person reaches a certain level.

[47] S Allegrezza, 'Collecting Criminal Evidence Across the European Union' cit. 64.

greater extent of communication allowed in the directive could serve a greater purpose in the field, which is enhancing mutual trust between the Member States and authorities.

Mutual trust is the facilitator of the principle of mutual recognition in the field of judicial cooperation in criminal matters.[48] It is said to be the normative glue that enables the quasi-automatic process of cooperation based on the formal assessment of judicial decisions subject to mutual recognition.[49] It is very often relied on by the ECJ when the functioning of mutual recognition regimes comes into question.[50]

Since the principle of mutual trust is fundamental to the functioning of the current system of judicial cooperation, the EU aims to implement trust-building policies that foster mutual trust between Member States against those circumstances that may hamper mutual trust, such as frequent violations of the ECHR and the differences between the legal systems of the Member States.[51] Such trust-building policies include criminal law harmonisation, the operation of EU agencies in the field, and the joint training of law enforcement and criminal justice personnel.[52] In addition, judicial dialogue is also a crucial trust-building factor in the EU that occurs between national judicial authorities (mostly courts) and the ECJ via the preliminary ruling procedure.[53]

I argue that the directive introduced a mechanism to intensify communication between the issuing and the executing authorities as a tool for trust-building. The individual rules above seem to serve the protection of fundamental rights of persons subject to the EIO, which is essential for Member States' (mutual) trust that they respect fundamental rights when applying EU law.[54] In addition, by facilitating communication between the authorities in the process of evidentiary cooperation during the execution of an EIO, the

[48] A Willems, *The Principle of Mutual Trust in EU Criminal Law* cit. 2; V Mitsilegas, 'Mutual Recognition, Mutual Trust, and Fundamental Rights after Lisbon' cit. 150.

[49] M Schwarz, 'Let's Talk about Trust, baby! Theorizing trust and Mutual Recognition in the EU's Area of Freedom, Security and Justice' (2018) ELJ 125.

[50] As well described by Sicurella, trust is an essential part of the European integration. Mutual trust is a belief that the Member States properly apply EU law and they work to achieve the common goals of the EU. The ECJ also supplemented this concept in its 2/13 Opinion on the EU's accession to the ECHR, where it extended mutual trust to the protection of fundamental rights; see R Sicurella, 'Fostering a European Criminal Law Culture: In Trust we Trust' (2018) New Journal of European Criminal Law 309-310; Á Mohay, 'Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR – Case note' (2015) Pécs Journal of International and European Law 31.

[51] A Willems, *The Principle of Mutual Trust in EU Criminal Law* cit. 4; V Mitsilegas, 'Mutual Recognition, Mutual Trust, and Fundamental Rights after Lisbon' cit. 150.

[52] For a detailed analysis see A Willems, *The Principle of Mutual Trust in EU Criminal Law* cit. 129-156.

[53] Arguably, Member States' trust in each other's legal system will increase if judicial authorities participating in the process of criminal cooperation are entitled to scrutinise the extent to which fundamental rights are protected in the other Member States. This phenomenon is referred to as a dialogical model of cooperation by Mitsilegas; see V Mitsilegas, 'Trust' cit. 70.

[54] E Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust' (2018) CMLRev 496.

directive allows Member States to double-check the viability of the EIO in exceptional circumstances. Should the executing authority suspect that the investigative measure is not necessary or proportionate to the aim of the EIO, or a less intrusive investigative measure could achieve the same result, it can consult the issuing authority about this concern. I believe that art. 6(1) of the directive realises the goal of institutionalised distrust set by scholars in a manner that also fits the intention of the ECJ to allow the questioning of mutual trust only in exceptional cases, as the mechanism set by the directive is only applicable in obvious cases of violation of the principle of proportionality or necessity or the double equivalency clause. Ultimately, Member States can have greater trust in each other's legal systems if they can make direct inquiries to each other in such cases.

IV.1. Regulating greater communication between issuing and executing authorities as a form of institutionalised distrust

As already mentioned above, there are very limited occasions when the issuing and the executing authorities can request additional information in connection with a judicial decision subject to the principle of mutual recognition. These almost exclusively include cases when the judicial decision may be subject to refusal. In such cases, the executing authority is obliged to request clarification from the issuing authority to avoid the refusal of the execution. This serves the speedy procedure of recognising and executing judicial decisions.

The possibility for additional communication was extended in two cases in the EIO directive. As mentioned above, one possibility for further communication presents itself when the executing authority either suspects that the EIO does not meet the requirements of necessity or proportionality, or that it could not be issued in a similar domestic case in the issuing or executing Member State. The other possibility for further communication comes with the corrective mechanism. As the latter is not suitable for implementation in other tools of judicial cooperation, I will only analyse the viability of utilizing the former in other cooperation systems.

First and foremost, it should be noted that art. 6 of the EIO directive is not entirely new in terms of the standard regulatory technique for giving effect to the principle of mutual recognition. It lays down the criteria that the judicial decision needs to meet for it to be executable. These criteria are laid down in other cooperation systems as well (*i.e.*, the EAW shall be executed if it is issued following the provisions laid down in its framework decision; a decision, imposing a financial penalty shall be executed if it was transmitted following the rules laid down in the framework decision).[55] The direct consequence of these rules is that a judicial decision cannot be executed if it does not meet the requirements laid down in its secondary source of EU law. For example, the EAW is not executable if it is issued due to a criminal offence that is not punishable with a maximum amount of at least twelve months

[55] Art. 1(2) of Framework Decision 2002/584/JHA cit.; art. 6 of Framework Decision 2005/214/JHA cit.

of prison sentence, and the decision imposing a financial penalty is not executable if the unified form provided in its framework decision is not used.

However, art. 6 of the EIO directive goes further in enabling the executing authority to clarify whether the judicial decision meets those criteria for execution. Such an option for additional communication between the issuing and the executing authorities could be easily added to any other tool of judicial cooperation. One possible method for implementing this rule could be inspired by Council Framework Decision 2009/299/JHA which addressed the procedural rights of persons in connection with decisions rendered in their absence from the trial.[56] Based on this model, every mutual recognition regime could be supplemented with the possibility for executing authorities to inquire about the fulfilment of the issuing-criteria for the judicial decision that are laid down in their secondary sources of EU law.

This addition to the system of judicial cooperation based on the principle of mutual recognition could be a step from blind trust to earned trust envisioned by Valsamis Mitsilegas,[57] since judicial authorities would be able to communicate their concerns about the judicial decision at issue to their counterparts in the issuing Member State.

V. The fundamental rights-based refusal ground and the question of its applicability

According to art. 11(1)(f) of the directive, the executing Member State may refuse to execute the EIO if it would result in the violation of its obligations under art. 6 TEU and the Charter (of Fundamental Rights). Art. 6 TEU lays down the fundamental rights framework to which the EU and its Member States must adhere. The Charter defines the content of fundamental rights. Consequently, the executing authority is entitled to reject the EIO if its execution would violate fundamental rights as defined in the above sources (hence referred to as fundamental rights-based refusal ground). Its introduction is a notable deviation from the standard regulatory technique for the principle of mutual recognition in the process of criminal cooperation between Member States, as preceding its adoption, it was never directly set out in the secondary sources. Nonetheless, the protection of fundamental rights has always been part of mutual recognition regimes. Each of them sets out that its application cannot modify the obligation to respect fundamental rights and fundamental legal principles of EU law.[58] Scholars and even the European Commission perceived this as a *de*

[56] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

[57] V Mitsilegas, 'Trust' cit. 70.

[58] See, for example, the Framework Decision 2002/584/JHA cit. art. 1(3); Framework Decision 2008/909/JHA cit. art. 3(4); Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties art. 3; Framework Decision 2005/214/JHA cit. art. 3.

facto refusal ground for the protection of fundamental rights.[59] However, this assumption was not confirmed until the *Aranyosi and Caldararu* joined cases.[60] Nevertheless, the EIO directly introduced this refusal ground on the advice of the Fundamental Rights Agency of the EU – a measure that might have predicted the greater protection of fundamental rights in the framework of judicial cooperation in the EU that started to unfold in the line of cases before the ECJ beginning with the *Aranyosi and Caldararu* joined cases.[61]

Even though implementing such a measure could seem to be a significant development in judicial cooperation, the fundamental rights-based refusal ground does not seem to function at all. In its casework, published in 2020, Eurojust stated that it did not encounter any cases where this refusal ground was called up. Later even the ECJ questioned the applicability of the refusal ground in the *Gavanozov II* case for reasons elaborated below.[62] In light of these circumstances, Inés Armada's comment on the applicability of this refusal ground is worth bringing up.

She points out that the wording of the refusal ground does not constrict its scope to cases when the execution of the EIO would violate fundamental rights in the executing Member State. As such, the executing authority is – in theory – entitled to refuse the execution even in cases when the violation of the fundamental rights would occur at a later stage in the criminal procedure pending in the issuing Member State. However, she did note that with such a broad scope, the executing authority is given too much discretion, which it cannot effectively use since it cannot foresee possible violations in the criminal procedure that will take place in the issuing Member State. She argues that this wide margin of discretion is too much of a burden on the executing authority since it would need to undertake a "prophetic" assessment of risks.[63]

She also brings up whether the executing authority is obliged to act *ex officio* or only on the request of the affected person and if the former applies, what circumstances may suggest to the executing authority that the refusal ground should be applied.[64] Finally, she also brings up the standard of protection that the executing authority must adhere to when assessing the EIO and its possible effects on fundamental rights. She also pointed out that the refusal ground only refers to the Charter of Fundamental Rights,

[59] V Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice' cit. 326; even some Member States' legislation provided for the refusal of the EAW if it would violate the fundamental rights of the surrendered person; see A Sanger, 'Force of Circumstance: The European Arrest Warrant and Human Rights' (2010) Democracy and Security 39.

[60] Joined cases C-404/15 and C-659/15 PPU *Aranyosi and Caldararu* ECLI:EU:C:2016:198.

[61] FRA, *Opinion of the European Union Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order* fra.europa.eu, 10-11.

[62] Case C-852/19 *Gavanozov II* ECLI:EU:C:2021:902.

[63] I Armada, 'The European Investigation Order and the Lack of European Standards for Gathering Evidence' cit. 25-26.

[64] *Ibid*. 26-27.

which demonstrates the will of the EU legislator to impose EU standards over national standards (as seen in the *Melloni* case).[65]

Summing up Armada's comments, the triggering criteria for the application of the refusal ground remain unclear. The grammatical analysis of the refusal ground provides two factors, that must be assessed when considering its use. "1. Without prejudice to Article 1(4), recognition or execution of an EIO may be refused in the executing State where: (f) there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter".[66]

First, it lays down the standard of proof needed to initiate the refusal ground. It is applicable when there are substantial grounds to believe that the violation of a fundamental right would occur. Secondly, it sets out the fundamental rights framework the executing authority must adhere to, namely that provided in art. 6 TEU and the Charter of Fundamental Rights.

A mere grammatical interpretation of the refusal ground could indicate a constricting approach, where it could be called up if the execution would result in the violation of fundamental rights in the executing Member State. To properly understand this statement, we must pose a question: can a Member State be responsible for the violation of fundamental rights in another state? In case of an EIO, the sole connecting factor between the executing and the issuing Member States is the execution of the requested investigative measure. The executing Member State does not influence the criminal proceedings pending in the issuing Member State in any way. In such circumstances, no connecting factor could establish the executing Member State's liability for the violation of fundamental rights in the criminal procedure in the issuing Member State.[67]

This interpretation certainly goes against that provided by Armada regarding the liability of the executing Member State. However, it would solve the problem of overburdening the executing authority with the obligation to assess possible violations of fundamental rights in a criminal procedure pending in another Member State. On the one hand, such an interpretation could provide an answer regarding the application of the refusal ground, which would be most in line with the principle of mutual recognition. In this case, the executing authority would not assess whether fundamental rights are respected in the issuing Member State. On the other hand, it would not provide efficient protection for fundamental rights as Member States execute the investigative measure requested in the EIO as any other investigative measure ordered in a domestic judicial decision. Hence, the execution of the EIO would be compatible with fundamental rights

[65] *Ibid*. 27-29.

[66] Directive 2014/41/EU cit. art. 11(1)(f).

[67] For these connecting factors, see the European Court of Human Rights, 'Guide on Article 1 of the European Convention on Human Rights' (2022) www.echr.coe.int.

in virtually any case if a Member State does not wish to expressly conclude that its procedural system violates fundamental rights in the criminal procedure.

Thus, a logical and systematic interpretation, specifically considering recital 19 of the directive,[68] would suggest that the executing authority may reject the execution of the EIO even if it would result in the violation of fundamental rights at a later stage of the criminal proceedings pending in the issuing Member State. However, when applying this approach, the question of how such a violation could be predicted remains, since the notion of substantial grounds to believe – the triggering factor for the refusal ground – is not defined in any EU source of law, be it primary or secondary.

In my opinion, one should turn to the *Aranyosi and Caldararu* joined cases when looking for the definition of the notion of substantial grounds to believe, as the joined cases and the following line of cases before the ECJ concerned the refusal to recognise and execute the EAW, another judicial tool based on the principle of mutual recognition, in case its execution would violate fundamental rights of persons subject to the order. This makes the *Aranyosi and Caldararu* joined cases sufficiently closely related to the fundamental rights-based refusal ground regulated in the EIO directive. The *Aranyosi and Caldararu* joined cases confirmed that the execution of the EAW may be suspended if it would amount to the violation of art. 4 of the Charter, that is, the surrendered person's right not to be subjected to torture and inhuman or degrading treatment or punishment. In later cases, such as *LM* and *Dorobantu*, the ECJ confirmed that the execution of the EAW may be suspended in cases when other fundamental rights are compromised.[69]

The *Aranyosi and Caldararu* joined cases concerned two EAWs issued by Hungary and Romania. The *Hanseatisches Oberlandesgericht in Bremen* (Higher Regional Court of Bremen) decided to refer the cases before the ECJ for a preliminary ruling procedure since the persons sought by the issuing authorities challenged the EAWs on the basis that their execution would violate their right not to be submitted to inhuman or degrading treatment due to prison conditions in Hungary and Romania.[70] Even though the EAW Framework Decision does not have a refusal ground for cases of fundamental rights violations, the ECJ ruled that whenever there seems to be a real risk of inhuman or degrading treat-

[68] Directive 2014/41/EU cit. recital (19): "The creation of an area of freedom, security, and justice within the Union is based on mutual confidence and a presumption of compliance by the other Member States with Union law and, in particular, with fundamental rights. However, that presumption is rebuttable. Consequently, if there are substantial grounds for believing that the execution of an investigative measure indicated in the EIO would result in a breach of a fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights recognised in the Charter, the execution of the EIO should be refused".

[69] P Bárd and W Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust? The CJEU in Minister of Justice and Equality v. LM' (2018) New Journal of European Criminal Law 360.

[70] H Sorensen, 'Mutual Trust – Blind Trust or General Trust with Exceptions? The CJEU Hears Key Cases on the European Arrest Warrant' (2016) Pécs Journal of International and European Law 56.

ment, the executing authority must make a further assessment of whether there are substantial grounds to believe that the concerned individual will be exposed to that risk.[71] Academics described this process as the *Aranyosi test*, the purpose of which is to determine whether the surrender would result in the violation of the surrendered person's right not to be submitted to inhuman or degrading treatment.[72]

It consists of two phases: the first is concluding that there is a real risk of violating the fundamental right in question,[73] which is called an *in abstracto* threat. If an *in abstracto* threat can be identified, the executing authority – in the second phase of the *Aranyosi test* – is called to determine whether that risk can manifest in the individual case under its specific circumstances. Academics call that an *in concreto* threat, and the ECJ refers to it as "substantial grounds to believe".[74]

Consequently, if we derive the meaning of substantial grounds in the EIO directive from the EJC's ruling in the *Aranyosi and Caldararu* joined cases, it means that the execution of the EIO exposes the concerned person to the evident possibility that their fundamental rights will be violated. However, this answer in and of itself is not enough to map out the applicability of the refusal ground in the EIO directive since the method of scrutiny is equally important.

The question of how to identify that the person concerned by the EIO would be exposed to fundamental rights violations brings up the problem referred to by Armada, namely that the executing authority would need to undertake a prophetic assessment of the facts of the case to identify this probability. To mitigate this problem, once again, we can turn to the ECJ's ruling in the *Aranyosi and Caldararu* joined cases since it sets the method of scrutiny. The ECJ established that the executing authority may only rely on objective, reliable, specific, and properly updated information to determine whether there is a real risk of inhuman or degrading treatment. Sources of such information may be judgements of international or national courts and decisions, reports, and other documents produced by bodies of the Council of Europe or under the aegis of the UN.[75]

[71] *Aranyosi and Caldararu* cit. paras 91-92.

[72] A Martufi and D Gigengack, 'Exploring Mutual Trust through the Lens of an Executing Judicial Authority: The Practice of the Court of Amsterdam in EAW Proceedings' (2020) New Journal of European Criminal Law 286; P Bárd and W Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust?' cit. 361.

[73] *Aranyosi and Caldararu* cit. para. 88; there is an abstract threat of a fundamental right being infringed if it has not yet occurred but is likely to occur. In its assessment, the executing authority may only use objective, reliable sources that are genuinely relevant and up-to-date in the given situation; see A Martufi and D Gigengack, 'Exploring Mutual Trust through the Lens of an Executing Judicial Authority' cit. 290.

[74] *Aranyosi and Caldararu* cit. para. 92; A Martufi and D Gigengack, 'Exploring Mutual Trust through the Lens of an Executing Judicial Authority' cit. 284.

[75] *Aranyosi and Caldararu* cit. para. 89; thus, the role of monitoring NGOs becomes more important; see E Aizpurua and M Rogan, 'Understanding New Actors in European Arrest Warrant Cases concerning Detention Conditions: The Role, Powers and Functions of Prison Inspection and Monitoring Bodies' (2020) New Journal of European Criminal Law 205.

Consequently, two crucial questions in connection with the application of the fundamental rights-based refusal ground can be answered based on the judgement of the ECJ in the *Aranyosi and Caldararu* joined cases: the triggering factor for the refusal ground and the source of information which the application of the refusal ground can be based on. However, one question remains: is the executing authority obliged to scrutinise the protection of fundamental rights *ex officio*, or only on the request of the concerned person? The ECJ never mentioned the former, *ex officio* obligation in the *Aranyosi and Caldararu* joined cases or others that continued this line of cases. Thus, I am inclined to believe that the executing authority is not obliged to practice such control over the protection of fundamental rights in connection with the execution of the EIO. Instead, this scrutiny should take place only at the request of the concerned person and only when the argument is well-founded. This could unify the case law regarding the refusal ground in every Member State thus preventing an unbalanced status of the concerned person in different Member States.

This interpretation elaborated above is in line with the judgement of the ECJ delivered in the *Gavanozov II* case, where the lack of available legal remedies against certain investigative measures was brought into question.[76] In that case, the referring Bulgarian judge asked the ECJ whether legislation that does not allow for challenging an EIO requesting the search of residential and business premises, the seizure of certain items, and the hearing of a witness is compatible with arts 47 and 7 of the Charter read in conjunction with arts 13 and 8 of the ECHR.[77] The ECJ found that such legislation is indeed in violation of the right to an effective legal remedy. Hence it violates the Charter and the ECHR.[78] However, it remained a question how to remedy this situation. Both AG Bobek, in his advisory opinion, and the ECJ argued that in such cases, the fundamental rights-based refusal ground could not be applied since that would place too much burden on the executing authority.[79] In addition, the Court noted that when the EIO is *a fortiori* in violation of fundamental rights, the refusal ground cannot be applied since its application would become automatic in such cases. That would not be compatible with the principles of mutual trust and sincere cooperation, not to mention that the refusal ground is devised to be applied on a case-by-case and exceptional basis which could not be guaranteed.[80]

Consequently, it is safe to assume that the executing authority should only examine the protection of fundamental rights in the case of an EIO if the concerned person requests it, and that request is based on precise, up to date and reliable information proving that there is a real risk of the violation of the concerned person's fundamental rights if the EIO is executed. In such cases, the executing authority should consult with the issuing authority

[76] *Gavanozov II* cit.
[77] *Ibid*. para. 23(1).
[78] *Ibid*. para. 34.
[79] Case C-852/19 *Gavanozov II* ECLI:EU:C:2021:346, opinion of AG Bobek, paras 89-91.
[80] *Gavanozov II* cit. paras 59-60.

to exclude the possibility of fundamental rights violations. If that cannot be guaranteed, then the execution of the EIO should be rejected or postponed at the very least.

V.1. Making the fundamental rights-based refusal ground the norm instead of it being the exception

With the introduction of the fundamental rights-based refusal ground, the intention of the EU legislature certainly was to better protect the fundamental rights of persons concerned by the EIO, however, its efficiency can be questioned due to the highly uncertain terms of its application. Even though there seems to be a working mechanism that can be analogous to the application of the refusal ground, one problem remains specifically in connection with the EIO. Investigative measures are usually executed without the prior knowledge of the concerned person. Thus, there is no intermediary stage where the person could object to the execution of the EIO, unlike the EAW where the person sought is interviewed by the court before the execution of the warrant.

Since the objective of the EU legislature was to strengthen the status of the individual in the criminal procedure, the introduction of such an intermediary procedural stage should be considered where possible. Accordingly, the executing authorities should provide the possibility for the concerned persons to object to the transfer of evidence gathered through the EIO to the issuing Member State. This method would maintain the original exceptional characteristics of the refusal ground. However, it must be noted that this intermediary stage for challenging the transfer of evidence cannot take place before the execution of the investigative measure as it would jeopardise the aims of the investigation if the concerned persons were notified in advance of the investigative acts.

Since every cooperation system building on the principle of mutual recognition is defined by the same set of rules, the implementation of the refusal ground should not pose any real problems. The implementation could be achieved in the very same manner as the implementation of rules regarding the greater extent of communication between the competent authorities.

However, it is important to better circumscribe the criteria for the application of the refusal ground as currently practitioners may only rely on the case law of the ECJ. It would be beneficial to clarify the application criteria for two reasons. Firstly, it would create a framework that is universally applied throughout the EU. Secondly, the universally applicable framework would eliminate the differences between the case law which could vary in each Member State. Such a reformulation of the application criteria of the refusal ground would increase legal certainty throughout the EU. In doing so, I propose to stick to the interpretation provided above.

To summarise, the refusal ground should be applicable in cases when the violation of fundamental rights of a person subject to a judicial decision based on the principle of mutual recognition is a real possibility due to the circumstances of the individual case pending in the issuing Member State. In such cases, the execution of the respective tool

of mutual recognition should be postponed until the issuing Member State provides sufficient guarantees that the fundamental rights of the concerned person are protected. This method would provide sufficient discretion for the judicial authorities taking part in the process of criminal cooperation without resulting in different case laws directed at the application of the refusal ground. Apart from that, the institutionalised *Aranyosi test* should be applicable based on the concerned person's well-founded initiative to avoid the refusal ground being shifted from an exceptional measure to a general practice.

VI. Conclusion

Although the EIO shows great similarities to other tools of judicial cooperation in criminal matters based on the principle of mutual recognition, the aforesaid showed that the directive introduced a framework for evidentiary cooperation which deviates from the standard regulatory technique for giving effect to the principle of mutual recognition in the policy of judicial cooperation in criminal matters on several points. Most of the newly introduced rules discussed above serve to strengthen the status of the individual in the Area of Freedom, Security, and Justice, where the enforcement capacities of the Member States are extended beyond national borders.

Even though having recourse to a different investigative measure serves the efficiency of cooperation in two instances, it aims to protect the fundamental rights of the person concerned by the EIO in its third case. As already mentioned, that can be perceived as a *de facto* refusal ground for the protection of fundamental rights as the issuing Member State does not have the power to uphold the original investigative measure if the executing Member State decides to avail itself of the possibility to have recourse to another investigative measure. The great advantage of the corrective mechanism is that it enables the executing authority to provide greater protection for the concerned person in the procedure while retaining the efficiency of cooperation. To apply this part of the corrective mechanism, the executing authority would have to consider both the intrusiveness of the investigative measure originally ordered in the EIO and the capability of the alternative investigative measure to reach the underlying objective in the criminal procedure which made it necessary to issue an EIO in the first place.

In addition, the EIO Directive provides a greater extent of communication, which can be seen as a crucial trust-building factor between the Member States. An interpretation focused on the efficiency of the legal tool is excluded here since the permission to engage in further communication between the authorities could very well postpone the execution of the EIO.

The fundamental rights-based refusal ground was one of a kind at the time of the directive's adoption. At that time, the ECJ still maintained a strict efficiency-based approach toward criminal cooperation between Member States. Notably, we had to wait two more years after the adoption of the EIO directive for the ECJ to confirm that the execution of a legal tool based on the principle of mutual recognition in the policy of judicial cooperation

in criminal matters – namely the EAW – can indeed be postponed if fundamental rights would be compromised upon its execution. Hence, in a way, the EIO directive foretold the future of judicial cooperation in criminal matters by expressly setting out a refusal ground for the protection of fundamental rights. Paradoxically, this refusal ground has never been applied in case of an EIO. However, arguably, it could be applied under a process similar to that outlined in the *Aranyosi* and *Caldararu* joined cases.

In conclusion, the adoption of the EIO directive had a predominantly positive impact on the status of the individual in the EU area of free movement, which is only slightly shadowed by well-founded critiques directed at the current framework, such as the insufficient representation of defence rights and the deficient regime of legal remedies.[81] This inspired me to review the possibility of implementing the above regulations in other cooperation systems as well – an idea that was brought up before this *Article*, because the fundamental rights-based refusal ground has already been integrated into Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders.[82]

However, the EU legislator should not stop at that point. It could be possible to implement and further enhance the applicability of the analysed rules in other mutual recognition regimes as well, especially those which institutionalise distrust. Enabling the executing authorities to double-check the criteria for issuing the judicial decision in the form of an inquiry could be implemented in any mutual recognition regime as they are based on the same logic. Every judicial decision that is subject to mutual recognition may be recognised and executed in case it is issued in line with the rules laid down in its mutual recognition regime. The inquiry could be provided for cases when the executing authority suspects that the criteria for issuing the judicial decision are not met. For example, this possibility could be included in the EAW framework decision for cases when the executing authority doubts that the underlying offense is punishable by a custodial sentence for a maximum period of at least twelve months in the issuing Member State.[83]

In addition, the introduction of the fundamental rights-based refusal ground could clarify the currently undefined practice of suspending the process of criminal cooperation when it directly amounts to the violation of the fundamental rights of the concerned persons.[84] Not only would this strengthen the status of the individual in the Area of Freedom,

[81] J Blackstock, 'The European Investigation Order' (2010) New Journal of European Criminal Law; R Garcimartín Montenero, 'The European Investigation Order and the Respect for Fundamental Rights in Criminal Investigations' (2017) eucrim eucrim.eu 48; R Belfiore, 'The European Investigation Order in Criminal Matters' cit. 320-321; F Zimmermann, S Glaser and A Motz, 'Mutual Recognition and its Implications for the Gathering of Evidence in Criminal Proceedings: A Critical Analysis of the Initiative for a European Investigation Order' (2011) EuCLR.

[82] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders arts 8(1)(f), 19(1)(h).

[83] Framework Decision 2002/584/JHA cit. art. 2(1).

[84] Literature shows that Member States sometimes implement optional refusal grounds as mandatory, and the judgements of the ECJ show that occasionally Member States create refusal grounds that are

Security and Justice and mitigate the harmful effects stemming from the differences between the criminal justice systems of the Member States, but it would also increase mutual trust as it would provide a form of scrutiny that may be applied only in exceptional cases where there is a well-founded risk of the violation of fundamental rights. This would decrease the responsibility of the executing authorities while enhance the remedial rights of the persons subject to the mutual recognition regimes, hence developing defence rights as well.

not based on the Framework Decision; see V Glerum and H Kijlstra, 'EAW: Next Steps, Will Pandora's Box Be Opened?' (2023) Review of European and Comparative Law 127; case C-158/21 *Puig Gordi and Others* ECLI:EU:C:2023:57 paras 68-74.

ARTICLES

REFORM OF EPIDEMIC SURVEILLANCE EXPOSING "STANDARDISING" DECISIONS AND THEIR REPLACEMENTS BY REGULATIONS

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ABSTRACT: The reform of epidemic surveillance in the European Union as a reaction to the Covid-19 pandemic attracts attention to one sporadically discussed phenomenon. Following the usual meaning of this term in legal settings, many decisions address individual cases. Nevertheless, a new category of decisions establishing rules has emerged in the past decades, *i.e.* "standardising" ("normative", "norm-setting", or "general") decisions. These decisions have addressed the cooperation between the EU and national authorities, funding programmes and assistance to foreign countries. The European Parliament and the Council approved them. Theoretical reflections on these decisions are rare, but their pitfalls are identifiable. Namely, their possible effects on individuals are limited. The definition of unaddressed decisions provided by the Lisbon Treaty did not clarify the situation. Therefore, the recent tendency to replace these decisions with regulations deserves attention.

KEYWORDS: European Union – secondary law – decision – regulation – law-making – official languages.

I. INTRODUCTION

The following *Article* extends the research on replacing directives with regulations within the framework of the EU law.[1] Several regulations also replace decisions. Unlike

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[1] F Křepelka, 'Transformations of Directives into Regulations: Towards a More Uniform Administrative Law?' (2021) EPL 781.

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directives, this instrument of secondary law has received only limited attention. Reform of the epidemic surveillance in the European Union provides an incentive to examine *decisions-legislative acts* adopted by the European Parliament and the Council, or by the Council, providing for cooperation, spending programmes or other general standards.

The conceptualisation of the *Article* reflects this intent. Replacing decisions addressing cross-border threats to health with a regulation (section II) results in re-examining the existing knowledge about decisions (section III), which reveals exciting language aspects (section IV). The identified complexity of decisions (section V) deserves a comparative perspective (section VI), resulting in distinguishing decisions stipulating rules and standards from other decisions (section VII). The decisions addressing all Member States or without addressees require critical scrutiny regarding their legal effects (section VIII). Their transformations into regulations (section IX), their evaluation (section X) and the perspective and limits of this trend (section XI) resulted in considerations about the possible reform of founding treaties concerning secondary law instruments (section XII).

In this way, this *Article* contributes to *Rechtsdogmatik*, *i.e*. the doctrine of "standardising" decisions as a subtype of the third secondary law instrument. This research is becoming retrospective. The European Union increasingly resorts to regulations to address agendas previously addressed by decisions. Therefore, this *Rechtspolitik* also deserves our evaluation.

Extended citations of discussed acts emerge in footnotes. Namely, mentioning their pages in the Official Journal indicates the tendency towards increasingly detailed frameworks.

II. Reform of epidemic surveillance

Regulation 2022/2371 on serious cross-border threats to health (SCBTHR)[2] has recently replaced the homonymous 2013 Decision (SCBTHD).[3]

Strengthening the Member States' cooperation regarding epidemics and other similar threats, this regulation is the keystone of the European Health Union as a long-term reaction to the Covid-19 pandemic. It is noteworthy that its components are regulations.[4] Demands for improving cooperation and coordination among public health authorities resulting in an adequate assessment of infections was an expectable reaction to the crisis.

[2] Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision 1082/2013/EU. SCBTHR has applied (art. 35) since 26 December 2022.

[3] Decision 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health, repealing Decision 2119/98/EC.

[4] The already adopted Regulation 2022/123 of the European Parliament and of the Council of 25 January 2022 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices, and Regulation of the European Parliament and of the Council of 23 November 2022 amending Regulation 851/2004 establishing a European Centre for disease prevention and control; and proposal for a Regulation COM/2022/197 final of the European Parliament and of the Council of 3 May 2022 on the European Health Data Space.

Similar views also prevailed in the World Health Organization (WHO). The Member States have begun negotiating a treaty on pandemic preparedness,[5] intended to replace the existing International Health Regulations (IHR).[6] Contrary to the past, the European Union participates in these negotiations.[7]

Unsurprisingly, the interest in this issue diminished with the retreat of the Covid-19 in 2022. The Russian invasion of Ukraine and skyrocketing energy prices started new crises. Despite this ensuing deprioritisation, the EU lawmakers completed the task. The momentum in the twenty-four months of deliberations on the initial proposal[8] of this regulation was the compromise the European Parliament, the Council, and the Commission achieved in June 2022,[9] while the final vote in the Council was quasi-unanimous.[10]

In the first place, SCBTHR specifies the planning of preparedness for public health,[11] coordinates cooperation on a global scale, specifies epidemic surveillance and establishes a warning and response system.[12] The Commission can proclaim public health emergency at the EU level,[13] with repercussions for controlling medical stocks.

SCBTHR established a health security committee composed of national representatives and an advisory committee of distinguished experts.[14] Concurrently, the Commission has institutionalised its increased political attention to the issue with the Health Emergency Preparedness and Response Authority (HERA) as a specific directorate-general.[15]

[5] World Health Organization: the World Health Assembly kick-started the negotiation on an instrument on its session 29.11.-1. 12. 2021, establishing the Intergovernmental Negotiating Body to draft and negotiate a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response, for developments see dedicated web pages inb.who.int.

[6] *Ibid*. The World Health Assembly adopted existing International Sanitary Regulations in 1951, renamed to International Health Regulations in 1969 and revised last in 2005.

[7] Decision 2022/451 of the Council of 3 March 2022 authorising the opening of negotiations on behalf of the European Union for an international agreement on pandemic prevention, preparedness and response, as well as complementary amendments to the IHR (2005).

[8] Proposal for a Regulation COM(2020) 727 final of the European Parliament and the Council of 11 November 2020 on serious cross-border threats to health and repealing Decision 1082/2013/EU, for deliberations, see "Procedure" in EUR-Lex.

[9] See Document ST 10925 2022 - Letter to the Chair of the European Parliament Committee on the Environment, Public Health and Food Safety, reflecting the compromise in COREPER achieved 29 June 2022, available at eur-lex.europa.eu.

[10] Bulgaria abstained in the Council of EU 3903rd meeting on 24 October 2022. There is no information about its reasons.

[11] Arts 5-11 SCBTHR.

[12] Arts 13-14 SCBTHR.

[13] Art. 23 SCBTHR.

[14] Arts 4 and 24 SCBTHR.

[15] Commission Decision of 16 September 2021 establishing the Health Emergency Preparedness and Response Authority 2021/C 393 I/02, C/2021/6712.

SCBTHR is twice as long as SCBTHD because its detailed provisions introduce more elaborate plans and procedures. Nevertheless, it is not a revolutionary change. Though the official correlation table exposes differences, it confirms continuity.[16]

The choice of instrument has become a part of the explanatory memoranda for the proposals. Regarding SCBTHR, it says: "The proposal takes the form of a new Regulation. This is considered to be the most suitable instrument as a key element of the proposal is to establish procedures and structures for cooperation on joint, EU-level work focussing on preparedness for and response to serious cross-border threats to health. The measures do not require the implementation of national measures and can be directly applicable".[17]

Explanatory memoranda accompanying proposals of regulations replacing directives claim that divergent transpositions by the Member States cause inefficiency and complexity. Therefore, a uniform framework should replace them.[18] As far as decisions are concerned, the explanation could be better. The explanatory memorandum for SCBTHR contains no critical scrutiny of this instrument.

The explanatory memorandum for SCBTHD lacked the "choice of the instrument". The Commission added it in the accompanying "Impact Assessment", but it solely mentioned[19] the then-existing instrument, the 1998 Decision.[20] Unfortunately, the preparatory documents accompanying the proposal of this decision are unavailable. We thus cannot learn about arguments for this instrument.

The developing competence provisions could explain the instrument change because several specify the instrument.[21] Nevertheless, SCBTHD, adopted in 2011-2013, relied on the same competence provision 168(5) TFEU. It is not a new competence that enables this instrument. The first decision already relied on the then art. 129 TEC (renumbered art. 152

[16] Annex II SCBTHR.

[17] Proposal COM/2020/727 final for a Regulation of the European Parliament and of the Council of 11 November 2020 on serious cross-border threats to health and repealing Decision No 1082/2013/EU Choice of the instrument (pages not indicated).

[18] F Křepelka, 'Transformations of Directives into Regulations' cit. 793.

[19] See Commission Staff Working Paper SEC(2011) 1519 final, 'Impact Assessment Accompanying the Proposal: Serious Cross-Border Threats to Health' (8 December 2011) 28 (principle of proportionality and choice of instrument).

[20] Decision 2119/98/EC of the European Parliament and of the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community.

[21] For the discussion the role of competences and recent legislative trends in the EU, see A Engel, *The Choice of Legal Basis for Acts of the European Union* (Springer 2018), for a critical assessment of regulations instead of directives, see N Wunderlich, T Pickartz, 'Hat die Richtlinie ausgedient? Zur Wahl der Handlungsform nach Art. 296 Abs. 1(6) AEUV' (2014) Europarecht 659. T van den Brink, 'The Impact of EU Legislation on National Legal Systems: Towards a new Approach to EU – Member State Relations' (2017) CYELS 211; or F Rösch, *Zur Rechtsformenwahl des europäischen Gesetzgebers im Lichte des Verhältnismäßigkeitsgrundsatzes. Von der Richtlinie zur Verordnung. Exemplifiziert anhand des Lebensmittelrechts und des Pflanzenschutzmittelrechts* (Duncker & Humblot 2013).

by the Amsterdam Treaty) defining European Community/European Union's and Member States' roles in healthcare.[22]

This 1998 Decision was the first EC/EU standard addressing the issue. Nonetheless, the Member States had already cooperated according to the then-applicable International Health / Sanitary Regulations of the World Health Organization.

Both SCBTHD and SCBTHR result from ordinary legislative procedure. The European Parliament and the Council approved the 1998 Decision already in the co-decision procedure as its predecessor.

III. Limited attention to decisions

SCBTHD and SCBTHR show that two secondary law instruments may establish the cooperation of the Member States on an identical agenda. Nobody questions a regulation as the recent choice of instrument. The feasibility of a decision as the previous instrument is an issue. For this purpose, we refresh our knowledge about decisions as the third secondary law instrument.

The citation of art. 288(4) TFEU defining decisions is instrumental for this task: "[a] decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them". SCBTHD belongs to the latter definition, as EU lawmakers addressed it to the Member States. As the European Parliament and the Council adopted it in the ordinary legislative procedure, it was a "legislative act".[23]

Complex doctrines have developed to address the implementation of directives, their shortcomings, and their consideration in national law. Even German scholars writing extensive commentaries admit that *ausufernde Rechtsdogmatik*, *i.e.* an overcomplex doctrine, has emerged.[24] Regulations enjoy significantly less attention. Their direct effect on individuals makes them standard legislation.

Nonetheless, decisions as the third secondary law instrument have always been even behind regulations. Extensive commentaries on the founding treaties, such as the 2019 Oxford Commentary by Manuel Kellerbauer, Marcus Klammert and Jonathan Tomkin et

[22] See the recent formulation of art. 168(5) TFEU: "[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure [...], may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, [...], excluding any harmonisation of the laws and regulations of the Member States".

[23] Art. 289(4) TFEU.

[24] See C Callies and M Ruffert (eds), *EUV AEUV mit Europäischer Grundrechtecharta. Kommentar* (C. H. Beck 2016) 2467, also the criticism I Ward, *A Critical Introduction to European Law* (Cambridge University Press 2009, 3 edn) 60.

al.[25] and 2016 C. H. Beck by Christian Calliess and Matthias Ruffert,[26] dedicate only one page to them. Considering these commentaries summarising the existing knowledge of EC/EU decisions, the following pages mention their authors: Marcus Klammert, Paul-John Loewenthal[27] and Matthias Ruffert. Among textbooks, that of Rudolf Streinz, having two pages in this respect,[28] deserves attention.

Monographs and articles addressing EU decisions as the third secondary law instrument are rare. There is no treatise in English for the international readership. Three German monographs deserve attention, the first by Andrea Bockey in 1998,[29] the second by Matthias Vogt in 2005,[30] and the third by Jürgen Bast in 2006.[31] In addition, one should not omit the seminal article by Ulrich Stelkens in 2005.[32] The interest in decisions culminated two decades ago, *i.e*. before the Lisbon Treaty.

We will resort to these authors in the following sections. Let us start by reiterating common knowledge. Unsurprisingly, the post-Lisbon texts emphasise the recognition of unaddressed decisions by the Lisbon Treaty and their differentiation from the addressed ones as the previous version expected addressed decisions.[33] Klammert and Loewenthal refer to several judgments specifying the effects of this instrument, namely, *Grad* establishing the right of individuals to invoke decisions addressed to the Member State,[34] *Hansa Fleisch* reiterating the prescribed deadline in this regard,[35] and *Albako* enabling invocation towards their private addressees, *i.e*. horizontal effect.[36] In addition, Ruffert outlines the discussion of German scholars about the types of decisions and the evolution of this instrument. Mentioning *Grad*, Streinz critically examines both addressed and unaddressed decisions.

[25] M Klammert and J Tomkin (eds), *EU Treaties and the Charter of Fundamental Rights. A Commentary* (Oxford University Press 2019).

[26] C Callies and M Ruffert (eds), *EUV AEUV mit Europäischer Grundrechtecharta* cit. 2437-8.

[27] M Klammert, PJ Loewenthal, 'Art. 288 - Decision' in M Kellerbauer, M Klammert and J Tomkin (eds), *EU Treaties and the Charter of Fundamental Rights* cit. 1897; and M Ruffert, 'Art. 288 - Entscheidungen' in C Calliess, M Ruffert (eds), *EUV AEUV mit Europaischer Grundrechtecharta* cit. 2437.

[28] R Streinz, *Europarecht* (C. F. Müller 2016, 10th edn) 183-184.

[29] A Bockey, *Die Entscheidung der Europäischen Gemeinschaft* (Peter Lang 1998).

[30] M Vogt, *Die Entscheidung als Handlungsform der Europäischen Gemeischaftsrechts* (Mohr Siebeck 2005).

[31] J Bast, *Grundbegriffe der Handlungsformen der EU: entwickelt am Beschluss als praxisgenerierter Handlungsform des Unions- und Gemeinschaftsrechts* (Springer-Verlag 2006).

[32] U Stelkens, 'Die „Europäische Entscheidung" als Handlungsform des direkten Unionsrechtsvollzungs nach dem Vertrag über eine Verfassung für Europa' (2005) Zeitschrichft für Europarechtliche Studien 62.

[33] Unchanged art. 249(4) TEC and art. 188(4) TE(E)C: "A decision shall be binding in its entirety upon those to whom it is addressed".

[34] Case C-9-70 *F Grad v Finanzamt Traunstein* ECLI:EU:C:1970:78.

[35] Case C-156/91 *Hansa Fleisch v Landrat des Kreises Schleswig-Flensburg* ECLI:EU:C:1992:423.

[36] Case C-249/85 *Albako Margarinenfabrik v Bundesanstalt für landwirtschaftliche Marktordnung* ECLI:EU:C:1987:245.

IV. Linguistic dimension

German literature addressing EC/EU decisions indicates an interesting linguistic dimension of this instrument. With the Lisbon Treaty, its German version switched from *Entscheidung* to *Beschluss* as their equivalent. Similar changes emerged in Danish with *beslutning* to *afgørelse*, in Dutch with *beschikking* to *besluit*, and in Slovenian with *odločba* to *sklep*.

This terminological change was not a correction of an outright translation error, as several previous reforms of primary law kept using *Entscheidung*. The Lisbon Treaty changed the provision addressing decisions, introducing the distinction between unaddressed and addressed.[37] The four language versions changed the words in the way mentioned above.

Publishing the proposal in EUR-Lex[38] indicates that the EU translation service assisted in the negotiations of the Lisbon Treaty and the Treaty establishing a Constitution for Europe. However, the founding treaties are also an issue for the Member States as the "masters of treaties". Their ministries of foreign affairs, government offices or parliaments have their own translation and interpretation services or hire them.

Such asymmetric terminological change is unusual. Generally, countries agree on international treaties in their authentic versions. One may expect the concerned state(s) to engage primarily in clarifications in their version. Checking other versions could be necessary to avoid outright discrepancies. However, questioning nuances could be sensitive.

Such changes may reflect semantic shifts, but this case is different. Matthias Ruffert considers *Beschluss* as another instrument besides *Entscheidung*. His commentary does not provide examples, referring to Jürgen Bast identifying *Beschluss* as a homegrown phenomenon.[39] Nonetheless, Ulrich Stelkens found no explanation and thus considered this change a mistake.[40]

Yet, this terminological differentiation has emerged in the German version already before. The Maastricht Treaty labelled the instruments for cooperation in judicial and police matters as *Beschluss* and *Rahmenbeschluss*.[41] The decision in the catalogue of the (then) Treaty establishing a European (Economic) Community continued to be *Entscheidung*.

This similarity in Germanic languages (English *decision* is of Latin/Romance origin) in *Beschluss*, *besluit*, *beslutning*, plus the unchanged *beslut* in Swedish, is apparent. However,

[37] Point 235 of the Lisbon Treaty: art. 249 shall be amended as follows: *a)* the first paragraph shall be replaced by the following: "to exercise the Unions competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions"; *b)* the fourth paragraph shall be replaced by the following: "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them".

[38] Treaty of Lisbon [2007].

[39] M Ruffert, *EUV AEUV mit Europäischer Grundrechtecharta* cit. 2467 (Rn. 335).

[40] U Stelkens, 'Die „Europäische Entscheidung" als Handlungsform des direkten Unionsrechtsvollzungs nach dem Vertrag über eine Verfassung für Europa' cit. 65.

[41] Art. 34 TEU; see also W Schroeder, 'Neues vom Rahmenbeschluss – ein verbindlicher Rechtsakt der EU' (2007) Europarecht 349.

there are nuances, as Denmark shows by abandoning this word. Without access to scholarly literature in these languages and consulting national legal scholars, we could only speculate whether these countries followed Germany or whether their move was independent.

Focusing on English, French, and German is understandable, as politicians, officials, diplomats, experts and scholars use them. Scholarly reflections primarily appear in these *de facto* working languages. Additionally, scholars may prefer the older versions to be the original ones from a linguistic viewpoint. Significantly, Ruffert does not mention that most language versions did not follow suit, confirming that discussing the supranational legal system by national scholars and experts in their respective languages is separate and different.[42]

Therefore, it is advisable to emphasise the European Union's legal multilingualism. The comparison of versions is desirable for compliance with the equality of EU official languages.[43] In this case, however, the changes in four versions cannot outweigh the other twenty versions. Besides English, the French version has retained *décision*. Therefore, this text does not need to devise equivalents for decision-*Entscheidung* and decision-*Beschluss*.

Finding that the German (plus Austrian) negotiators, possibly joined by their Danish, Dutch, and Slovenian colleagues, embraced distinguishing the decisions with two terms, but failed to convince others, would be the proof of the desirable striving for terminological clarity. Unfortunately, Stelkens did not confirm that. While lamenting that mixing the categories of decisions establishes an unduly differentiated phenomenon, Ruffert is responsive to this differentiation at least.[44]

V. Diversity and incidence of decisions

Nonetheless, rich terminology often indicates complex reality. Indeed, EU decisions are diverse. When reading textbooks[45] or asking teachers for examples, students probably learn about the Commission's decisions on competition issues[46] and the Council's decisions in the Common Foreign and Security Policy (CFSP decisions).[47] SCBTHD would not fit this picture, as it specified cooperation in epidemic surveillance with general rules.

[42] D Thym, 'Die Einsamkeit des deutschsprachigen Europarechts' (29 May 2014) Verfassungsblog verfassungsblog.de.

[43] Art. 55 TEU and Regulation 1/58 of 6 October 1958 determining the languages to be used by the European Economic Community, 385-386.

[44] M Ruffert, *EUV AEUV mit Europäischer Grundrechtecharta* cit. 2467.

[45] Streinz, *Europarecht* cit. 182-183.

[46] As specified by arts 7-10 of Regulation 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty, 1-25. The frequent mentioning of "decisions by associations of undertakings" in the regulation and in art. 101 TFEU exemplifies the polysemous nature of the term in English and other languages (see section VI).

[47] Arts 28 and 29 TEU, for an analysis including the practice, see G Wessel, 'Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?' (2015) European Foreign Affairs Review 123.

Both Mathias Ruffert and Marcus Klammert and Paul-John Loewenthal, respectively, give no lists expanding on the two categories, as they do not mention them in their commentaries of art. 288(4) TFEU. Ulrich Stelkens addresses this diversity with a classification developed on the German legal theory.[48] Unsurprisingly, Jürgen Bast examined many aspects of various decisions in his monograph but did not focus on categorisation.[49] Matthias Vogt was the only author who emphasised that several EU decisions go beyond administrative acts, cautiously appreciating this instrument as flexible.[50]

The founding fathers conceived the Lisbon Treaty as saving the substance envisaged by the Treaty establishing a Constitution for Europe. Therefore, considering the latter document may improve our understanding of the issue. Unsurprisingly, an in-depth consideration of that barely started in several months between its signing in October 2004 and the negative results of the referenda in June 2005 and their assessment as the end of this reform. The planned commentaries became irrelevant.

Despite that, the basic conclusions are possible. The Treaty establishing a Constitution for Europe envisaged *European (framework) laws* instead of regulations and directives as legislative acts. Nonetheless, we focus on decisions here: "A European decision shall be a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them". The distinction should have been the same, but the Treaty stated that decisions would have been non-legislative acts. Addressing cross-border health threats would thus have been a decision or a legislative act. One could expect the latter solution to be adopted when considering the related competence provision.[51]

Mentioning that the European decision would have been a non-legislative act hints at the most notable change by the Lisbon Treaty concerning secondary law: distinguishing legislative acts and specifying the derived ones as implementing and delegated acts.[52]

[48] U Stelkens, 'Die „Europäische Entscheidung" als Handlungsform des direkten Unionsrechtsvollzungs nach dem Vertrag über eine Verfassung für Europa' cit. 74. The author differentiated "acts of government", decisions related to supervision of the Member States, decisions enforcing EC law adopted by national authorities, decisions by the EC authorities with effects on private entities (competition) and decisions related to EC public servants.

[49] Among others, J Bast, *Grundbegriffe der Handlungsformen der EU* cit. pays attention to definitions and procedures, concluding that TEC does not exclude other instruments (Handlungsformen) (p 43). He pays attention to multilingualism (p 110), distinguishes private and public decisions-making (110), identifies *Beschluss* as result of deliberation (p 117), considers addressees and their absence, and analyses judicial control (p 67). To sum up, his opus magnum is mainly the theory of decision-making in the EC/EU based on German legal theory than an empirical scrutiny of the existing practices. Being published in 2006, this monograph realised the failure of TECE, but could not address the Lisbon Treaty.

[50] M Vogt, *Die Entscheidung als Handlungsform der Europäischen Gemeischaftsrechts* cit. discusses Entscheidungen as "Scheinverordnungen" (p 34), and "die Entscheidung als Mittel normativer Steuerung" (chapter 7, p. 150).

[51] See art. III-278(5) TECE.

[52] Arts 289, 290 and 291 TFEU, respectively; for an analysis, see H Hofmann, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality' (2009) ELJ 482-505; A Türk,

This change retained the intent of the Constitutional Treaty but did it in another context, so the result is different.

The Lisbon Treaty was no recast but a complex amendment of the existing treaties. This approach resulted in several pitfalls, which also concerned secondary law. On the one hand, removing "the Maastricht pillars" suppressed the second pillar's common positions, actions and strategies and the third pillar's decisions and framework decisions.[53] On the other hand, it cemented many combinations of secondary law instruments.[54] Unsurprisingly, there was little enthusiasm about the result.[55]

Recently, the European Union has enacted regulations, directives and decisions which could be either *legislative (acts)*, adopted in ordinary legislative procedure, or *delegated* and *implementing* ones adopted by the Commission. Additionally, some acts do not fit the classification mentioned above as the Council relies on the specific provisions in TFEU and TEU. Magdaléna Svobodová proposes to label these acts *innominate*.[56]

The EUR-Lex statistics were instrumental in the research. Its classification of the published acts is even more complex. Concerning decisions, it sorts out *i)* legislative acts – ordinary legislative procedure – decisions of the European Parliament and the Council, SCBTHD being among them, *ii)* other legislative acts – Council decisions, non-legislative acts: *iii)* Commission delegated decisions, *iv)* Council implementing decisions, *v)* Commission implementing decisions, other acts: *vi)* Commission decisions, and *vii)* European Central Bank decisions.

EUR-Lex distinguishes *basic*, *i.e.* new/recast, and *amending* acts in each category. The basic decisions adopted in the ordinary legislative procedure since the Lisbon Treaty or in the co-decision procedure before it (category 1) were numerous, about ten each year.[57] The decisions adopted by the Council, classified as other legislative acts – Council decisions, *i.e.* the second category, are much more frequent, with hundreds of them annually.

'Legislative, Delegated Acts, Comitology and Interinstitutional Conundrum in EU Law–Configuring EU Normative Spaces' (2020) ELJ 415.

[53] Art. 34 TEU, as amended by the Amsterdam Treaty. For an in-depth analysis of the framework decisions, see W Schroeder, 'Neues vom Rahmenbeschluss – ein verbindlicher Rechtsakt der EU' (2007) Europarecht 349. We mentioned already that differentiation in German language emerged there.

[54] Arts I-33-I-37 TCE and art. 291 TFEU, respectively.

[55] Among others, E Best, 'Legislative Procedures after Lisbon: Fewer, Simpler, Clearer?' (2008) Maastricht Journal of European Law 85.

[56] M Svobodová, 'On the Concept of Legislative Acts in the European Union Law' (2016) Charles University in Prague Faculty of Law Research Paper II/1.

[57] According to Eur-Lex, *Legal Acts – statistics* eur-lex.europa.eu 1994: 2, 1995: 6, 1996: 9, 1997: 5, 1998: 7, 1999: 11, 2000: 10, 2001: 7, 2002: 8, 2003: 13, 2004: 8, 2005: 1, 2006: 18, 2007: 10, 2008: 13, 2009: 7, 2010: 4, 2011: 6, 2012: 3, 2013: 9, 2014: 13, 2015: 2, 2016: 3, 2017: 5, 2018: 3, 2019: 0 (!), 2020: 8, 2021: 3, 2022: 7, 2023: 2, 2024: 1 (until 29. 2.).

VI. Inspiration for comparison

The cited classifications distinguish secondary law acts according to the procedures. At the same time, the substance of the third binding instrument is diverse. Decisions address individual cases, formulate policies, and manage cooperation. We need to develop methods to understand them.

The European Union is a unique supranational structure with a specific law. Despite it, exceptionalism in EC/EU legal scholarship[58] is unfortunate. Worldwide, legal systems share commonalities. Therefore, a comparative perspective is also feasible concerning transnational laws.[59]

The European Union has acquired several federal features. Comparing it with countries is thus inherent. Nonetheless, international law forms its fundaments. Therefore, examining whether similar phenomena exist in international organisations may be helpful.

Distinguishing "normative" ("general") and "individual" ("single case") legal acts/instruments seems to be a paradigm in central European legal education. The "normative" acts include statutes (broadly understood), forming the primary source of national law.[60] These statutes exist in a hierarchy, sometimes visualised as a pyramid, with a constitution at its top, parliamentary statutes in the middle, and legislation of the executive branch (statutory instruments in British terminology) at the bottom. The "individual" acts are decisions and judgments of administration and courts confirming or establishing the rights and duties of identified persons or entities.

Unsurprisingly, the reality is complex. There are confusing hybrid and mixed phenomena. Statutes are general if they address any case defined by them. They retain this feature also when addressing specific and temporary phenomena, such as the Covid-19 pandemic. However, these statutes may become *de facto* individual: laws on nuclear energy if only one power plant exists. Regional and local laws are less general as the number of cases diminishes. *Allgemeinverfügung* in German administrative law[61] and its emulations elsewhere form the most localised "norm".

Parliaments deciding on issues other than laws as sources of generally applicable rules form another borderline phenomenon. Annual budgets, as plans of revenues and expenditures, often allocating money to specified institutions, exemplify that best. Other cases include spatial plans, establishing institutions, launching programmes and projects, and approving large contracts. These issues are politically significant. Constitutions or

[58] J Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic' (1996) OJLS 231-253. The author deplores (p 235) the tendency of EU legal scholars to exclusivism by stressing EC law specifics, namely sui generis teleological interpretation, writing about "monster dominating its environment". An excellent study of these specifics in interpretation and their limits in the author's native language D Sehnálek, *Specifika výkladu práva Evropské unie a jeho vnitrostátní důsledky* (C. H. Beck 2019).

[59] U Kischel, *Rechtsvergleichung* (C. H. Beck 2015) 945, 956.

[60] *Ibid*. 392.

[61] Para. 35(2) Verwaltungsverfahrengesetz (Bund), BGBl. I-1253, 25. May 1976.

statutes/laws confer decision-making on directly elected bodies. Activating and deactivating emergencies is another issue the directly elected bodies decide about. Parliaments approve international treaties before their ratification by presidents or monarchs. They may also stipulate policies toward other countries. Some countries consider these acts laws/statutes, while others classify them otherwise.[62]

Laws/statutes stipulating special arrangements exist in several countries, *Specustawa* in Poland or *Einzelfallgesetz* in Germany. Unsurprisingly, such acts incite discussions as they undermine equality in general. Other countries, such as the author's Czech Republic, avoid it as frustrating the expectations towards statutes as "systemic solutions".

Law(making) in international law means primarily concluding international treaties, either bilateral or multilateral, the latter often in international organisations. Concerning substance, international treaties are diverse. The doctrine of international law distinguishes *traités-lois* and *traités-contrats*.[63] Lawmaking by international organisations is limited and resembles negotiations on treaties: an example is the International Health Regulations adopted by the World Health Assembly, composed of national delegates.

Some treaties and quasi-treaties may expect decisions addressing particular events or situations. The United Nations Organisation Security Council adopts *resolutions* for protecting and restoring peace and security among nations.[64] Similarly, the World Health Organisation proclaimed *public health emergency of international concern* and, finally, *a pandemic*.[65]

One linguistic remark closes this cursory overview for comparison. Similarly to *decisions* in English, other languages also use their equivalents for results of consideration and deliberation. Parliaments *decide* on laws. Meanwhile, individuals also *decide* while choosing options in their lives. The term is polysemous. Taking context into account is necessary.

VII. Substantial classification of decisions

In-depth scholarly analyses of the theory and practice concerning decisions would be helpful, as the mentioned literature is almost twenty years old. Such studies should encompass acts labelled as decisions and ascertain whether they match the cited definition. These analyses might also evaluate acts not considered decisions if there are arguments for their classifying them as such, starting with the EU courts' judgments.[66] As the implementation of EU

[62] The German theory emphasises that the annual *Haushaltgesetz* is a statute/law in the formal sense, but not in the material one, for a textbook explanation, see, among others, M Hütwohl, *Einführung in Recht* (C. H. Beck 2020) 17-19.

[63] For such distinction, see, D Carreau and F Marella, *Droit international* (A. Pedone 2012, 11th edn) 149.

[64] The United Nations Charter [1945], art. 27.

[65] World Health Organization, 'Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCov)' (30 January 2020) who.int; World Health Organization, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID19' (11 March 2020) who.int.

[66] It is interesting that EU legal scholars do not answer this question. Undoubtedly, it is an academic question as specific provisions define judgments, but there are arguments for both conclusions.

law by the Member States prevails, such analyses might also include decisions of national authorities implementing comprehensive EU legal frameworks.

Monographs will be needed as the primary and secondary law range is immense. Indeed, the EU law is primarily administrative law in its broad meaning. This text focuses on several decisions establishing norms for generally defined addressees, considering others only to distinguish them.

Undoubtedly, many decisions are administrative acts addressing individual cases, similar to their national counterparts. In addition to the decisions mentioned above on competition (cartels and abuse of dominant position, mergers, and state aid), other centralised agendas have emerged. As this text deals with the laws reflecting the Covid-19 pandemic, it may mention conditional and standard authorisations of the vaccines by the European Commission, which the European Medicines Agency advised.[67]

It isn't easy to find parallels to *Allgemeinverfügung*, as the European Union relies on the Member States concerning implementing its laws in local settings. Perhaps, the approvals of national acts establishing protected areas[68] are its supranational version.

Comparing CFSP decisions with the Security Council resolutions is not surprising. Undoubtedly, there are significant differences, reflecting the ones between the United Nations and the European Union, the universality of the former and the regionality of the latter. However, both instruments address international relations.

Nonetheless, we put these two categories aside, focusing on the decisions the European Parliament and the Council adopted in the ordinary legislative procedure or its predecessors.

Their first group is close to the CFSP decisions, which often exist concurrently. There are decisions stipulating assistance to non-Member States.[69] Its realisation usually relies on an international treaty with the respective country, also approved by decisions.

[67] According to Regulation 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency. For an analysis, see A Donati 'The Conditional Marketing Authorisation of Covid-19 Vaccines: A Critical Assessment under EU Law' (2022) European Journal of Health Law 33.

[68] In accordance with the Council Directive 92/43/EEC of 28 November 2019, such as Commission Implementing Decision (EU) 2020/96 of 28 November 2019 adopting the thirteenth update of the list of sites of Community importance for the Mediterranean biogeographical region (notified under document C(2019) 8583) establishing the list of protected areas in the member states in accordance with the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

[69] Decision 2022/1628 of the European Parliament and of the Council of 20 September 2022 providing exceptional macro-financial assistance to Ukraine, reinforcing the common provisioning fund by guarantees by Member States and by specific provisioning for some financial liabilities related to Ukraine guaranteed under Decision 466/2014/EU.

Their second group is the programmes on spending EU money on specified purposes. These programmes apply for a specified period, so EUR-Lex does not indicate that these decisions are not valid anymore.[70]

The EU annual budgets – to which these programmes relate – result from a specific procedure with necessary deadlines.[71] Nonetheless, the institutions approving them are the Council and the European Parliament. Commentaries do not discuss whether budgets are decisions. One may resolve the dilemma by considering them *acts sui generis*. The accompanying measures use standard instruments. The decision adopted in a specific legislative procedure encompassing "ratifications" by national parliaments specifies the European Union's "own" resources.[72] At the same time, the regulation specifies managing expenditures.[73] Finally, the directive harmonises national criminal laws for combatting fraud of EU money.[74]

The third group is decisions that deserve to be labelled the legislative ones in the plain meaning at most, as they specify cooperation between the Member States and EU institutions. SCBTHD belonged to these decisions.

As "legislative" identifies the procedure, we seek alternative adjectives. One may label these decisions "normative"[75] or "norm-setting". These decisions are "general" as they denote generally applicable rules. After repeated reflection and consideration, this text in English labels them "standardising". "Standard" implies both "norm" as "rule" and "generality". Quotes alert the readers. As the phenomenon escapes attention, there is no settled terminology.

Nonetheless, one need not reject this adjective concerning the decisions in the first and second groups, as they also establish standards discussed here.

[70] Decision 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme Solidarity and Management of Migration Flows.

[71] "A decision addressed to all MS will often constitute a legislative act" in M Klammert, PJ Loewenthal, 'Art. 288' in M Kellerbauer, M Klammert and J Tomkin (eds), *EU Treaties and the Charter of Fundamental Rights* cit. 1909.

[72] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of the own resources of the European Union and repealing Decision 2014/335/EU, based on art. 311 TFEU. Inconsistently, the decision labels itself "legislative act".

[73] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

[74] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

[75] Vladimír Týč uses the adjective in the Czech textbook by M Tomášek, V Týč and D Petrlík (eds), *Právo Evropské unie* (Leges 2021, 3rd edn) 106, highlighting their similarity to regulations while citing several Commission decisions.

Two of the existing decisions – legislative acts – stipulate the cooperation of national authorities in allocating wavelengths in the radio spectrum.[76] This issue is subject to international collaboration due to its cross-border nature. Similar decisions establish a multiannual programme for environmental protection encompassing comprehensive monitoring by the Commission collaborating with the Member States[77] or expect the selection of "the European capitals of culture".[78]

Among the decisions adopted by the Council, CFSP decisions (identified with this abbreviation in brackets) form their minor part.[79] Numerous decisions are appointments of persons to EU institutions.[80] EUR-Lex classification is misleading as CFSP decisions are, *per definition*, non-legislative,[81] and appointments lack this feature, too.

Other Council's decisions are approvals of international treaties[82] or mandates to their negotiation.[83] Following the differentiation between *traités-lois* and *traités-contrats*, one may consider those related to the former as "standardising".

Several decisions of the Council are also "standardising" as they establish a legal framework, albeit *ad hoc*. The two 2015 decisions redistributing asylum seekers[84] to

[76] Decision 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision), and Decision 243/2012/EU of the European Parliament and of the Council of 14 March 2012 establishing a multiannual radio spectrum policy programme, together with Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast).

[77] Decision 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030.

[78] Decision 445/2014/EU of the European Parliament and of the Council of 16 April 2014 establishing a Union action for the European Capitals of Culture for the years 2020 to 2033 and repealing Decision 1622/2006/EC.

[79] Among the latest, Council Decision (CFSP) 2022/2245 of 14 November 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces trained by the European Union Military Assistance Mission in support of Ukraine with military equipment, and platforms, designed to deliver lethal force, or Council Decision (CFSP) 2022/1965 of 17 October 2022 in support of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.

[80] Among the latest, Decision 2022/2248 of 14 November 2022 appointing a member of the Court of Auditors, confirming expiration of office of Mr Šadžius (Lithuania) and appointing Ms Andrikienė.

[81] Art. 31(1) TEU, see P Eeckhout, 'The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism' in A Biondi, P Eeckhout, S Ripley (eds), *EU Law after Lisbon* (Oxford 2012).

[82] Among the latest, Council Decision 2022/1987 of 13 October 2022 on the signing, on behalf of the Union, of the Framework Agreement on Partnership and Cooperation between the EU and its Member States, of the one part, and the Government of Malaysia, on the other part.

[83] Council Decision 2022/451 cit. about the EU engagement in negotiating the Pandemic Treaty.

[84] Council Decision 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, and Council Decision 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

mitigate the unbalance resulting from the general framework set by regulation[85] were subject to judicial disputes[86] and political upheavals. The Council initially established the Court of First Instance (the General Court) with such a decision.[87]

Concerning implementing decisions adopted by the Commission, the same instrument specifies clauses for contracts on transferring personal data to third countries[88] and assessing the equivalence of personal data protection in a particular third country.[89] The former decision is general, and we may thus consider it "standardising". The latter may result from evaluation. We can thus consider it an administrative decision. Still, its impacts on the related international trade and cooperation with a country bring them closer to the above-mentioned country-specific decisions.

VIII. Outlining the doctrine of "standardising" decisions

Markus Klammert and Paul-John Loewenthal label the decisions addressed to the Member States and the unaddressed ones as legislative acts.[90] It is understandable as they often establish legal standards. SCBTHD was one of them. However, using the adjective this way is unfortunate because it does not match the definition of decisions – legislative acts.[91] Therefore, Matthias Ruffert labels these decisions better as former *quasi-legislative Beschlüsse*.[92]

Nonetheless, these authors did not refine a doctrine for the decisions which this text identifies as "standardising" ("normative", "norm-setting", or "general"). As mentioned, Matthias Vogt has considered the normative effects of decisions at most.[93] Nonetheless, he wrote his monograph-dissertation years before the Lisbon Treaty. This section will

[85] Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

[86] Joined cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* ECLI:EU:C:2017:631, and joined cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and the Czech Republic* ECLI:EU:C:2020:257.

[87] Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities.

[88] Commission Implementing Decision 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 (GDPR).

[89] Commission Implementing Decision 2022/254 of 17 December 2022 on the adequate protection of personal data by the Republic of Korea under the Personal Information Protection Act.

[90] M Klammert and PJ Loewenthal, 'Art. 288' in M Kellerbauer, M Klammert and J Tomkin (eds), *EU Treaties and the Charter of Fundamental Rights* cit. 1909: "A decision addressed to all MS will often constitute a legislative act".

[91] Art. 289(3) TFEU: "Legal acts adopted by legislative procedure shall constitute legislative acts".

[92] C Callies and M Ruffert (eds), *EUV AEUV mit Europäischer Grundrechtecharta* cit. 2467 (Rn. 85).

[93] M Vogt, *Die Entscheidung als Handlungsform der Europäischen Gemeischaftsrechts* cit. distinguishes decisions coordinating the Member States (p 151) and supporting regulations (p 159) and directives (p 172) and considers delineation of regulations and decisions as limited to specified persons and locations (p 183).

thus reconsider the principal doctrinal aspects of these decisions following the differentiation introduced by it.

The decisions addressed to the Member States – SCBTHD being among them – can impose duties on them, and they do it. The question is whether one could generalise the existing case law stipulating individual rights towards these Member States. Concerning SCBTHD, the question was whether people could demand particular anti-epidemic engagements from the Member States.

Another question is whether these decisions may require harmonisation. It is easy to answer affirmatively as no provision explicitly excludes that. However, such an approach would render directives as specific instruments redundant. Therefore, we agree with Markéta Whelanová criticising[94] the decision expecting the implementation of its detailed standard concerning imported meat products[95] with national laws because directives serve this purpose.

The unaddressed decisions (*adressatenlose Beschlüsse*) are even more confusing. As the addressed decisions are binding upon specified Member States, entities or individuals, they may be *a contrario* binding upon everybody, *i.e*., the EU institutions, the Member States and any individuals and entities within their jurisdiction. According to their definition, these decisions are *binding in entirety*.

The question is whether the unaddressed decisions can impose obligations, duties, tasks or restrictions on individuals similarly to regulations. Our reluctance results from the definition of the latter in art. 288(2) TFEU "[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States." The cited definition of an unaddressed decision lacks the first sentence and the final disposition.

Concerning the capacity of these decisions to harmonise national laws, the answer should be the same as in the decisions addressed to all Member States.

Agreeing with both questions would render the unaddressed decisions the most potent instrument. One doubts that the authors of the Lisbon Treaty intended to establish such an instrument in addition to regulations and directives.[96]

An analysis of the decisions - legislative acts, i.e. those adopted in the ordinary legislative procedure in 2009-2022 and the co-decision procedure in 1994-2009[97] – shows that the EU lawmakers addressed with "[t]his decision is addressed to the Member States" most of them to the Member States, *i.e*. all of them.

[94] M Whelanová, 'Quo vadis Europa? Loopholes in the EU law and Difficulties in the Implementation Process' (2016) European Journal of Law Reform 179.

[95] Commission Decision 2007/777/EC of 29 November 2007 laying down the animal and public health conditions and model certificates for imports of certain meat products and treated stomachs, bladders and intestines for human consumption from third countries and repealing Decision 2005/432/EC.

[96] R Streinz, *Europarecht* cit. 182 concludes that the unaddressed decisions are binding exclusively upon EU institutions.

[97] Arts 289, 294 TFEU, and art. 189(b) TEC, renumbered as art. 251 by the Amsterdam Treaty.

The decision concerning "Europass" lacks this provision, but its substance does not allow another conclusion.[98] The resulting uncertainty is deplorable. Another debatable case is the above decision, which expresses the European Union's environmental programme.[99] It seems intentionally unaddressed, but its legal significance is little if other regulations and directives address this policy.

On the contrary, the decision specifying the control of Romania concerning its corrupt and inefficient judiciary and administration[100] is not "standardising" in reality. The Commission addressed the decision based on the 2006 Treaty on Accession (also Bulgaria) provision to the Member States. Still, its text stipulated particular obligations of the newcomer exclusively.[101]

The missing addressees in the Council decisions nominating individuals to the EU institutions and bodies cause little problems. Respecting the result is expected by everybody. On the contrary, one needs to consider this feature in the Council decisions specifying the position in negotiations on international treaties with other countries or international organisations and their approvals as binding upon the EU institutions and the Member States. Regarding CFSP decisions, primary law outlines the sincere cooperation of these Member States.[102]

The practice supports theoretical conclusions. Nothing indicates that any unaddressed decision applies directly to individuals. Commentaries are also tacit about the possible failure to transpose these decisions similarly to directives.

The research did not identify any decision addressed explicitly to the Member States, individuals and entities under their jurisdictions, *i.e*. to everybody. The doctrine does not consider this possibility, either. Let us oppose this idea. Regulations serve this purpose.

Therefore, we may conclude that the European (Economic) Community or the European Union deploy "standardising" decisions in the agendas in which they established the Member States' cooperation while refraining from establishing rights and duties of individuals, either directly or through national laws.

[98] Decision (EU) 2018/646 of the European Parliament and of the Council of 18 April 2018 on a common framework for the provision of better services for skills and qualifications (Europass) and repealing Decision No 2241/2004/EC, art. 7 Member States' tasks. The repealed Decision 2241/2004/EC explicitly defines the Member States as addressees in its art. 19.

[99] Decision 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030 and its predecessors.

[100] Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, 56–57, special edition in Romanian 11, 051.

[101] See art. 10 of Commission Decision 2006/928/EC, the Court of Justice invoked in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația "Forumul Judecătorilor din România" and others* ECLI:EU:C:2021:393 the obligation imposed on Romania, but did not clarified the tasks of other Member States. One may propose that these Member States shall actively require the compliance.

[102] Arts 28(1), 28(2) TEU.

Arguing that "standardising" decisions should not harmonise national laws, supported by the limited evidence for the opposite and its criticism, does not exclude one similar phenomenon. These decisions expect the Member States to pursue activities they can hardly do without national laws. Therefore, they improve these laws if necessary or convenient. Regarding this, these decisions still resemble directives addressed by the EU lawmakers to the Member States.

SCBTHD exemplified this phenomenon well. It implied that the Member States monitored and suppressed contagious diseases.[103] For this purpose, national authorities resorted to mandatory testing, tracing contacts, quarantines and isolations. The Member States cannot impose these requirements and restrictions without laws specifying them.

Nonetheless, this phenomenon is not specific to "standardising" decisions. SCBTHR also relies on national epidemic surveillance. Among others, "Brussels I" and "Rome I" regulations imply that the Member States operate courts applying procedural rules and address contracts, respectively.[104]

IX. Identified replacements by regulations

Replacing "standardising" decisions with regulations has become common in recent years. Regulations now stipulate the EU programmes supporting research.[105] The methodology for measuring greenhouse gas emissions has been subject to repeated recodifications.[106] One regulation supersedes, for the next decade, a decision applied in the

[103] Art. 1 Subject matter (1). This Decision lays down rules on epidemiological surveillance, monitoring, early warning of, and combating serious cross-border threats to health, including preparedness and response planning related to those activities, in order to coordinate and complement national policies. (2) This Decision aims to support cooperation and coordination between the Member States in order to improve the prevention and control of the spread of severe human diseases across the borders of the Member States, and to combat other serious cross-border threats to health in order to contribute to a high level of public health protection in the Union.

[104] Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), and Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[105] Regulation 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) and repealing Decision 1982/2006/EC; Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013, replaced the 2013 Regulation.

[106] Regulation 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at the national and the EU levels relevant to climate change and repealing decision 280/2004/EC, already absorbed by the Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009

previous decade in another framework related to this rapidly evolving policy.[107] Transforming may last three decades, as the case of standards for EC/EU statistics reveals.[108] A regulation started to address the exchange of information related to the trade in goods.[109] Codifying the EU space programme rules included standards for this specific task.[110] The European Labour Authority absorbed an informal platform for combatting undeclared work.[111] Jürgen Bast started his treatise by mentioning the decision on the Erasmus students' exchange program,[112] which has just received its second regulation.[113]

and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council.

[107] Regulation 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation 525/2013, 26-42, supersedes – without a formal repeal - Decision 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5. 6. 2009. We may discuss the significance of this approach.

[108] Regulation 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics and repealing Regulation 1101/2008 of the European Parliament and of the Council on the transmission of data subject to statistical confidentiality to the Statistical Office of the European Communities; Council Regulation (EC) 322/97 of 17 February 1997 on Community Statistics, 1-7; and Council Decision 89/382/EEC of 16 June 1989 establishing a Committee on the Statistical Programmes of the European Communities.

[109] Regulation 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision 3052/95/EC; Decision 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community; Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State a repealing Regulation 764/2008, applies recently.

[110] Regulation (EU) 2021/696 of the European Parliament and of the Council of 28 April 2021 establishing the Union Space Programme and the European Union Agency for the Space Programme and repealing Regulations (EU) No 912/2010, (EU) No 1285/2013 and (EU) No 377/2014 and Decision No 541/2014/EU and Decision 541/2014/EU of the European Parliament and of the Council of 16 April 2014 establishing a Framework for Space Surveillance and Tracking Support.

[111] Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344.

[112] Council Decision 87/327/EEC of 15 June 1987 adopting the European Community Action Scheme for the Mobility of University Students (Erasmus), extended by Decision 89/663/EEC until 1994.

[113] Regulation (EU) 2021/817 of the European Parliament and of the Council of 20 May 2021 establishing Erasmus+: the Union Programme for education and training, youth and sport and repealing Regulation (EU) No 1288/2013, which repealed Regulation 1288/2013, which, in turn, consolidated the programmes specified by Decisions 1719/2006/EC, 1720/2006/EC and 1298/2008/EC and repealed them. To sum up, the EC/EU lawmakers adopted decisions for these programmes periodically.

It would be helpful to investigate whether "standardising" decisions enacted by the Council in various special legislative procedures also retreat because the following case is quite specific. The Court of Justice triggered[114] the recast of rules concerning migration surveillance and checks of vessels[115] after the European Parliament successfully challenged its bypassing by the Council.[116]

The survey has identified no countertrend, transforming a regulation into a decision. Transformations of directives into regulations are also a one-way tendency.[117] The first instrument of secondary law has become the preferred one. However, there are also rare cases of their transformations in directives. This second instrument thus becomes the second option.

Directives replacing *framework decisions* of the former third pillar[118] reflect the consolidation of the European Union as this instrument was quasi-directive. Amendments to the former with the latter sparked discussions due to their different theories.[119]

The transformation of a "standardising" decision into a directive specifying consular protection of unrepresented EU citizens outside the European Union[120] is exceptional. It is easy to explain this case with the amended competence provision requiring the former "before Lisbon" and the latter after.[121]

Let us scrutinise the transformation of SCBTHD to SCBTHR as a reform of epidemic cooperation in the European Union. Concerning the epidemic surveillance, the Member States blocked the empowerment of the EU institutions and agencies to impose restrictions on them or to require them to introduce these when SCBTHD was subject to negotiations a decade ago.[122] An attempt to centralise the epidemic surveillance thus predated the instrument change.

[114] C-355/10 *European Parliament v Council* ECLI:EU:C:2012:516.

[115] Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

[116] Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

[117] F Křepelka, 'Transformations of Directives into Regulations' cit. 792.

[118] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2007 on combating terrorism and replacing Council Framework Decision 2002/475/JHA.

[119] H Satzger, 'Legal Effects of Directives Amending or Repealing Pre-Lisbon Framework Decisions' (2015) New Journal of European Criminal Law 528.

[120] Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries, which replaced Decision of the Representatives of the Governments of the Member States meeting within the Council 95/553/EC of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations.

[121] Art. 23 TFEU and art. 20 TEC (post-Amsterdam numbering of articles), respectively.

[122] Compare art. 12 SCBTHD to its initial proposal COM/2011/0866 final – 2011/0421 (COD).

The political and societal context differed from the deliberations on SCBTHD and the 1998 decision predating it. The threat of infections was not hypothetical due to the Covid-19 pandemic. Worldwide, people experienced contact tracing, mandatory testing, quarantines, isolations, suppressed contacts, prohibited activities, closed businesses and schools, and curtailed travel.

It is good to emphasise that SCBTHR does not centralise the epidemic responses. The Member States differed in their requirements and restrictions during the pandemic and changed them over two years. The willingness of people to quarantine themselves for numerous months gradually vanished, and experts diverged in their advice and recommendations.

Critical observers would ask whether more elaborate procedures and new institutions could stop such "communicable diseases" as Covid-19. But blaming SCBTHD for the pandemic would amount to scapegoating. Indeed, SCBTHR addresses the cooperation of the Member States whose national epidemic surveillance is a primary issue. One need not be an expert on public health after the Covid-19 pandemic to expect differences among the European countries. The evaluation of the effectiveness of this cooperation is thus tricky. A multidisciplinary approach would be necessary and beyond the expertise of legal experts.

Interestingly, the European Union established the European Centre for Prevention and Control of Diseases (ECDC) as its public health agency with a regulation eighteen years ago[123] according to the same competence.

Every decision and regulation this section mentions is a unique story deserving its legal, political and substantial analysis. Change of the instrument need not coincide with reforms of the substance. We dare to generalise solely about the detailedness of acts. New regulations are longer than the decisions replaced by them, as their pages in the Official Journal cited in the footnotes indicate.

X. Evaluation of replacements

EU legal scholars should check competence provisions before considering the substance and politics of the "standardising" decisions discussed here. The Lisbon Treaty allowed all instruments in most cases, thus enabling the preference for regulations. The cited decision on the EU's "own" resources is an exception. However, the pre-Lisbon "standardising" decisions, including those replaced by regulations, could have relied upon similar competence provisions requiring this instrument.

Hurka and Steinebach conclude in their political analysis of the EU lawmaking that the recasts of directives and regulations often follow certain traditions. The European Commission proposes regulations if the previous ones were regulations as directives are

[123] Regulation 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for Disease Prevention and Control.

less effective. On the contrary, Member States avoid regulations as the more intrusive instruments.[124] The authors' findings may extend to "standardising" decisions, including SCBTHD as the 2013 recast of its 1998 predecessor.

It is time to add that traditions become eroded, especially during crises. The Covid-19 pandemic was such an event. Nonetheless, the preference for regulations predates it. The European Union has transformed three dozen directives into regulations during the last two decades.[125] Perhaps, the Member States have realised that detailed directives are challenging to transpose. Still, the process is unavoidable, as the Commission checks transposition and regularly sanctions failure in that respect, and undesirable legal effects appear. A similar tendency has emerged in decisions – legislative acts.

While deliberating on the substance of SCBTHR, the Council and the European Parliament did not question a change of the instrument.

Paradoxically, imposing requirements or restrictions on people is not what characterises SCBTHR. Namely, this regulation does not empower to impose quarantines, contact tracing, mandatory testing, isolations and lockdowns. Like the preceding decisions, it specifies the cooperation of the national and supranational public health authorities.

However, confirming this characteristic of SCBTHR would be careless without analysing all its provisions. Private providers – hospitals, ambulances and laboratories – would contribute to tackling eventual epidemics.[126] One may also question whether the cited case law would enable individuals to ask Member States for epidemic responses.

Nonetheless, the new instrument removes doubts, as regulations enable every possible arrangement. Such an analysis would thus be purely academic, only clarifying the hypothetical permissibility of the abandoned instrument.

As indicated, the feasibility of detailed directives is questionable.[127] Nonetheless, this instrument has a manifest *raison d'être*. The European Union and the Member States prefer national laws stipulating particular standards instead of uniform ones.

Doctrinal arguments for "standardising" decisions are weaker. We suggest considering them as an instrument establishing "mere" cooperation of the Member States, manifestly excluding direct or intermediated effects on individuals under their jurisdiction. "Standardising" decisions resemble international treaties considered binding exclusively to countries (states) as their contracting parties (dualism of international law and national laws), unlike regulations and directives applicable directly or indirectly to individuals, which resemble international treaties applied as such in national legal systems with privileged position (so-called incorporation) or through adjusted national laws (adoption) if the states decide for it.

[124] S Hurka and Y Steinebach, 'Legal Instrument Choice in the European Union' (2018) JComMarSt 278, 279.

[125] For an incomplete list of transformations, see F Křepelka, 'Transformations of Directives into Regulations' cit. 782 and 789-790.

[126] Art. 15 SCBTHR expects selected reference laboratories and stipulated requirements for them. Nonetheless, these laboratories would participate voluntarily in fulfilling government tasks.

[127] F Křepelka, 'Transformations of Directives into Regulations' cit. 793-794.

The explanatory memoranda accompanying the proposals of "standardising" decisions usually did not contain any explanations of the instrument choice. Retrospectively, we conclude that the Commission had no consistent approach concerning this subtype of decision when it proposed them in the previous decades. Their subsequent discontinuation seems to be a side-effect of the increasing preference for regulations instead of directives.[128] Let us admit that directives and "standardising" decisions share limitations.

The European Union does not reflect the third instrument in its legislative policies. Foremost, *the Interinstitutional Agreement on Better Lawmaking* requires an explanation of the instrument choice, distinguishing regulations and directives, but remains silent about (lawmaking with) decisions.[129] Similarly, initiatives aimed at improving EU legislation such as SLIM (*Simpler Legislation for the Internal Market*) since 1996,[130] *Small Business Act* since 2008,[131] REFIT (*Regulatory Fitness and Performance Programme*) since 2012,[132] *Better Regulation* since 2015[133] encompassing *Fit for Future Platform* since 2020[134] also lack any significant consideration of this instrument, despite the enormous length of some documents.[135]

At the same time, one does not need to be a political scientist to estimate that "standardising" decisions could be helpful. A retrospective multidisciplinary analysis would be interesting to identify how often the European (Economic) Community and the European Union resorted to decisions when balancing at the edge of competence and expecting the Member States to refuse regulations and directives.

[128] Let us reiterate that Protocol n. 30 on the application of the principles of subsidiarity and proportionality in its original Amsterdam version stipulated with its para. 6: "[...] Other things being equal, directives should be preferred to regulations and framework directives to detailed measures". The Lisbon Treaty dropped this preference, for discussion of its impact see F Křepelka, 'Transformations of Directives into Regulations' cit. 795-797.

[129] See Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, IV. Legislative Instruments, para. 25.

[130] Simpler Legislation for the Internal Market (SLIM): Extension to a Third Phase – Working document of the Commission Services SEC (98) 559, 26. 03. 1996.

[131] Communication COM/2008/0394 final from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 25 June 2008, "Think Small First" - a "Small Business Act" for Europe; Communication COM(204) final from the Commission to the Council and the European Parliament of 8 May 1996 - Simpler Legislation for the Internal Market (SLIM): a Pilot Project, and subsequent documents reflecting and evaluating this initiative.

[132] Communication COM(2012) 746 final from the Commission to the European Parliament to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions of 12 December 2012, Regulatory Fitness.

[133] Communication COM(2015) 215 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions of 25 May 2015, Better regulation for better results - An EU agenda.

[134] Commission decision of 11 May 2020 establishing the Fit for Future Platform (2020/C 163/03), 1-7.

[135] Even the 612 pages-long (!) Better Regulation Toolbox - July 2023 edition compiled by the European Commission, available at commission.europa.eu does not go beyond summarising art. 288 and listing several examples.

Epidemic surveillance was one of these cases until recently. Art. 168(5) TFEU excludes harmonisation concerning healthcare. One may argue that *a fortiori* this provision prohibits unification. Nevertheless, the enactment of SCBTHD in 2013 and the preceding 1998 decision were without any problems as they specified cooperation. It seems that cautiousness materialised in the choice of the decision.

Despite little doctrinal attention, the limits of decisions are common knowledge. The Commission, the Council and the European Parliament respect them. The Court of Justice has identified no "standardising" decision imposing duties, restrictions and liabilities on individuals without due authorisation. The aforementioned decision on imported meat expecting harmonisation seems to be a sporadic deviation, now overcome.[136]

Nonetheless, the increasingly complex provisions of the acts we discuss can affect individuals and private entities, including their claims and counterclaims. Regulations can impose duties, restrictions and liabilities on individuals. EU lawmakers need not care for allowed and excluded effects. Therefore, replacing "standardising" decisions with regulations is convenient.

But in fact, the burden need not increase in particular cases. The Commission, the European Parliament and the Council can refrain from imposing duties, restrictions and liabilities on individuals. The direct effect of regulations is their potential, not necessity.

In-depth analyses of cited regulations replacing "standardising" decisions would be needed to evaluate whether this instrument has been necessary. These analyses require familiarity with the substance, its contexts, origin and development.

As SCBTHR shows, "Choice of the instrument" paragraphs in explanatory memoranda accompanying their proposals simplify. Moreover, some explanations are doubtful. Arguments for the cited regulation establishing the EU space programme are misleading,[137] and these for establishing the European Labour Authority exaggerate the effects of the instrument.[138]

[136] Commission Delegated Regulation (EU) 2020/692 of 30 January 2020 supplementing Regulation (EU) 2016/429 of the European Parliament and of the Council as regards rules for entry into the Union, and the movement and handling after entry of consignments of certain animals, germinal products and products of animal origin, has replaced the Commission Decision 777/2007.

[137] See Proposal for a Regulation establishing the space programme of the Union and the European Union Agency for the Space Programme COM/2018/447 final – 2018/0236 (COD), 6 June 2018: "Choice of the instrument: A Regulation [...] establishing the Programme is not only explicitly provided for by Article 189(2) TFEU, but also the preferred instrument for placing the Programme on a sustainable footing. For that choice of legal instrument ensures the uniformity and direct application which are required for the effective implementation of the Programme, while giving it all due visibility and providing it with the financial resources it needs for its implementation"; the cited TFEU article does not specify the legal instrument. We wonder whether the instrument provides financial resources.

[138] See Proposal for a Regulation COM/2018/0131 final of the European Parliament and of the Council of 13 March 2018 establishing a European Labour Authority: "Choice of the instrument – The proposed instrument is a regulation [...]. A regulation provides the legal certainty required for setting up the Authority, which could not be achieved by means of other legal instruments".

Indeed, the sole reason for "standardising" decisions, as the third binding instrument of secondary law in its narrow sense, is to signal that these acts are obligatory exclusively for the Member States as their usual addressees.

XI. Perspectives and limits of the tendency

This text is sympathetic to replacing "standardising decisions" with regulations. The latter instrument does not raise doubts about its applicability in complex relations encompassing individuals. The culture of recasts provides an opportunity for an instrument change. Let us identify prospective cases.

The new standard for electronic customs clearance did not use this opportunity[139] as one of the widely known regulations, the Customs Code, was addressing the customs administration for three decades.[140] Concerning the standard for surveillance of the goods subject to excises,[141] its explanatory memorandum unnecessarily turned a tradition into an obligation as similar cooperation in this field has been subject to regulations for decades.[142] Another debatable case is guidelines for the legislative policy concerning product standards.[143]

There is no reason to object even to regulations specifying the rights and duties of every Member State or most of them with numbers (figures, amounts) or enumerating individuals and entities to whom measures apply, albeit these regulations are not

[139] Decision 70/2008/EC of the European Parliament and of the Council of 15 January 2008 on a paperless environment for customs and trade, as amended by Regulation (EU) 2019/1243 of the European Parliament and of the Council of 20 June 2019 adapting a number of legal acts providing for the use of the regulatory procedure with scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union.

[140] Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), is the second recast of custom procedures. The first codification was Council Regulation (EEC) 2913/92 of 12 October 1992 establishing the Community Customs Code.

[141] Decision 2020/263 of the European Parliament and of the Council of 15 January 2020 on computerising the movement and surveillance of excise goods (recast). We read in the explanatory memorandum for its proposal: "The choice of instrument is fully in line with the current legal act in force. Since the proposal is a recast of Decision 1152/2003/EC it must be a proposal for a Decision".

[142] Council Regulation 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax.

[143] Decision 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC. The citation of the choice of instrument explaining the policy: "The Commission has taken the option of splitting its proposal into two separate legal texts in order to take on board the consequences in legal terms of the contents of the proposals: [...] the Decision sets guidelines for the future legislator. For this purpose a sui generis decision is proposed, as was done in 1993 in this same area, in order to set out the common elements for the future, accompanied by guidelines for their implementation. Future sectoral legislation, new or revisions of existing legislation, should use these elements wherever possible to ensure coherence, simplification and to follow rules of better regulation".

"standardising" ("normative", "norm-setting", or "general"). As mentioned, similar phenomena exist in countries and international organisations.

This text mentions the asylum seekers' quotas. Both instruments seem feasible from the doctrinal point of view. The Court of Justice refused objections to the two Council decisions, which are inherently non-legislative.[144] But one can hardly argue against an amending regulation if this instrument stipulates general competence. Regulations prescribing quotas for the Member States concerning agricultural products are frequent.[145] These figures result from various calculations but may be subject to bargaining. The European Union prefers figures before formulae.

As the Member States negotiate in the Council and enjoy privileged access to the Court, we do not learn about the character of these quotas and the calculations behind them. Therefore, we also consider the CFSP decision[146] and the related regulation listing sanctioned Russian officials and oligarchs after the aggression against Ukraine.[147] These people may oppose their inclusion before the General Court similarly to the decisions addressed to them.[148] One may describe both acts as packages of decisions adopted *en bloc* by the Council combining legislative and executive roles and enjoying political legitimacy instead of hypothetical burdensome administrative evaluation of these individuals resulting in actionable decisions.

Nonetheless, there are measures the decisions shall express, while regulations are unfeasible. As mentioned, decisions in national settings stand primarily for individual (single-case) acts. As state aid approvals and controls indicate, particular Member States may be their addressees in the supranational European Union. Similarly, the cited special supervision of Romania should also rely on this instrument, as it is country-specific.

XII. Envisaged reform of secondary law instruments

The founding treaties have been in force unchanged for the past thirteen years.[149] Unfortunately, this stability, contrasting with their frequent changes in the previous

[144] *Slovakia and Hungary v Council* cit.

[145] Among the recently applied, Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, annex XII – national and regional quotas for sugar.

[146] Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, as amended by numerous Council implementing regulations expanding the list of sanctioned Russian officials and oligarchs.

[147] Council Regulation (EU) 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, following the Decision 2014/145/CFSP cit.

[148] Among partially successful applicants case T-720/14 *Rotenberg v Council* ECLI:EU:T:2016:689.

[149] Besides treaties on the accession of Croatia (2013) and withdrawal of the United Kingdom (2020).

decades, is a deadlock caused by the crises. Several Member States and the European Parliament have recently called for their reforms, but others consider that hasty with other problems soaring. The Conference on the Future of Europe encompassing laypeople (2019-2022) may be an innovative impulse, but it cannot replace the unwillingness of the Member States as founding fathers.

The abolition of the veto right in the Council has become a debated issue. An adjustment of the European Union's healthcare competence is expectable after the Covid-19 pandemic. Nonetheless, no debates about other changes have started. Unsurprisingly, the Conference on the Future of Europe did not mention legal instruments beyond the calls for reviving the Constitution, which is sensitive.

Secondary law instruments deserve reform due to their overcomplexity.[150] Let us call for its discussion. The simplification envisaged by the Treaty establishing a Constitution for Europe may inspire.

CFSP decisions will undoubtedly remain non-legislative and non-justiciable expressions of the joint positions and joint actions – the echo of the former instruments[151] and their recent definition – reflecting the political consensus of the Member States coordinating their foreign and security policy.

Approvals of international treaties and appointments of persons to institutions differ from administrative acts. Perhaps, one may distinguish these politically significant acts with the terms “appointment”, “mandate”, and “approval”. This delineation may also contribute to specifying the extent and limits of judicial review, as appointments[152] and conclusions of international treaties[153] have been its object in borderline cases.

Similarly, the competition policy is prominent to disappear from the primary law. Nevertheless, other EU administrative agendas have emerged recently. Under these conditions, formulating principles for the administration could be more feasible than defining its results. In that respect, one may note that Stelkens called for the de-constitutionalisation of administrative instruments fifteen years ago.[154]

[150] E Best, 'Legislative Procedures after Lisbon: Fewer, Simpler, Clearer?' (2008) Maastricht Journal of European and Comparative Law 85.

[151] Arts 13, 28, 29 TEU (Maastricht version).

[152] Among others, see a passionate discussion about the removing AG Eleanor Sharpston after the Brexit whose legal action the Court rejected to hear. For a fierce criticism, see DV Kochenov and G Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member States Power after the Sharpston Affair' (2021) ELJ 262.

[153] Art. 218(11) TFEU enables ex-ante control of compliance of international treaties concluded on behalf of the European Union by the Court of Justice. See Briefing - European Court of Justice and international agreements (European Union, 2021) www.europarl.europa.eu.

[154] It was also proposed in respect to the then signed TECE, also U Stelkens, 'Die „Europäische Entscheidung” als Handlungsform des direkten Unionsrechtsvollzungs nach dem Vertrag über eine Verfassung für Europa' cit. 95: “Notwendigkeit einer Dekonstitutionalisierung der Europäischen Verwaltungsrecht”.

Let us realise the recent complexity. Contrary to *delegated* and *implementing* in derived acts,[155] the adjective *legislative* is not mandatory. Mentioning *regulations/directives – legislative acts* or simply *legislative regulations/directives* is uncommon as it sounds strange. *Decisions – legislative acts*, simply *legislative decisions*, are an oxymoron.

It is worth noting that the Treaty establishing a Constitution for Europe envisaged two legislative instruments only: European laws and European framework laws. European decisions shall be non-legislative acts.[156] The European Union does not need a specific legislative instrument with applicability restricted to the Member States. "Standardising" ("general", "normative", or "norm-setting") decisions are redundant.

Existing terminology, *i.e*. regulation and directive, does not reflect their prominent position (direct effect and primacy, indirect effect) and democratic legitimacy. *European (framework) laws* as the legislative instruments envisaged by the Constitutional Treaty[157] faced no opposition and enjoyed acknowledgement also after its failure.[158]

Indeed, this terminology is adequate. The quick explanation of regulations and directives to laypeople is to say they are European (framework) laws. The EU lawmakers have recently embraced this terminology in official short titles of several regulations.[159] Therefore, we suggest considering its revival.[160]

With this terminological reform, European laws would be the preferred instrument instead of regulations. There is no reason to exclude those replacing "standardising" decisions.

XIII. Conclusions

The European Community/the European Union have adopted decisions specifying cooperation and programmes on spending their money, including partnerships with third

[155] Arts 290(3) and 291(4) TFEU in contrast to art. 289 TFEU.

[156] Citation of relevant sentences in the (unsuccessful) Constitutional Treaty. Arts I-33(1): "A Europan decision shall be a non-legislative act, binding in its entirety"; arts I-35 "(Non-legislative acts) (1). The European Council shall adopt European decisions in the cases provided for in the Constitution, (2) The Council and the Commission, in particular in the cases referred to in articles I-36 and I-37 [...] shall adopt European regulations and decisions, I-37 (Implementing acts):"(4). Union implementing acts shall take the form of European implementing regulations or European implementing decisions".

[157] Arts I-33 TECE.

[158] J Ziller, *Separation of Powers in the European Union's Intertwined System of Government a Treaty Based Analysis of the Use of Political Scientists and Constitutional Lawyers* (Il Politico 2008) 133, 144 "There is hardly any doubt that it has been the European Convention's merit to start calling a spade a spade, and a law a law. [...] The Treaty [...] has therefore replaced the designations used since the Rome treaties, i.e. regulations and directives, by European laws and European framework laws".

[159] Regulation 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance (Data Governance Act) and Regulation 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality ("European Climate Law").

[160] For details and discussion, see F Křepelka, 'Several Acts and One Law as an Impulse for Reviving European (Framework) Laws' (2022) Časopis pro právní vědu a praxi 829.

countries or having a similar “standardising” content. The theory paid little attention to these decisions.

Recently, the European Parliament and the Council have replaced several of these “standardising” (“normative”, “norm-setting”, or “general”) decisions with regulations. This instrument enables duties and restrictions on individuals and private entities. These effects can result from increasingly complex frameworks. Therefore, the trend is laudable.

It may be helpful to generalise this tendency in the envisaged reform of the founding treaties. European laws are the appropriate terminology. Following the plain meaning of this term in legal settings, the decisions in EU law should be primarily acts of the European Union's expanding administration.

ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

Edited by Justin Lindeboom *and* Ramses A. Wessel

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

JUSTIN LINDEBOOM* AND RAMSES A. WESSEL**

TABLE OF CONTENTS: I. The autonomy of EU Law and legal theory: bridging the disconnect. – II. Overview of this *Special Section*.

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.

ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

Edited by Justin Lindeboom *and* Ramses A. Wessel

THE PRIMACY OF EU LAW: INTERPRETIVE, NOT STRUCTURAL

PAVLOS ELEFTHERIADIS*

TABLE OF CONTENTS: I. Introduction. – II. Defiance. – III. Primacy of what? – IV. Pluralism in action. – V. The incoherence of pluralism. – V.1. Legal systems do not "conflict". – V.2. Legal systems do not "overlap". – V.3. Pluralism cannot provide a framework for consensus. – VI. Federal monism. – VII. Social monism. – VIII. Primacy: a pragmatic view. – VIII.1. Europe's legal order. – VIII.2. MacCormick's internationalism. – IX. Conclusion: the principle of primacy.

ABSTRACT: A leading position among European Union lawyers is that the primacy of EU law has a "structural" dimension. Under views known as pluralism and monism, many scholars believe that the EU has created a new legal system which either sits next to or, alternatively, above the legal systems of the member states. These views, however, are paradoxical and self-defeating. This is shown when we apply the structural theories to the question of primacy as put by the Polish Constitutional Tribunal in case K 3/21 of 7 October 2021. Neither pluralism nor monism can show that EU law prevails over a state that takes Poland's defiant position. The correct way of understanding EU law is interpretive, not structural. It is the only way that shows that the Polish Court has acted unlawfully. The EU Treaties have not created a new "legal system", allegiance to which remains optional. According to the best view of EU law, universally accepted in legal practice although not yet fully by legal theory, EU law is entirely continuous with the established constitutional settlement. The EU treaties are ordinary treaties of international law that create constitutional obligations in the normal way. They create bonds of cosmopolitan reciprocity that each member state is legally obliged to respect. The primacy of EU law is based on our ordinary practices concerning the status and authority of the law of nations.

KEYWORDS: primacy – pluralism – monism – dualism – interpretation – cosmopolitanism.

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I. Introduction

Primacy is the most important principle of European Union law, yet the exact way it operates is continuously tested by domestic courts. Most challenges accept the principle, but quibble about its effects. Unusually, the Polish Constitutional Tribunal has challenged the principle itself. In a judgment issued in October 2021, the Tribunal departed from its earlier case law and ruled that Polish law applies in preference to the Treaties in various ways.[1] The judgment appears to accept the account of EU law proposed by the Polish government in a lengthy "White Paper" issued in 2018, which made extensive use of the theory of "constitutional pluralism" offered by the eminent legal philosopher Neil MacCormick. This was a most unusual association, because MacCormick was a passionate European, a member of the conference that drafted the Treaty on the European Constitution and an advocate of a theory of a "European commonwealth".[2] How could his thought ground an act of defiance by a Eurosceptic and illiberal government? Yet, as we shall see below, pluralism is a very unstable basis for EU law, something that MacCormick ultimately saw very clearly.

The Polish challenge asks the question of primacy in a remarkably clear way. It asks: what is the constitutional authority of the treaties as a matter of legal doctrine? This question cannot be answered through ordinary EU law. We cannot respond to it by reading the Treaties back to Poland. The Polish Tribunal says precisely that these Treaties lack authority. We therefore need to turn to deeper questions concerning the relationship between treaties and constitutions and ask fundamental questions about the structure of national and transnational legal orders as a whole.

In this *Article* I will try to do just that. I will take the Polish challenge seriously as a theoretical argument. As I read it, Poland's defiance gains some support from MacCormick's analysis. Nevertheless, the sceptical conclusion it reaches must be rejected, because pluralism itself must be rejected as a theory of law. I will take the view that the basic principles of EU law, namely direct effect, primacy and autonomy, make sense only as set of coordinated principles of interpretation of the Treaties under a broadly cosmopolitan framework of law. Hence, the principle of primacy is interpretive, not structural. This reading of EU law considers it to be a part of the law of nations, hence I call this an "internationalist" view.[3]

This view has to be contrasted to the currently dominant view among European Union lawyers, which I take it to be "structural" in orientation. Structural views say that the

[1] Constitutional Tribunal of Poland of 7 October 2021 K 3/21 trybunal.gov.pl. The same court had found the EU treaties compatible with the Polish constitution when Poland first joined the EU in case K 18/04 of 11 May 2005, available at isap.sejm.gov.pl.

[2] See N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press 1999).

[3] I defended this view in greater detail P Eleftheriadis, *A Union of Peoples: Europe as a Community of Principle* (Oxford University Press 2020).

European Union has brought about changes to the general framework of the legal orders of the member states by creating an entirely new "legal system" that competes or supplements the legal systems of the member states. The formation of the EU legal system is often seen as the beginning, to put it at its lowest, of an inexorable path to the creation of a unified, federal legal system. Some such "federalist" approach is adopted by leading scholars of EU law. Ingolf Pernice speaks for many others, I believe, when he writes: "European law, thus, is considered an autonomous, new and specific legal system based upon a transfer of sovereign rights to the European institutions with 'real powers'".[4]

A different, but equally structural in orientation, approach is being suggested by Neil MacCormick, when he writes: "The legal systems of member-states and their common legal system of EC law are distinct but interacting systems of law, and hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another".[5]

The Polish Tribunal endorses MacCormick's view, but it does so in a surprising manner. It invokes pluralism in order to reject primacy, not to affirm it. As I will argue below, the structural argument fails. The correct way of understanding EU law is interpretive, not structural.[6] According to the best view of EU law, a national court is bound by the Treaties and is under an obligation to give them primacy in light of the judgments of the Court of Justice. This is the standard view in legal practice. But this view rests on an internationalist reading of EU law and not a federalist reading. A closer look at the structural argument shows that it is ultimately self-defeating. The only way in which the primacy of EU law can be vindicated is if we accept that the European Treaties are fairly unremarkable international treaties. They have not brought about any structural changes to the legal orders of the Member States and have not created a rival legal system. They have merely introduced new legal principles as a matter of accepted constitutional essentials. The principle of primacy is thus interpretive and not structural: it binds all domestic courts as a matter of both treaties and constitutions in a spirit of cosmopolitan reciprocity. The primacy of EU law is based on ordinary practices concerning the status and authority of the law of nations.

II. Defiance

The judgment of the Polish Constitutional Tribunal in case K 3/21 is extremely brief and its reasoning unclear. The Tribunal said that in so far as any articles of the Treaty on the

[4] I Pernice, '*Costa v ENEL* and *Simmenthal*: Primacy of European Law' in M Poiares Maduro and L Azoulai (eds), *The Past and Future of European Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 47, 49.

[5] MacCormick, *Questioning Sovereignty* cit. 117–118.

[6] I use the term "interpretive" here in a non technical sense, referring to the ordinary process of legal interpretation. The argument does not depend, on the truth of 'interpretivism', the theory of law articulated by R Dworkin, *Law's Empire* (Harvard University Press 1986).

European Union created an "ever closer union among the peoples of Europe", according to which "the European Union authorities act outside the scope of the competences conferred upon by the by the Republic of Poland in the treaties; [and] the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application; [and] the Republic of Poland may not function as a sovereign and democratic state" they were incompatible with the Polish Constitution.[7] This sentence implies that whether the Treaties require Poland not to be a 'sovereign and democratic state' is an open question, something to be determined by the Polish courts in each case, and not something that had been settled once and for all by Poland joining the European Union in accordance with its constitutional requirements (which had been confirmed by the Tribunal's earlier case law).

The Tribunal's focus is on the Treaties and their design of the institutional arrangement of the EU, not on any supposedly "ultra vires" interpretation of them by a judgment of the court (and to that extent the judgment is different from other criticisms made of the CJEU by national courts over the years). Unfortunately, there is no development of these surprising assertions by the Polish Tribunal, nor is there any reference to its earlier case law. The judgment is extremely brief, perhaps irresponsibly so. Everyone familiar with European Union law has condemned the judgment. The editors of the *Common Market Law Review* observed that "While constitutional courts of almost all Member States have challenged the ECJ's rather absolute conception of EU primacy, most notably the *Bundesverfassungsgericht*, this is the first time in history that actual Treaty provisions have been deemed (partly) incompatible with a national constitution".[8] The Editors conclude that the "The potentially disintegrative impact of this ruling, for the EU legal order and by extension, the EU itself, can hardly be overstated".[9]

It is obvious that the judgment has an inescapable political dimension. The Polish courts have been in turmoil for years. The Constitutional Tribunal has rejected the interpretation of the principle of the independence of the judiciary reached by the European Court of Human Rights in *Xero Flor*. The problem here was not with any set of European laws, but with the existence of any mechanisms of accountability itself. The European Court of Human Rights concluded *in Xero Flor v Poland*, that the Polish government set about its course of changing the composition of the Polish Constitutional Tribunal by first ignoring a domestic court judgment:

> "In the present case, the [Polish] legislative and executive authorities failed to respect their duty to comply with the relevant judgments of the [Polish] Constitutional Court, which determined the controversy relating to the election of judges of the Constitutional Court,

[7] Constitutional Tribunal of Poland K 3/21 cit. The same court had found the EU treaties compatible with the Polish constitution when Poland first joined in case K 18/04 cit.

[8] See Editorial Comment, 'Clear and Present Danger: Poland, the Rule of Law & Primacy' (2021) CMLRev 1635, 1640.

[9] *Ibid*. 1642.

> and thus their actions were incompatible with the rule of law. Their failure in this respect further demonstrates their disregard for the principle of legality, which requires that State action must be in accordance with and authorised by the law".[10]

The Polish government is not only ignoring European Courts, it is also ignoring its own courts. The problem with Poland goes beyond EU law.

The European Parliament criticised Poland in an acerbic resolution of its own. It said that the Parliament:

> "Deeply deplores the decision of the illegitimate 'Constitutional Tribunal' of 7 October 2021 as an attack on the European community of values and laws as a whole, undermining the primacy of EU law as one of its cornerstone principles in accordance with well-established case-law of the CJEU; [...]; underlines that the illegitimate 'Constitutional Tribunal' not only lacks legal validity and independence, but is also unqualified to interpret the Constitution in Poland".[11]

The European Parliament's charge of illegitimacy derives not only from various judgments of the Court of Justice of the EU but also from the judgment of the European Court of Human Rights, which, in case *Xero Flor* has found that the Constitutional Tribunal had been unlawfully constituted since October 2015, when thew newly elected Polish government ignored the lawful appointments already made to that court by the outgoing government.[12] The Strasbourg Court ruled that "that breaches in the procedure for electing three judges, including Judge M.M., to the Constitutional Court on 2 December 2015 were of such gravity as to impair the legitimacy of the election process and undermine the very essence of the right to a 'tribunal established by law".[13] The European Commission followed suit and by the end of the year it issued infringement proceedings against Poland along the above lines.[14] In late October 2021, in Case C-204/21R *Commission v Poland*[15] *the* vice-president of the CJEU imposed a fine of one million Euros per day for Poland's failure to comply with an interim measures order of July 2021.[16]

[10] ECtHR *Xero Flor v Poland* App n. 4907/18 [07 May 2021] para. 282.

[11] Resolution 2021/2935 (RSP) of the European Parliament of 21 October 2021 on the rule of law crisis in Poland and the primacy of EU law.

[12] *Xero Flor v Poland* cit. In March 2022 the Polish Constitutional Tribunal assessed that the European Convention on Human Rights is also unconstitutional in Poland, see Polish Constitutional Tribunal of 10 March 2022 K 7/21. The judges of the Polish Constitutional Tribunal have a personal stake in the dispute. It is their court's legitimacy that is being disputed. That they are judges on their own cause is an unfortunate as well as inescapable aspect of this case.

[13] *Xero Flor v Poland* cit. para. 287.

[14] See European Commission, 'Rule of Law: Commission Launches Infringement Procedure against Poland for Violations of EU Law by its Constitutional Tribunal' (22 December 2021) ec.europa.eu.

[15] Case C-204/21R *Commission v Poland* ECLI:EU:C:2021:878.

[16] Case C-204/21R *Commission v Poland* ECLI:EU:C:2021:593.

A similar direction has been taken by Hungary and its Constitutional Court.[17] In 2015 Hungary refused to comply with the EU Decision establishing a refugee resettlement quota within the Member States, which required all member states to share a small number of refugees.[18] The Hungarian Constitutional Court concluded that it had a right to "examine whether [EU law] results in a violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State) and the constitutional self-identity of Hungary".[19] Its judgment spoke at length about Hungary's "rights" to protect both its "sovereignty" and its "identity" which is supposedly at risk from EU membership.

The Polish and Hungarian courts pose, therefore, a theoretical as well as a practical challenge to the European Union. They dispute the status of the EU treaties themselves and the accommodation of state sovereignty under the institutional design of the Treaties. I do not mean to discuss here the nature of the political challenge or comment on the generally illiberal rhetoric adopted by the two governments. I am strictly focused on the principle of primacy as a doctrine of law. Is the doctrine of unconditional primacy legally binding in Poland and Hungary, and if so for what reason?

III. Primacy of what?

What is the disagreement between Poland and the EU about? The Tribunal's first order is that there is some incompatibility between the Polish Constitution and the EU Treaties. The Tribunal concentrates on arts 1 and 4(3) TEU. These articles set out some very general programmatic statements about the EU, such as: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen". How can that be contrary to the Polish Constitution? The relevant articles are arts 2, 8 and 90(1) of the Polish Constitution. They include the declaration that Poland is "a democratic state ruled by law and implementing the principles of social justice" (art. 2), a principle that "The Constitution shall be the supreme law of the Republic of Poland" (art. 8) and a declaration that Poland may delegate to international organisations certain public competences (art. 90(1)). There is immediately an air of unreality to this supposed conflict between these broad principles. There is no evident conflict here. The relevant provisions say more or less the same thing.

[17] See RD Kelemen and L Pech, 'The Uses and Abuses of Constitutional Pluralism' (2019) CYELS 59, 66–70; G Halmai, 'Abuse of Constitutional Identity: The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) Review of Central and East European Law 23.

[18] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

[19] Hungarian Constitutional Court, Decision 22/2016, para. 54, hunconcourt.hu. For a discussion of this judgment see JC Lawrence, 'Constitutional Pluralism's Unspoken Normative Core' (2019) Yearbook of European Legal Studies 24, 33–37 and G Halmai, 'National(ist) Constitutional Identity? Hungary's Road to Abuse Constitutional Pluralism' (EUI Working Papers LAW 08-2017).

Could the problem arise form the way they are being interpreted? The Tribunal seems to be saying so. It says that the Treaty is incompatible with the Constitution when it allows "European Union authorities" to act outside "the scope of the competences conferred upon them by the Republic of Poland in the Treaties". However, this is a non-sequitur. The Treaty never allows action outside the scope of the powers it creates. If the exercise of some powers goes beyond the competences conferred by the Treaties, then this exercise is a violation of EU law and the Treaties themselves. A Treaty cannot allow its own violation. The word "it" in the phrase "when it allows" switches imperceptibly from a Treaty to the Court of Justice. It cannot be the Treaties that allow their own violation.

The same applies for the other parts of the first order, where the Tribunal adds that the Treaties are unconstitutional whenever they make it the case that: "the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards is binding force and application".[20] The Treaties say no such thing. And it is striking here that the Tribunal makes no reference to the provision of the Polish Constitution that allows for the incorporation of EU law into Polish law, with full constitutional recognition. Art. 9 of the Constitution provides that: "The Republic of Poland shall respect international law binding upon it". Nor is there any reference made to art. 91(1), which makes this obligation more specific by requiring that "an international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute" and that a ratified international agreement "upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes". This is a primacy principle under the Polish Constitution. In other words, EU law has primacy over Polish statutes under the Polish Constitution and not merely on account of the EU treaties. Remarkably, these provisions were not even mentioned by the Constitutional Tribunal in judgment K 3/21.

The Tribunal's second and third orders were more specific. They concerned art. 19(1) TEU, which provides that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". The Tribunal suggests that this contradicts various provisions of the Polish Constitution to the extent that it "grants national courts (common courts, administrative courts, military courts and the Supreme Court) the power to [...] [examine] the legality of the act of appointing a judge by the President of the Republic of Poland" and otherwise to supervise matters dealing with judicial independence. Once again, it is very difficult to comprehend where the conflict lies. Art. 19 is a general principle of the rule of law, requiring the protection of judicial independence. It does not contradict the equivalent provisions of the Polish Constitution, which state exactly the same principle. Art. 178(1) of the Polish Constitution states: "Judges, within the exercise of their office, shall be independent and subject only to the

[20] Constitutional Tribunal of Poland of 7 October 2021 K 3/21 cit.

Constitution and statutes". Is that contrary to art.19 TEU? It is not. So the problem here is not with the principle, but with its interpretation and application by the CJEU.

We thus return to the difficulties that Poland has had with the Court of Justice of the EU over judicial independence.[21] In 2015 the political Party of Law and Justice (or PiS) won parliamentary elections. It immediately sought to reform Poland's judicial system. These reforms were widely seen to interfere with judicial independence and to create undue pressure on sitting and future judges. Numerous judgments of the CJEU have challenged the laws and practices of the Polish Government.[22] On 13 January 2016 the European Commission launched the rule of law framework in relation to Poland.[23] The Council of Europe also took action in relation to the same concerns.[24] The Court of Justice of the EU heard various preliminary references in relation to the Polish judicial reforms and gave various rulings implicitly or explicitly criticising the Polish government.[25] In May 2021 the European Court of Human Rights also weighed in the ongoing disputes between the Polish Government and its critics. In the case *Xero Flor v Poland* the Court ruled that Poland had acted in violation of art. 6(1) ECHR because one of the judges of the Constitutional Tribunal had been appointed in violation of the Polish Constitution.[26] Two months later, in July 2021 the Grand Chamber of the Court of Justice delivered another judgment in a related case, this time in a direct action by the Commission against Poland. It found that the new disciplinary regime for judges in violation of art. 19(1) TEU.[27] It is against this background that the Polish Constitutional Tribunal delivered its judgment in case K 3/21 on 9 October 2021.

On the basis of this discussion, we need to distinguish between what the court says and what it could possibly mean. The Tribunal appears to be saying that there is a conflict of general or abstract principles of institutional design, or something like this:

[21] See W Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); W Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' (2018) Hague Journal on the Rule Law 63; L Pech and K Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) CYELS 3; and L Pech, P Wachowiec and D Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (in)action' (2021) Hague Journal on the Rule of Law 1.

[22] At the time of writing there are 27 such cases, dating from 2018 to 2022, according to the website: Safeguarding The Rule of Law in the European Union, *Rule of Law Cases – Poland* euruleoflaw.eu.

[23] See Proposal COM(2017) 835 final for a Council Decision of 20 December 2017 on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.

[24] Council of Europe Resolution 2316 (2020), PACE, *The Functioning of Democratic Institutions in Poland*.

[25] See *e.g*. case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531; case C-192/18 *Commission v Poland (Independence of ordinary courts)* ECLI:EU:C:2019:924; joined cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* ECLI:EU:C:2019:982.

[26] *Xero Flor v Poland* cit. See also ECtHR *Reczkowicz v Poland* App n. 43447/19 [22 July 2021]. Bizarrely, the Constitutional Tribunal's response was to rule a month later in an interim judgment that the judgment of the European Court of Human Rights was "a non-existent judgment"; see Constitutional Tribunal of Poland decision of 15 June 2021 30/A/2021, P 7/20. In judgment K 7/21 of the Constitutional Tribunal of Poland cit., it was ruled that art. 6 of the ECHR is inconsistent with the Polish Constitution.

[27] Case C-791/19 *Commission v Poland* ECLI:EU:C:2021:596.

i) conflict of principles: principle A contradicts principle B, because they cannot be both satisfied at the same time in facts x. If principle A applies, it excludes principle B.
This is what the Tribunal appears to be saying that there is a conflict between principles of the EU treaties and principles of Polish constitutional law. But if one reads the judgment closely, it appears that the conflict it identifies is somewhere else. The principle of judicial independence is the same in both Poland and EU law.

It is possible, therefore, that we may have to understand the conflict as a conflict in the exercise of competences or a conflict of "jurisdiction". It may be that Poland and Hungary are objecting to the idea of obeying directions by the CJEU as a foreign or in any event inappropriate institution. So, a conflict of jurisdiction may be described as follows:

ii) conflict of jurisdiction: institution 1 believes it has jurisdiction in deciding a question x, but institution 2 thinks that it alone can decide question x.

A further possibility is that the Polish Tribunal is saying that the CJEU is acting within its jurisdiction, but in a way that is unacceptable in substance. This will be a conflict of judgments:

iii) conflict of judgments: institution 1 makes the judgment that principle A means *p* in facts x, but institution 2 makes the judgment that the same principle, *i.e*. principle A, means *q* in facts x. If one judgment is given primacy, it applies to facts x, to the exclusion of the rival judgment.

What the Polish Tribunal is describing is a proposition close to *iii)*. We have a conflict of judgments, not a conflict of principles, or conflict of jurisdiction. What are we to do about it?

IV. Pluralism in Action

In March 2018 the Polish Government published a White Paper on precisely this question. The paper set out its views on judicial reform as an expression of pluralism in action.[28] We find there an ambitious theoretical argument which gives further, if indirect, support to judgment K 3/21 on the basis of a theory of "constitutional pluralism". This is, on its face, a surprising choice of theory.

Pluralism is both a serious theoretical approach to transnational law as well as a strongly pro-European one. It has always been directed at ensuring the openness of a legal order in order to overcome what appear to be strong theoretical hurdles to EU law's primacy. Yet, the Polish government has taken a different view. It believes that pluralism supports defiance. Pluralists say that the tension between the EU and member state courts can be described as a conflict of legal systems, which can be resolved by adopting a pragmatic view about the nature and scope of legal orders. This reading of EU law finds

[28] Government of Poland, 'White Paper on the Reform of the Polish Judiciary' (7 March 2010) English version available at www.statewatch.org. For a very helpful discussion of the White Paper see RD Kelemen and L Pech, 'The Uses and Abuses of Constitutional Pluralism' cit. 69–72.

some support in the CJEU ruling in *Costa* which used explicitly the term "legal system" for EU law: "By contrast with ordinary international treaties, the EEU Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply".[29] I pause here to add that the English words legal system were not used. The original term was the French term *ordre juridique* which was translated into "legal system" in the 1970s after Britain and Ireland joined the then European Communities. The choice of words is important because the idea of legal system comes with very strong theoretical background.

In his well-known analysis of the relations between EU law and domestic law Neil MacCormick presupposed that the EU is a legal system which overlaps but also conflicts with the legal system of the member states. He presupposed a theory of "systemic validity", according to which a proposition of law is true because it is valid under a hierarchy of rules or norms set up by the legal system.[30] MacCormick believed that the decisions of the Court of Justice of the EU have asserted "the constituent (and thus constitutional) character of the foundation treaties for the 'new legal order' that they brought into being" so that the *acquis communautaire* is "valid primarily on account of the higher law of the Communities in its character as constitutional law".[31] He described the problem this creates in relation to domestic laws as one where the "interlocking of legal systems, with mutual recognition of each other's validity, but with different grounds for that recognition, poses a profound challenge to our understanding of law and legal system".[32] MacCormick then argued that under a doctrine of pluralism, "there can coexist distinct but genuinely normative legal orders", which "can generate different answers to the same question".[33]

After a long discussion of the problem MacCormick concluded that one possible account of this standoff is a theory of "radical pluralism", which entailed that: "it is possible that the European Court interprets [EU] law so as to assert some right or obligation as binding in favour of a person within the jurisdiction of the highest court of a member state, while that court in turn denies that such a right or obligation is valid in terms of the national constitution".[34] MacCormick then argued that under the radical pluralist position "not every legal problem can be solved legally".[35]

[29] Case C-6/64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66.

[30] MacCormick's own analysis of law came to diverge somewhat from this tradition. In later work MacCormick spoke of law as an "institutional normative order" which incorporates "as aspiration to order" and, possibly, a concern with justice. See N MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007) 11–19. See also N MacCormick, 'A Moralistic Case for A-Moralistic Law' (1985) Valparaiso University Law Review 1.

[31] N MacCormick, *Questioning Sovereignty* cit. 101.

[32] *Ibid*. 102.

[33] *Ibid*. 102.

[34] *Ibid*. 119.

[35] *Ibid*. 117. See also for similar conclusions M Poiares Maduro, 'Europe and the Constitution: What If This Is as Good as It Gets?' in M Wind and J Weiler (eds), *European Constitutionalism Beyond the State*

This analysis focuses on the relation between legal systems, not just principles and judgments. We may say that the conflict is reconstructed by the pluralist account as follows:

conflict of legal systems: there is legal system 1 which requires A in facts x, and there is legal system 2 which requires B in facts x. Both systems apply to facts x (because the systems "overlap" or for some other reason). The conflict is not only in the contents of the relevant principles, but also in the structure and shape of the framework that determine the validity of principles and judgments under each legal system.

If, in MacCormick's scheme, the European Union cab be seen to be legal system 1 and a member state as legal system 2, then their requirements may not always be aligned in practice. They could issue conflicting judgments about what to do. Under the pluralist theories, what the courts ought to do depends on the requirements of the legal system of which they are part. Each system would recognise something as law in its own way. A conflict of judgments by different legal systems could be resolved, the pluralists say, by giving some kind of primacy to one legal system over another.

Primacy, for this analysis, concerns the ranking of legal systems. The EU has created a new legal system, which now stands to some kind of hierarchical relationship to the legal systems of the member states.[36] Following this line of thought, MacCormick concluded that a pluralist analysis is "clearly preferable to the monistic one that envisages a hierarchical relationship in the rank order international law – Community law – member state law".[37] So it follows that there is no "all purpose subordination of member state law to Community law".[38] He said that "these are interacting systems" and not systems linked by ranking.

The Polish White Paper explicitly endorses this analysis. In its preamble it endorses "fundamental European values like the principle of constitutional pluralism and the need to account for the totalitarian past".[39] The paper includes a section entitled "Constitutional Pluralism and the Rule of Law" (paras 169-183) where it sets out its view

(Cambridge University Press 2003) 74, and N Walker, 'The Idea of Constitutional Pluralism' (2002) ModLRev 317. For criticisms, see P Eleftheriadis, 'Pluralism and Integrity' (2010) Ratio Juris 365; J Baquero Cruz, 'Another Look at Constitutional Pluralism in the European Union' (2016) ELJ 356; RD Kelemen, 'On the Unsustainability of Constitutional Pluralism' (2016) Maastricht Journal of European and Comparative Law 136; and 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) 77.

[36] It must be obvious also that the problem disappears under a theory of European "monism", according to which the EU might be a single legal system. See for example R Schütze, 'On "Federal" Ground: The European Union as an (Inter)national Phenomenon' (2009) CMLRev 1069. I discuss this argument below.

[37] N MacCormick, *Questioning Sovereignty* cit. 117.

[38] *Ibid*. 117. For "monism" there is, strictly speaking, no "subordination" since the matter is seen from within the EU law "legal system" only. For further analysis see P Eleftheriadis, 'The Law of Laws' (2010) Transnational Legal Theory 597, 602–612 and A Somek, 'Monism: A Tale of the Undead' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 343.

[39] Government of Poland, 'White Paper on the Reform of the Polish Judiciary' cit. 5.

that "the legal system of the European Union is based on constitutional pluralism of the member states". At para. 174 the paper refers to the work of Neil MacCormick and describes how the Polish legal system cannot be subordinated to the EU's legal system:

> "The basis for [MacCormick's] theory is a belief that the EU – being something more than a typical international organisation, yet something less than a federation of states – a hierarchical system of the sources of law as proposed by Hans Kelsen may not suffice to describe our legal reality. Each of the legal systems – national and European – has different sources for its legitimisation (they are different but have many tangent points). It is thus impossible to completely subordinate one system to another – as impossible as completely separating them".

This is indeed what MacCormick said. He suggests that the relationship between EU and national law is one of two different legal systems. The White Paper then goes on to argue that since the Polish legal system cannot be completely subordinated to that of the EU, it follows that: "the EU and its Member States should mutually respect themselves and remain open to withdraw some of their actions if they would too much interfere in the areas reserved for the other party – even if both of the parties would believe that there are some legal grounds for action" (para. 175).

If this argument is correct, then any conflicting judgments by institutions belonging to different legal systems will not conflict: strictly speaking, they are talking past each other. There will be one constitutional obligation under the EU legal system and another one under the Polish legal system. Only the latter applies in Poland.

Is that view tenable? I believe it is. Pluralism supports the Polish courts. It does so because it says that they are doing nothing wrong in law – at least in Poland. In order to see how this works, we need to look more closely at MacCormick's arguments. In his celebrated essay "Beyond the Sovereign State" MacCormick uncovered the theoretical difficulties with the idea of European law as a transnational "legal system".[40] By carefully exploring the possibilities of applying standard positivist analysis first to the European Union as a distinct "legal system" and then to each state, MacCormick showed that a supposed coexistence of two legal systems would create insurmountable problems. If it exists, a European legal system will make demands for supremacy under its own rule of recognition. A state legal system will continue in existence, however, and it will make its own demands. Some theorists argue that this creates no conflict, because European courts and national courts will always be doing the same thing by occupying two roles at the same time, *i.e*. as European judges and as state judges. MacCormick understood, however, that a rule of recognition is not merely a practice of doing something but it is also a *reason* for doing something.

[40] N MacCormick, 'Beyond the Sovereign State' (1993) ModLRev 1. One of the reasons MacCormick's argument was so influential was that MacCormick was at the time one of the most distinguished defenders of Hart's legal theory. See for example N MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) and N MacCormick, *H. L. A. Hart* (Stanford University Press 1981).

A rule of recognition in Hart's system is a rule under which courts use a standard by which to identify the law. If a court operates under two such standards, then neither of them can be a rule of recognition in the proper sense. None of them would operate as the relevant standard for identifying the law in that place. Strictly speaking, the situation described here would be one where there was no general standard, and no "rule of recognition". It is for this reason that Hart said that a rule of recognition must first of all be effective in the relevant population in the relevant place.

MacCormick accepted all of this theoretical background. He went on to observe that given our conventional understanding of law as state-based, one might have expected that the domestic constitutional rules would have prevailed. Yet, this did not happen. Domestic courts complied with the doctrine of a "new legal order". It thus appeared to MacCormick that the states had modified their understanding of their own legal system through social practice. They modified their "rule of recognition". If so, then no European state was sovereign, because no state enjoyed full political powers within its jurisdiction. MacCormick wrote that in his view, the theory of law is messy enough and sophisticated enough so that it "allows of the possibility that different systems can overlap and interact, without necessarily requiring that one be subordinate or hierarchically inferior to the other or to some third system".[41] He accepted the uncertainty as a necessary condition of pluralism, which he then developed as he proposed "radical pluralism" as one way forward.[42]

MacCormick's discussion finds support in the *Concept of Law* in a passage where Hart says that in cases where officials disagree on the contents of the rule of recognition we have a "substandard, abnormal case containing within it the threat that the legal system will dissolve".[43] Hart acknowledges that a legal order can carry on with some such ambiguity, but only until the expected collapse of the legal order, or until "the population became divided and 'law and order' broke down".[44] The original legal system might continue to exist for a while but not indefinitely.

MacCormick applied this thought to the European Union, without however accepting Hart's pessimism about instability as a necessary consequence. MacCormick said – against Hart - that such conflicts are "not logically embarrassing" because "strictly, the answers are from the point of view of different systems".[45] In his view there was nothing more for a lawyer to say. So MacCormick concluded: "not every legal problem can be solved legally".[46]

What is the upshot of this analysis? The Polish White Paper draws a clear conclusion. It suggests at para. 170 that "constitutional identity, a core value of each national community, determines not only the most fundamental values and resulting tasks for state authorities,

[41] N MacCormick, 'Beyond the Sovereign State' cit. 8.
[42] N MacCormick, *Questioning Sovereignty* cit. 97-101.
[43] HLA Hart, *Concept of Law* (Oxford University Press 1994, 2nd edn) 122–123.
[44] *Ibid*. 122–123.
[45] N MacCormick, *Questioning Sovereignty* cit. 119.
[46] *Ibid*. 119.

but also sets the limit for regulatory intervention by the European Union". The analysis concludes that: "The right to introduce its own sovereign institutional solutions concerning the judiciary is a pillar of each national constitutional system in Europe" (para. 176).[47]

This argument, however, is incoherent. MacCormick's conclusion that there is no legal answer is being used to suggest that there is a legal answer, namely Poland's right to independence. But MacCormick's argument does not vindicate Poland's position. It cannot say that the constitutional identity of Poland must be legally respected by the EU due to a legal principle of "self-restraint", which "should never be disturbed".[48] If there is no legal solution to the conflict, neither Poland nor the EU can have a legal obligation to do anything. If the relevant obligations belong to different legal systems, they cannot conflict. It follows that there is no legal wrong in denying Poland what it wants or in denying the EU what it wants. Each system has its own answer. We have reached an impasse.

Nevertheless, it must be obvious that if there is no legal way out from the impasse identified by radical pluralism, Poland is the political winner. It gets what it wants in real life, because it has the last word. Since there is no appeal from the Constitutional Tribunal, before the CJEU or any other court the judgment cannot be overturned. It stays in place, at least until the EU exercises some kind of political pressure. As is well known, the EU relies on domestic institutions for the enforcement of EU law. But if, due to legal pluralism, EU law has become ineffective in Warsaw, there is also no legal ground – in Poland - for asking the Polish Constitutional Tribunal to change course in compliance with the EU. This is all there is to it. And if judgment K 3/21 is the last word on the subject, then EU law has been politically, if not legally, defeated.[49]

V. The incoherence of pluralism

I conclude that radical pluralism assists the defiant state. But this victory, is short-lived. It does not matter what radical pluralism entails, because it is an incoherent theory that we ought to reject. What the defiant states are doing is simply unlawful. It is unlawful from *all* relevant points of view, not just from the point of view of a hypothetical EU legal system. It is as much unlawful in Brussels as it is in Warsaw.

In order to see this point, we need to revisit some of the fundamental concepts and categories deployed by MacCormick. Some of his assumptions are mistaken. MacCormick's mistakes, as I now see them, are in these three propositions:

[47] Government of Poland, 'White Paper on the Reform of the Polish Judiciary' cit. 83.

[48] *Ibid*. 83.

[49] Pech and Kelemen have correctly observed that the reasoning of the Polish and Hungarian governments uses the idea of "national identity" explicitly and the idea of "constitutional pluralism" implicitly by deploying the "dual concepts of constitutional pluralism and identity as a very useful veneer to disguise their defiance of EU law"; RD Kelemen and L Pech, 'The Uses and Abuses of Constitutional Pluralism' cit. 69. They are right that the veneer is very useful: pluralism is a convenient theory for authoritarians because it says that defiance is lawful.

i) that legal systems may conflict,
ii) that they may overlap and
iii) that pluralism provides some common framework for legal systems.

The problems here arise from the idea of a legal system as defined by MacCormick and the legal positivists. There is some ambiguity in that theory, since Kelsen, Hart and Raz adopt slightly different accounts. But the most common theory is that put forward by Hart, which is endorsed explicitly by MacCormick and by most pluralist scholars. I will therefore rely on Hart's account for what follows.

Hart's concept of legal system requires that at the foundation of law there is a significant causal event. The law emerges from the social fact of the common coordination or coincidence of views among legal subjects and officials, which creates – as a matter of fact – the rule of recognition. This rule serves as the foundation of the legal system. Because it is a social and not a legal rule, the rule of recognition does not depend on any legal technicalities. So when EU law and state law appear to be comparable legal systems, they are seen as rival hierarchies of rules with some kind of rule of recognition at their foundation. In my view, this is a highly misleading theory.[50] The problem is this: the only way of recognising transnational law is on the basis of a *substantive* theory of its content. EU law is a political and institutional project of international cooperation, which embodies a "practical ideal of collective action in the international domain for the sake of justice and peace".[51]

V.1. Legal Systems do not conflict

The very first point we need to make against the pluralist theories is that legal systems defined in Hart's sense, which is the sense used by almost all pluralist theories, cannot "conflict". When MacCormick says that the problem of EU law arises because of a "superfluity of legal answers" he is making a mistake: there is no such superfluity.[52] According to Hart's analysis, each one of us looks at the law from the point of view of only one "legal system", the one where we happen to be in fact.

The thought that systems may conflict proceeds easily from the idea that two judgments may conflict, for example the judgment that A is tax resident, so that he has to pay income tax, or that he is not tax resident, and is not liable to tax there. The legal system of France may take the first view, and the legal system of Britain may take the second view. One may say that not only the judgments conflict, but that also the systems

[50] For this point in more detail in relation to the ideas of "law" and "legal system" (and rejection of the positivist position in transnational and international law) see P Eleftheriadis, 'The Law of Laws' cit. 602–605.

[51] *Ibid*. 612. See also P Eleftheriadis, 'The Moral Distinctiveness of the European Union' (2012) ICON 695.

[52] N MacCormick, *Questioning Sovereignty* cit. 119. The same point is made by Samantha Besson when she says: "When conflicts between legal orders occur, the solution lies in the principles governing the relations between legal orders. In a nutshell, these can be organized according to the principle of monism [...], dualism [...] and pluralism"; see S Besson, 'Theorizing the Sources of International Law' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 163, 184.

conflict. This is perhaps clearer if the same person is claimed as tax resident by two different tax jurisdictions, so that one may be deemed tax resident in system 1 as well as system 2. The systems are, thus, rivals, to the extent they both wish to tax the same amount of earnings. But it would be wrong to say that these tax obligations conflict in law. They may conflict in fact, because the tax payer does not wish to pay both. But they do not conflict *in law*, if each system does not recognise the other's obligations. From each system, there is one obligation, not two. So there is no legal conflict from the point of view of either system. Strictly speaking these obligations do no not co-exist. Competing requirements may conflict in practice, if it comes to that. But they do not conflict as laws. Each system makes its own assessments from within its own framework.

Each system has one answer. There is, thus, no "superfluity" of rules in any system, as MacCormick says. The rules apply in their own terms in only one system at a time. The problem arises because one may be subject to both systems at once, for example by having two homes, for example.

This insight can perhaps be illustrated by an analogy with the rules of a natural language. I may admire Socrates as a philosopher, so that I say to my friend as we both stand in front of the philosophy section at Blackwells in Oxford:

i) Socrates is the greatest philosopher.

But I may also happen to have the same thought in Paris, where I visit my friend at Sciences Po. While we stand at a bookshop, I say to him, in my moderately competent French:

ii) Socrate est le plus grand philosophe.

These statements have the same meaning, but they constructed with different materials. They follow different rules of a natural language. Under the English rules sentence *ii)* is full of errors and mistakes in vocabulary and grammar (for example, the English say "philosopher", not "philosophe", they say "the greatest" not "le plus grand"). If a student used those linguistic forms in Oxford, he would stand to be corrected. Similarly, if a student uttered sentence *i)* at a seminar in Paris, he would probably be criticised.

Is one linguistic form wrong and the other right? The question is nonsensical. Each linguistic expression makes sense within its framework. We cannot therefore say that the rules of grammar, vocabulary and spelling supposedly "conflict" because they result in different sounding sentences. This would be an absurdity. Languages are not rivals. Which language is appropriate for each occasion depends on the social realities of the person speaking.

The same thought, I believe, applies to law. Each law makes sense within each own framework. The point was captured well by Joseph Raz: "Since all legal systems claim to be supreme with respect to their subject-community, none can acknowledge any claim to supremacy over the same community which may be made by another legal system".[53] It follows that there can only be one legal system in place. If so, a legal system cannot

[53] J Raz, *Practical Reason and Norms* (Oxford University Press 1999) 152.

recognise that another legal system conflicts with it. It simply does not exist *qua* legal system. If conflicting claims exist, they will be understood only as some kind of social structure of power, in the form perhaps of voluntary organisations, trade unions, churches, sects, or criminal syndicates that challenge the law and have to be dealt with in some way.

This is exactly what Hart said about legal systems. He did so when he discussed the example of Belgian law applying to German occupied Belgium, during the Second World War. The potential conflict, he noted, arises from the fact that occupied Belgium is in fact under German law, whereas the Belgian government may claim jurisdiction under the established constitutional order. The Belgian legal order was overturned by the invasion, but it is still in force according to Belgian law. Hart says that in such cases "the questions are questions of law which arise within some system of law (municipal or international) and are settled by reference to the rules or principles of that system".[54]

This point was misunderstood by MacCormick. He said that conflicts are "not logically embarrassing" because "strictly, the answers are from the point of view of different systems".[55] This is correct: the answers belong to different systems. But MacCormick does not see the step that must follow. If legal propositions are internal to each legal system then propositions that arise under different systems cannot conflict. For legal judgments to conflict, they must be part of the same legal system. Kelsen explained this point well when he said: "If an insoluble conflict existed between international and national law, and if therefore a dualistic construction were indispensable, one could not regard international law as 'law' or even as a binding normative order, valid simultaneously with national law (assuming that the latter is regarded as a system of valid norms)". [56]

Hart also discusses a related matter, namely the possibility that a legal system begins to split into different directions. He discusses this possibility with another example which he takes from British colonial laws from the facts of the South African case of *Harris v Dönges* of 1954, where the legislature set up a rival court to compete with the ordinary courts, with whom the government disagreed.[57] The new court, called the "High Court of Parliament" created new ultimate criteria to be used in identifying the law and started operation in competition with the ordinary courts.[58] For a while the rival courts invalidated each other's judgments. After a while the government lost its nerve and gave way. Hart notes that since for a period of time we had two rival views of the criteria of valid law for a period of time, "the normal conditions of official, and especially of judicial, harmony, under which alone it is possible to identify the system's rule of recognition,

[54] HLA Hart, *Concept of Law* cit. 216.

[55] N MacCormick, *Questioning Sovereignty* cit. 119.

[56] H Kelsen, *Pure Theory of Law* (University of California Press 1967) 329.

[57] *Harris v Dönges (Minister of the Interior)* [1952] 1 TLR; (1952) 2 SA 428; in the Appellate Division of the South African Supreme Court.

[58] HLA Hart, *Concept of Law* cit. 122.

would have been suspended".[59] Hart believes that such a conflict can be tolerable only for a time and not indefinitely. He says: "All we could do would be to describe the situation as we have done and note it as a substandard, abnormal case containing within it the threat that the legal system will dissolve".[60] This is a "substandard" case for him, not a normal one. It is important to note that Hart describes this as a conflict within the same legal system, not as a conflict of two rival legal systems. And he insists that is a pathological case that undermines law's foundations.

Joseph Raz took the same view. It is part of the very nature of a legal system, he says, that it aims to be comprehensive and exclusive. If this is not the case, then rival rules of recognition will be competing for domination, which ensures that there is no law at all in such a place. Raz's own view is that a legal system is connected to the law-applying institutions we find in modern states: "Every state — by which is meant a form of political system and not a juristic person — has one legal system that constitutes the law of that state, and every municipal legal system is the law of one state".[61] There is no room for competing legal systems in the same place. Raz disagrees with Hart on the method by which this comprehensive claim is achieved. He puts less emphasis on the existence of a rule of recognition and more emphasis on the conduct of law-applying officials. Raz argues that "the unity of a legal system does not depend on having only one rule of recognition". Instead, "the unity of the system depends on the fact that it contains only rules which certain primary organs are bound to apply".[62] Be that as it may, legal officials cannot maintain a single legal system while they apply rules that endorse rival constitutional frameworks.[63]

MacCormick's analysis fails in precisely the ways identified by Hart and Raz. A legal dispute can only take place within the *same* legal system. If EU law claims priority for the Treaties, it must do so as a successor legal system of the legal systems of the member states. In no other way can primacy make sense. Within Hart's analysis, which forms the basis of MacCormick's analysis, the idea that one legal system conflicts with another is a simple absurdity. It is equally absurd to say that legal systems can be ordered in some hierarchy. If they are so ordered, they are not distinct legal systems.

V.2. Legal Systems do not "overlap"

The second mistake MacCormick made was in suggesting that legal systems overlap. MacCormick is not the only theorists making this assumption. That legal systems overlap is occasionally accepted by legal scholars who follow Hart. Even Raz writes loosely, for

[59] *Ibid*. 122.

[60] *Ibid*. 123.

[61] J Raz, *The Authority of Law* (Clarendon Press 1979) 98–99.

[62] J Raz, *Practical Reason and Norms* cit. 147.

[63] For the differences between Hart and Raz and their significance for the positivist analysis of EU law see G Letsas, 'Harmonic Law' cit. 84–91.

example, that "legal systems can co-exist, can be practised by one community", although he admits that this "undesirable" and lead to an "unstable situation".[64] By this he means, I believe, that a legal system may adopt some of the rules of the other system. Nevertheless, Raz does not believe that this is sustainable in the long run so that he ultimately adopts the opposite position.

It is not possible, he says a few paragraphs down, that a legal system recognises another "system's claim to supremacy". He writes: "Since all legal systems claim to be supreme with respect to their subject-community, none can acknowledge any claim to supremacy over the same community which may be made by another legal system".[65] This is the more coherent position and this is the position held by Hart. This is because the question of the legal system, just like the test of the relevant natural language, is for Hart and Raz purely one of social fact, which gives rise to a rule of recognition and through it the "union of primary and secondary rules" that creates a proper legal system.

The test of social facts of convergent behaviour are impossible to be met by two systems at the same time and place. A legal system exists as the union of primary and secondary rules only if, first, ordinary citizens obey its rules and, second, if officials accept its secondary rules as critical common standards of official behaviour.[66] Accordingly, a legal system will exist in the EU, only if it has its own rule of recognition for the whole of Europe, followed by way of common dispositions of European legal officials as well the obedience of citizens.[67] If such a social rule exists, it will make it impossible for another rule to also be true for the same place. Since a legal system requires obedience by ordinary citizens and "acceptance by officials of secondary rules as critical common standards of official behaviour", the required obedience cannot be true of rival systems in the same place at the same time.[68]

Hart explained this very clearly. He discussed the possibility that a colonial legal order may declare unilateral independence from Britain who was, however, resisting the change. In such a scenario, the United Kingdom legal system would believe and act as if it was the legal system of the colony, whereas the colony would consider itself independent and the local officials would follow local law. The matter would be resolved by the relevant social facts. But there is no overlap between the two legal systems at any particular time. The rival claims do not "overlap", since they are strongly denied by each system. There was no doubt in Hart's mind that only one legal system exists in fact. Hart's

[64] J Raz, *Practical Reason and Norms* cit. 152.

[65] *Ibid*. 152.

[66] HLA Hart, *The Concept of Law* cit. 117.

[67] This is indeed the beginning of MacCormick's analysis of EU law. See N MacCormick, *Questioning Sovereignty* cit. 101 and 106–107.

[68] HLA Hart, *The Concept of Law* cit. 117. So effectiveness is an essential characteristic. Hart said that in the extreme case a legal system may exist even when the citizens obey without any critical attitude it and the internal point of view is limited to the "official world".

account of this case shows clearly that there is no "overlap" of legal systems or of the judgments they lead to:

> "in this case propositions of English law seem to conflict with fact. The law of the colony is not recognised in English courts as being what it is in fact: an independent legal system with its own local, ultimate rule of recognition. As a matter of fact there will be two legal systems, where English law will insist that there is only one. But, just because one assertion is a statement of fact and the other a proposition of (English) law, the two do not logically conflict. To make the position clear we can, if we like, say that the statement of fact is true and the proposition of English law is 'correct in English law'".[69]

In Hart's theory, a legal system exists only if it inspires in fact social obedience to the required degree. Such obedience cannot be true of two different systems in the same place at the same time. Legal systems cannot overlap.

V.3. Pluralism cannot provide a framework for consensus

Finally, legal pluralism does not provide a framework for coordination. According to Hart's theory the question of which legal system applies in each case is a matter of social fact. If this is so, there cannot be any legal principle of moderation, consensus or coordination replacing the various claims of each system (and this is the whole problem). Remember that each system claims to apply to the exclusion of all others. This means that there cannot be an overall legal arrangement between them.

This point is often misunderstood by pluralist theorists. MacCormick wrote as if radical pluralism provided some kind of resolution for conflicts by transforming relations from hierarchical to horizontal. He said that under pluralism "relations between states *inter se* and between states and Community are interactive rather than hierarchical" and that "hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another".[70] This is a view adopted by other pluralists theorists, for example Nick Barber and Nico Krisch.[71] I understand the intuitive appeal of this argument. Ultimately, however, it is self-contradictory.

Here is why. There may well be good reasons for dialogue and cooperation, which the relevant courts respond to.[72] But there cannot be a *legal* principle of interaction or cooperation between legal systems. There is nothing to replace the internal hierarchies of each legal system. So there cannot be any *legal* transformation of the conflict. It is therefore a mistake to say a pluralist framework provides any principles of "mutual

[69] *Ibid*. 121.

[70] N MacCormick, *Beyond Sovereignty* cit. 117.

[71] NW Barber, *The Constitutional State* (Oxford University Press 2010) 145–71, and N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) 69.

[72] See for example A Arnull, 'Judicial Dialogue in the European Union' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* cit. 109–133.

validity" for legal orders, as Samantha Besson suggests.[73] Pluralism cannot do any such thing. Under any theory of pluralism that presupposes Hart's idea of a "legal system", whatever the Polish courts do is lawful in Warsaw (under the "legal system" of Poland) and whatever European courts do is lawful in Brussels or Luxembourg (under the 'legal system' of the EU). As we saw above, in his account of Belgian law under occupation Hart said that the first step in applying the law is the identification of the socially relevant system because: "the questions are questions of law which arise within some system of law (municipal or international) and are settled by reference to the rules or principles of that system".[74] MacCormick suggestions that pluralism has some kind of transformative effect, so that hierarchy gives way to coordination ignores this aspect of Hart's theory.

VI. Federal monism

I have argued thus far that pluralism cannot provide any resolution for the conflicts identified by MacCormick, once we accept that the EU is its own "legal system". Is there a way of rescuing the idea that the EU legal system is now its own legal system?

One possible response is offered by Robert Schütze. In various highly original and well-argued works Schütze has rejected the radical pluralist model proposed by MacCormick and has argued that the new EU legal system encompasses a broader doctrinal legal framework under a theory of monism. He calls "federalist" but he is careful to note its "dual" foundation in both the treaties and domestic law. This new framework includes the member states, whose legal systems must now be in some way subordinate. This means that we should see EU law through the lenses of some kind of European monism which accommodates the institutional complexity of the EU and the division of labour between states and the EU under a federal framework.

Schütze writes that "in the eyes of the European Court and the majority of European scholars, the normative force of European law derives no longer from the normative foundations of international law. The ultimate normative base within the European Union – its 'originality hypothesis' or 'Grundnorm' – is the Rome Treaty as such. […] While 'international' in formation, the European Treaties have assumed 'national' characteristics".[75] This means that there is no reason to consider that EU law is to be compared to international law. The problem with this move, however, Schütze correctly observes, is that EU law was created by a treaty of public international law which does not have, at least at the point of its conclusion, a "constitutional" significance.[76] For the Treaties to be considered a constitutional document something must have happened in the intervening years. What could that be?

[73] See S Besson, 'Theorizing the Sources of International Law' cit. 184.
[74] HLA Hart, *The Concept of Law* cit. 216.
[75] R Schütze, 'On "Federal" Ground' cit. 1082.
[76] *Ibid*. 1079.

Schütze says that the treaties were "elevated" into a position of constitutional status by a combination of a series of social events. The first is the emergence of the case law of the Court of Justice, which "emancipated" EU law from international law through a series of judgments. Schütze observes that the important elements in this case law were that the Court asserted that a member state cannot invoke the breach of EU law by another state to justify a derogation from it, that EU law is supreme over all national law including constitutional law, and that EU law applies directly for the benefit of individuals in the member states.[77] Since these substantive features are now part of EU law and are recognised by the "European Court and the majority of European scholars", it follows that "the normative force of European law derives no longer from the normative foundations of international law".[78] Instead, the "ultimate normative base within the European Union – its 'originality hypothesis' or 'Grundnorm' – is the Rome Treaty as such".[79]

Schütze finds support for this conclusion in the case law of the CJEU that speaks of the Treaties as a "basic constitutional charter".[80] He then draws the conclusions from this analysis that the member states have thus lost their "competence-competence", by which he means that they "are no longer competent unilaterally to determine the limits of their own competences themselves".[81] Similarly, we must conclude that the European Parliament now represents, not the individuals peoples separately, but "a – constitutionally posited – European people".[82] Schütze concludes that the European Union is something that lies between a sate and an international organisation, which he calls a federation of states and which is close to what MacCormick called a European commonwealth.

This argument is made with great care. Its message of doctrinal coherence is very attractive. It does a very good job of interpreting the case law in a meaningful way. Yet, in my opinion it cannot succeed. Schütze's analysis underestimates the role reserved for states under the treaties. The Treaties are clearly expressed in a way that leaves no doubt that there has never been an intention to abandon international law as the foundation of the European Union. Art. 1 TEU states that the "High Contracting Parties establish among themselves" the European Union, "on which the Member States confer competences to attain objectives they have in common". These are not the words of a *Grundnorm*.

Schütze also argues that member states have lost their competence to "unilaterally" determine the limits of their own competences themselves.[83] This is not true. It is correct that any amendment to the treaties must be supported by unanimity. So the states are masters of the Treaties only when they act collectively. But this does not mean that are not

[77] *Ibid*. 1081–1082.

[78] *Ibid*. 1082.

[79] *Ibid*. 1082.

[80] Case C-294/83 *Les Verts v Parliament* ECLI:EU:C:1986:166 para. 23 and Opinion 1/91 *Accord EEE- I* ECLI:EU:C:1991:490.

[81] R Schütze, 'On "Federal" Ground' cit. 1083.

[82] *Ibid*. 1085.

[83] *Ibid*. 1083.

sovereign. Nothing can change without their consent. Moreover, the example of the United Kingdom shows that by using art. 50 a member state can unilaterally leave the European Union. As the *Wightman* judgment shows, EU law leaves the sovereignty of the member states entirely intact.[84] Schütze also argues that member states cannot modify their obligations *inter se* through the conclusion of subsequent international treaties. This is not entirely correct either. Member states have concluded *inter se* treaties in the area of freedom of movement (Schengen), on the Eurozone (*e.g.* ESM) and on the Stability and Growth Pact.

Finally, the most important concepts of EU law are not derived by the treaties at all. What is a "court" or a "government" or a "citizen" or "member of European Parliament" in EU terms is determined fully by domestic laws and constitutions, not by the Treaties. Moreover, the very constitutional process of the European Union, the process of the amendment of the Treaties which is in a way the highest "constitutional" power in the EU is purely a matter for the states. It almost entirely escapes EU law since it is conducted according to the rules of public international law, as specified by art. 48 TEU. No institution of the EU has any decisive role in the amendment of the treaties. Decisions are to be made by a "conference of representatives of the governments of the Member States" and they take effect only if a new treaty is ratified by the member states as general public international law requires. In all these ways, the Treaties resist the interpretation of a "federal" union, such as that proposed by Schütze. Even the Court of Justice of the EU seems to recognise this fact. It speaks of the "dialogue" between European and domestic courts, accepting that there is no hierarchical relationship between the CJEU and the domestic courts.

Finally, the EU treaties themselves depend on their interpretation on public international law (something entirely familiar with all treaties). One example may suffice. If one looks at the text of art. 52 TEU today (most recently reaffirmed in 2012 through the Treaty of the accession of Croatia), one will see that among the members of the EU there is one "United Kingdom of Great Britain and Northern Ireland". But this article has to be read alongside the EU-UK Withdrawal Agreement, which was made under art. 50 TEU in 2019 and has taken the UK out of the EU with effect from 2020.[85] In this simple doctrinal sense, the TEU is not an independent source of law within a federal legal order, but a Treaty like all others. It is part of public international law like all other similar treaties and its meaning depends a network of principles and institutions that jointly make up a legal order for the European Union and its member states.

Although I agree with Schütze that some overarching principle is necessary, so that monism is much preferable to pluralism if we are friends of integration, I do not agree that such a principle has been created through a Kelsenian master rule. The EU legal order does not have the institutional features that put together a coherent institutional model with a master rule at the top. Doctrinally, the situation is the other way round: it is

[84] Case C-621/18 *Wightman v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999.

[85] Agreement 2019/C 384 I/01 of 12 November 2019 on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

the domestic constitutions that meet the tests of constitutionalism and on which EU law continuously depends for its enforcement and its ultimate success.

When one looks at the treaties seriously, they read very much like, well, treaties. They are not foundations of a new legal order. They are agreements among states. If they provide a coherent framework, this must be one interpreted – at least in my view– in internationalist terms.[86]

VII. Social monism

There is yet another argument for monism. Justin Lindeboom tries to avoid the problems we have just identified in Schütze's argument. He offers a rival monism, which goes beyond the text of the treaties of the content of any laws (and therefore departs from the Kelsenian framework). If I understand the argument correctly, Lindeboom argues that the EU has challenged the structure of the European legal order on a different basis. Instead of focusing on doctrinal arguments, in the way of MacCormick and Schütze, Lindeboom focuses on the social practices underlying the creation of a new chain of obedience. This argument closer to Hart's original argument, by following some things said by Raz about the nature of the legal system.

Lindeboom opens his discussion by noting that: "Hart and his followers conceptualise law as a species of a social system which is founded on the social practice of institutionalised officials".[87] And he describes the EU legal system as an institutional order of precisely this kind, where domestic officials follow – in practice – the directions of the CJEU: "If EU law is to be a directly effective legal system in the Member States' legal-institutional arena, clearly the practice of the national courts must establish a social rule to that end".[88] It follows that for Lindeboom, "an autonomous EU Rule of Recognition must not be conflated with any written norm in the Treaties [...]".[89] So it does not matter that the treaties read like treaties and not like a constitutional master rule. The rule of recognition is not the highest legal rule, but only the "social rule that designates this or that norm or set of norms as the highest source of the legal system".[90] So what makes

[86] This is my argument in P Eleftheriadis, *A Union of Peoples* cit. It is also the argument, I believe, in MacCormick's *Questioning Soveriegnty*, where he briefly speaks of "pluralism under international law", as I explain below.

[87] J Lindeboom, 'Why EU Law Claims Supremacy' (2018) OJLS 328, 336. My account below may not reflect every aspect of the argument made by Lindeboom. Towards the end of the article, Lindeboom endorses the analysis of legal system of MacCormick (see *ibid*. 353) and states: "There is nothing in legal positivism to resist the idea that concurrent legal systems have concurrent claims to supremacy. In fact, some classical works on descriptive constitutional pluralism in Europe can be viewed as restatements of traditional legal systems theory". This takes us back to pluralism. So my monist reading of Lindeoom's argument may be an exaggeration. In any event, for purposes of exposition I will describe Lindeboom's argument as primarily an argument for monism.

[88] J Lindeboom, 'Why EU Law Claims Supremacy' cit. 339.

[89] *Ibid*. 339.

[90] *Ibid*. 340.

the EU a legal system is not what the treaties or the case law say, but how the officials behave. Lindeboom's conclusion is a resounding affirmation of the EU as an independent and autonomous legal system: "Rather than perceiving EU law as something 'supranational', 'international' or 'sui generis', the CJEU simply perceives the EU legal system—following its own construction to this end—as an autonomous legal system mimicking national law, claiming supremacy not because it deems itself hierarchically positioned above national law, but because this is an inherent part of the imitation".[91]

I consider this to be a monist reading, to the extent that it assumes that EU law approximates a domestic legal order as a matter of fact. Lindeboom says, reflecting Hart's insights, that such a system can emerge spontaneously with a complete break with the past: "If law is a social construct primarily rooted in the behaviour of a particular group of people, it can emerge spontaneously".[92] He accepts that "something cannot be law if it is not generally obeyed".[93] This is precisely the spirit of Hart's theory, which explicitly states that the existence of a rule of recognition, as well as its demise, are non-legal matters that depend entirely on matters of fact, not matters of law. For such a social theory of the legal system the doctrinal details are immaterial. This means a social, extra-legal transformation, which brings about a real revolution in the foundation of the legal system.

Lindeboom thus adopts a social and or content-independent analysis of the legal system, according to which law is a "social system which is founded on the social practice of institutionalised officials".[94] Lindeboom attributes this theory to Hart, but he misses the fact that Hart also included the conduct of legal subjects as a relevant test and not merely the officials (as we saw above in some detail). Lindeboom actually applies Raz's theory, which he relies upon explicitly throughout his argument. Lindeboom adopts Raz's three criteria for the existence of a legal system: namely that its has to be a social, normative system which *i)* is comprehensive, *ii)* claims supremacy and *iii)* is an open system.[95]

Lindeboom argues that EU law meets those tests and is sufficiently similar to a domestic legal system. He finds support for these conclusions in the CJEU's case that shows that "the Court effectively purports to mimic national legal systems".[96] On the basis of this case law Lindeboom argues that EU law is comprehensive, in that it claims "unspecified jurisdiction for itself", refuses to acknowledge any limit to its jurisdiction and adopts a doctrine of "*Kompetenz-Kompetenz*", so that it claims to be "total law".[97] Like Schütze,

[91] *Ibid*. 355.
[92] *Ibid*. 338.
[93] *Ibid*. 338.
[94] *Ibid*. 336.
[95] *Ibid*. 336, where he refers to J Raz, *Practical Reason and Norms* cit. 151–154.
[96] J Lindeboom, 'Why EU Law Claims Supremacy' cit. 340.
[97] *Ibid*. 345. In the same article, however, we read the precise opposite observation, namely that EU law "has an explicitly purposive nature in light of its specific policy objectives and limited competences" (see *ibid.* 338) and that "one of the major idiosyncrasies of EU law qua law is that it only possesses limited competences in the pursuance of specific objectives" (see *ibid*. 344).

Lindeboom argues that EU law can be explained by the EU's "federal nature" and that from a "legal-philosophical viewpoint, the EU legal system is perhaps not that different from national law".[98] But Lindeboom relies for this argument not on the treaties themselves, but on the court of justice as an institution.[99] Under this more or less Razian theory the transformation of the EU legal order into a proper legal system happened not because the treaties changed nature, but because the Court of Justice of the EU gradually became the highest legal office, or institution, with the power to determine by way of an authoritative legal judgment what the law means – and occasionally make new positive law.

Lindeboom thus argues that the EU has successful claimed to be "total law" because the CJEU claims exclusive power to determine the limits of the powers of the EU and the states under a doctrine that holds that while the competences of the EU are limited in nature, it is solely for the CJEU to establish whether a particular matter falls within the scope of EU law. So Lindeboom concludes that "It has been the CJEU's jurisprudence that has transformed the EU into an EU legal system, not the EU legal system forcing the CJEU to acknowledge its existence as such".[100]

What about the national courts? What is their role now? This is, however, where the argument begins to unravel. Lindeboom accepts that "if EU law is to be a directly effective legal system in the Member States' legal-institutional area, clearly the practice of the national courts must establish a social rule to that end".[101] No such rule can be found, however. The fact is that most of them do not accept that the EU treaties have absolute and unconditional supremacy over constitutions. They do not accept that the CJEU is the supreme court in the European Union. A typical statement is that of para. 101 of the *Weiss* judgment of the German Constitutional Court, where it is said that matters of "constitutional identity" are beyond EU law: "The democratic legitimation by the people of public authority exercised in Germany belongs to the essential contents of the principle of the sovereignty of the people and thus forms part of the Basic Law's constitutional identity protected in Art. 79(3) GG; it is therefore beyond the reach of European integration in accordance with Art. 23(1) third sentence in conjunction with Art. 79(3) GG".[102]

This is one of many similar challenges to the absolute supremacy of EU law by national courts. What do they mean? Don't they show that the social foundation of a EU legal system is radically incomplete? Unfortunately, Lindeboom does not deal with this fundamental challenge to his argument in any detail. He brushes it aside with the remark that national courts have in fact "heeded" the CJEU's invitation. He is perhaps right about *Weiss*, in that the German court did not carry out its threat to ignore the CJEU. But in what

[98] J Lindeboom, 'Why EU Law Claims Supremacy' cit. 350–351.

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

[100] J Lindeboom, 'Why EU Law Claims Supremacy' cit. 350.

[101] *Ibid*. 339.

[102] Federal Constitutional Court of Germany of 5 May 2020 2 BvR 859/15 *Weiss and Others* para. 101.

sense does the German Court accept that it is bound by the Treaties as higher or the only applicable law? So far we can see the German Court flatly rejects the idea that the treaties are the rule of recognition in Germany. And the case law of other courts is equally clear that the treaties are not a European constitution.

There is perhaps an effective response to this objection from the practice of national courts. Lindeboom's argument, we must remember is not doctrinal. It follows the Razian social and factual analysis of the legal system as the product of social forces beyond and before the law. The argument focuses on the practice of courts, not their doctrines, on what they do and not on what they say. And as it turns out most courts – with the exception perhaps of some Polish and Hungarian courts – do accept in practice the elevated status of EU law and of the CJEU. So Lindeboom argues that a court's theoretical objections are less significant than their practical compliance. It wouldn't matter if this compliance was actually in contradiction with the official constitution:

> "Whether the social practice of national courts supports the existence of an autonomous EU norm of adjudication as applied to them is an empirical question, as is the question of whether an autonomous EU Rule of Recognition is practised by national courts. However, the dual hats of national courts as such do not threaten the CJEU's conceptualisation of the EU legal system as being no different from the national legal systems".[103]

Lindeboom thus argues that national courts operate as European courts *in fact*. Given their practical compliance with EU law for the most part it is at least arguable, he suggests, that "perhaps contrary to the self-perception of many national courts, when national courts apply EU law they are actually functioning as courts of the EU legal system as opposed to their national legal system".[104] The official constitutional theory does not matter. It is the social practice that mattes. And since the social practice complies with the CJEU, the national courts have become de facto instruments of a single EU led, European legal system, which has in fact taken over the member states.

It is important to stress here that this is still a theory of monism. There is one legal system, that of the EU. The EU legal system and the member state legal systems apply "concurrently" and "by the same officials" at least in fact. Pluralism applies perhaps at a second, but less important level, the level of (superficial, legal) doctrine. But, as we saw, the reality of a legal system is social, not doctrinal. So all that is needed for unity is the fact of social convergence, irrespective of legal technicalities. This reminds us of Hart's statement: "in this field nothing succeeds like success". That's the whole point of Raz's analysis of the legal system as social fact.

Here, however, lies the theory's greatest weakness. If the idea of a legal system depends solely on facts of obedience and not on legal doctrine and argument, then it is defeated by acts of *disobedience*. If the EU legal system cannot determine that acts of

[103] J Lindeboom, 'Why EU Law Claims Supremacy' cit. 352.
[104] *Ibid*. 351.

defiance by member states are unlawful it has no response to the rebellions by Poland and Hungary. Defiance wins.

If we conceive of the existence of a legal system socially – in the way Lindeboom prefers – then the social departure from the idea of a European legal system is also a *de facto* amendment of the boundaries of that legal system. An act of active disobedience or defiance can take those pursuing it outside the legal system of the EU. What can such a social theory of the EU legal system say to the Polish Constitutional Tribunal and the Polish government, that are defying EU law? Nothing. As we saw above the nerve of the Razian theory is that a legal system is created because of the practices of mutually supporting legal officials, or judges. But if those legal officials stop acting int that way, the legal system disappears. This does not require any constitutional or theoretical unity at all (and Raz explicitly allows that a single legal system may have more than one rule of recognition). He argues that the unity of a legal system does not depend on having only one rule of recognition. Instead, the unity of the system depends on the fact that it contains only rules which certain primary organs are bound to apply.[105] But if these "primary organs" change course, the legal system ceases to exist. Raz further argues that: "the primary organs which are to be regarded as belonging to one system are those which mutually recognize the authoritativeness of their determinations"'.[106] It is the actions of these organs that matter for the continuing existence of a legal system.[107]

But if the identity of a legal system is a matter of the conduct of the officials that work within it, then the defiant action of the Polish judges must have effectively redrawn the boundaries of the EU legal system. Lindeboom in effect gives the Polish acts of defiance a constitution-making character. His argument is thus self-defeating: rather than assert the primacy of EU law *against* defiance, it accepts its demise *because of* defiance. Under a doctrine of social monism such that is being proposed by the legal positivists that follow Hart and Raz, we have no defence against the fact that the exercise of power by some popular government (be it in Poland or Hungary or elsewhere) destroys and cancels the legal system.

In fact, under this legal positivist view of law, the worse a government behaves the freer it will be of legal obligations. When the social facts change, monism must go with them. Any defiant court and any defiant government will be able to destroy the current

[105] J Raz, *Practical Reason and Norms* cit. 147. Lindeboom endorses that with these words: "There is nothing in the concept of a legal system that suggests it is constrained to a single geographical area, nor that any geographical area can have only one legal system", see J Lindeboom, 'Why EU Law Claims Supremacy' cit. 342.

[106] J Raz, *Practical Reason and Norms* cit. 147.

[107] Indeed, Lindeboom ends his essay by making the claim that law is irrelevant, he writes that "Opinion 2/13 is quite typical of law as we know it: pretentious and rife with an inflated sense of its own importance" (citing John Gardner). But if this is so, then legal scholarship is just some kind of parlour game with no practical significance – which may well have been John Gardner's view, I do not know. If find this view not only patronising but also evidently false. It is not a view of law shared by judges, practitioners or citizens, who act on the basis of law and criticise each other when one fails to be guided by it. The idea that law is a game or a hobby seems entirely absurd to anyone who has ever walked into a court of law or a parliament or a jail.

legal order. In the case of Poland and Hungary, we may thus have to say that because of the actions of primary organs, the scope of the EU legal system has changed and the content of EU membership has been redrawn. The old social basis has evaporated and a new one has taken over. Lindeboom's social theory of the constitution cannot explain why the EU is right to insist that Poland and Hungary should obey EU law.

VIII. Primacy: a pragmatic view

If the arguments above are correct, MacCormick was wrong on several points: Hartian legal systems do not conflict, they do not overlap, and cannot be ranked or held equivalent to one another under an overall pluralist framework. We cannot understand how EU law has become part of domestic law with the idea that it is a new legal system. Of course, MacCormick said those things because they corresponded to common sense impressions we have about the way in which EU law and domestic law relate. Yet these phenomena cannot be described through Hart's idea of the legal system. Such an idea cannot accommodate an EU legal system next to the national systems. So we must try something new, rejecting perhaps MacCormick's most fundamental assumption: the there is an EU legal system in Hart's sense. What follows from such a change of focus? What could replace it?

We may approach this from the vantage point of a theory that rejects legal positivism altogether. This theory would do away with the idea of a legal system. Neither the member states nor the Union are legal systems in Hart's sense of the union of primary and secondary rules. We may follow here Dworkin's theory of law as a moral project, which tells us that the institutional framework of the state is held together by series of interconnected moral judgments, including judgments about the legitimacy of historical institutions.[108] Dworkin connects legal judgment with legitimacy and explains that governments are legitimate "if their laws and policies can nevertheless reasonably interpreted as recognizing that the fate of each citizen is of equal importance and that each has a responsibility to create his own life".[109] A similar moral argument may be made about EU law – and I have offered such a detailed argument elsewhere.[110] But we do not need to turn to Dworkin's abstract theories in order to understand the primacy of EU law. We do not need to fully climb this mountain, just in order to understand this point.

We can simply say that the European Union is not a legal system, remaining agnostic on the nature of the domestic jurisdictions as legal systems or otherwise. All we need to say is that domestic law has to be open to European Union law on the basis of the EU treaties as a matter of constitutional principle. Something like this has been accepted by all

[108] I have said more about how we should interpret EU law as a moral project in P Eleftheriadis, *A Union of Peoples* cit.

[109] R Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 322.

[110] I find this argument compelling, but I do not need to make the point here. See for example P Eleftheriadis, *Legal Rights* (Oxford University Press 2008) and P Eleftheriadis, *A Union of Peoples* cit. ch. 4.

domestic courts, which have recognised the authority of the EU treaties and their primacy, on the basis of the domestic constitution. We can thus leave aside the larger theoretical questions to one side and accept that the introduction of the EU treaties did not have the "structural" effects identified by the theories offered by MacCormick and Schütze.

We can then just make a simple distinction between "structural" theories and "interpretive" theories of EU law. The structural theories proceed, like MacCormick and Schütze, on the basis that the Treaties have created a new "legal system". This causes all the problems we identified above. If we say that the EU has not created a new "legal system" and the changes it has brought have not transformed the structure of domestic legal orders, we can approach the question of primacy with doctrinal minimalism. We may say that the treaties are nothing out of the ordinary. They are common treaties of public international law, that are incorporated into the legal orders of the member states according to established constitutional processes. It is the domestic constitution, however, that demands that such treaties are given primacy, direct effect and autonomous meaning in domestic jurisdictions. This interpretive view of the treaties is, to my mind, the standard way of accepting EU law in all member states according to the supreme courts of the member states.[111] We do not need any general theory to make these points. Like the practitioners, we say that EU law is part of ordinary constitutional doctrine in all member states.

This is also the approach of the Court of Justice. When we look at the case law of the Court, we find that it has never accepted the theory of two legal systems with their own rules of recognition. It has never accepted the structural interpretation of EU law in either its pluralist or monist versions. It has instead put forward a substantive account of the autonomy of EU law that makes minimal theoretical commitments and simply invites domestic jurisdictions to interpret their own legal orders in light of the principles of the Treaties. This has been the case since the very first cases of primacy. If we recall, in *Costa* the Court said: "By contrast with ordinary international treaties, the EEU Treaty has created its own legal system [*ordre juridique propre*] which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States [*integre au système juridique des états membres*] and which their courts are bound to apply".[112]

The meaning of *ordre juridique* in this context cannot be that of a new legal system. The second sentence clearly denies it. If EU law becomes an "integral part" of the legal system of the member states, then it is not a novel or competing legal system. That would be impossible, since on the account of the legal system offered by Hart and MacCormick, a legal system cannot be part of another. If so, the translation of the term *ordre juridique* to legal system was an unfortunate error, which misled many theorists of law in looking up the ideas of Hart and Raz. The Court did not endorse those ideas. All the court says is that EU law must be interpreted, immediately and without further incorporation, as an

[111] I argue for this point in P Eleftheriadis, *A Union of Peoples* cit. ch. 3.
[112] *Flaminio Costa v ENEL* cit.

"integral part" of the domestic legal order. But this means only one thing: that the EU does not constitute a separate legal system.

The CJEU has deployed a modest substantive account of a legal order as an element of the constitutional order of all member states. EU law, in this account, is a set of general constitutional principles of equal recognition and reciprocity that transform the domestic constitutional order without amending its structure. The legal orders of the member states adopt cosmopolitan principles, without changing their nature as independent sovereign constitutions. So EU law does not make claims to structural supremacy. EU principles become constitutional fundamentals from within the established constitutional orders. There is continuity, not a breach with the past. The relevant cosmopolitan principles are constitutional principles that take effect domestically just like any other constitutional principle.[113]

I outline below how a transnational legal order works alongside the domestic legal orders on the basis of some cosmopolitan principles in this pragmatic way, summarising some things I have written in the past.[114]

VIII.1. Europe's legal order

The standard approach to the legal order in all member states of the EU is constitutional. We take the fundamental structures of the legal order to be matters of law, explicitly set out in constitutional law. Under this model, the state is not a product of power or social convergence or a momentary expression of approval, as the legal positivists say, but is a framework of principles, institutions and judgments that are legally binding as constitutional law. These constitutional principles make sense as a coherent intellectual framework that offers concrete practical guidance.[115] We may call this a "constitutional legal order". A constitutional legal order exists on account of its substantive contents. It is obvious that such a legal order can be state-based as well as international. It can, indeed, be non-territorial, for example in the way of an ecclesiastical legal order may bind

[113] For the argument that the EU does not have a "legal system" in the Hartian sense see also the interesting analysis offered by K Culver and M Giudice, 'Not a System But an Order: An Inter-Institutional View of European Union Law' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* cit. 68, they say that "in our view, supra-state law is not best explained by tracing its existence up some chain of validity or authority ultimately resting with a Member State's constitution and its assertion of supremacy". My only criticism of this argument is that it does not recognise – at least not explicitly – that it rejects the Hartian framework entirely as a theory of law.

[114] The same point is very well argued by G Letsas, 'Harmonic Law' cit. 107, an essay from which I have benefited greatly. Letsas writes that "non-positivism [...] changed radically the old paradigm by rejecting altogether the view that law is a system of rules".

[115] I have argued for this view in some detail in P Eleftheriadis, 'Power and Principle in Constitutional Law' (2016) Netherlands Journal of Legal Philosophy 37. A similar view is taken by Julie Dickson who is arguing that "in order to be a legal system [...] I propose that something has to make a claim to normative self-determination", see J Dickson, 'Towards a Theory of European Union Legal Systems' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* cit. 50.

different people sharing the same faith and the same institutions across territories in different countries or continents. I believe that this how judges look at EU law: as a coherent order of principles that bind in substance, precisely in the way of constitutional law. This idea is a kind of monism, because it shows that international institutions can be law-making and law applying in the same way as domestic ones. But it is best described as a form of dualism about law, because it draws a clear distinction between the idea of a comprehensive legal order (or jurisdiction) which is only appropriate to states, and the idea of transnational or international law as the law of nations, which is created in order to link separate states with bonds of law.[116] This view of law is animated by substantive cosmopolitan principles of international justice and legitimacy.

There are many ways of putting this point. In a recent wide-ranging essay in the *European Journal of International Law* the American legal theorist Liam Murphy has put forward an idea of a substantive legal order for international institutions as an alternative to Hart's theory of international law, while respecting much of its theoretical orientation. Murphy made this proposal after seeing a truth that MacCormick did not see, namely that Hart's analysis was unable to account for transnational and international law as *law*.[117] Hart argued that international law does not have a rule or recognition or convergent behaviour among the relevant officials and was just a bundle of disorganised set of primary rules, whose existence did not depend on validity. Hart said of international law: "[t]he rules of the simple structure are, like the basic rule of the more advanced systems, binding if they are accepted and function as such".[118] International law was an unsystematic collection of norms, from which the domestic legal system could borrow freely.

Murphy observes, against Hart, that international law does make sense as a legal order, even if it lacks a rule of recognition and a set of compliant officials. Even if this was not clear at the time of the *Concept of Law* was written, it is clear now. International law has internal legal principles that create a structure of powers and institutions, within which legal obligations make sense as principles of law, not as manifestations of power or managerial directions.

Murphy thus proposes that international law may be systematic in the sense that it is "a set of rules that have direct, rather than derived, validity" which are "connected in that they refer to each other and develop in the context of the existence of the others".[119] Murphy notes that international law has its own well established structural rules, such as the rule *lex specialis derogat lex generali.* He argues that such internal or practical connections may "enable us to say, in a sense entirely different and much more

[116] See P Eleftheriadis, *A Union of Peoples* cit. 131–143.
[117] L Murphy, 'Law Beyond the State: Some Philosophical Questions' (2017) EJIL 203.
[118] HLA Hart, *Concept of Law* cit. 235.
[119] L Murphy, 'Law Beyond the State' cit. 212.

important than Hart's that this group of legal rules makes up a legal system".[120] In this sense it is possible that various sub-areas of international law may be taken to be distinct legal orders, built on the basis of some adjudicating institution, such as the WTO, the Law of the Sea or EU Law.[121] And we can remember here that primacy is a principle of international law as well. Art. 27 of the Vienna Convention on the Law of Treaties provides that a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty to which it is a party.[122] Gerald Fitzmaurice summarised this general point when he said that the principle of supremacy is "one of the great principles of international law, informing the whole system and applying to every branch of it".[123]

If international law is a legal order in this sense, it can work as the legal ground for the relations among states and between states and international bodies. We can then say that the mutual relations between the domestic legal orders are properly *legal*, so that there is in place a law of laws that organises their mutual relations. Under this model legal orders, recognise each other as law and there are "normative contacts between the two, at least to the extent that they exhibit some sort of mutual recognition and respect as legal orders and not simply as structures of power and authority".[124] The key to this idea which we may call internationalism is that each order recognises the status of other orders as authoritative in law because of their content.[125]

Even Hart seemed to have been open to this suggestion, namely that the self-constitution of a legal order is legal and not factual. He accepted that judges must construct the foundation of a legal system on the basis of principles of law and not on observations of fact. He said that when judges are faced with fundamental constitutional questions, they do not look to social facts or dispositions that supposedly create the rule of recognition by way of some social process, but decide the case according to law, assuming that fundamental matters are also legal matters. Judges look for the most persuasive interpretation of the available public law materials and precedents. When he turned his attention to the "uncertainties" about the rule of recognition in the United Kingdom (and

[120] *Ibid*. 212.

[121] This is, as Murphy notes, the view taken by the International Law Commission UN Doc. A/61.10 of 2006 Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, para. 251: "International law is a legal system. Its rules and principles (*i.e*. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time".

[122] For an excellent discussion of the complex issues raised by the supremacy of international law today see A Nollkaemper, 'A Rethinking the Supremacy of International Law' (2010) Zeitschrift für Öffentliches Rechts 65.

[123] G Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) Collected Courses of the Hague Academy of International Law 85.

[124] P Eleftheriadis, 'The Law of Laws' cit. 609.

[125] For this point in detail see P Eleftheriadis, *A Union of Peoples* cit. ch. 3.

the distinction between continuing or self-embracing parliamentary sovereignty), Hart accepted that the matter can be decided by a court so that: "The Courts will have made determinate at this point the ultimate rule by which valid law is identified".[126]

Hart noticed immediately the air of paradox: "At first sight the spectacle seems paradoxical: here are courts exercising creative powers which settle the ultimate criteria by which the validity of the very laws, which confer upon them jurisdiction as judges, must itself be tested".[127] But the paradox disappears, Hart says, "if we remember that though every rule may be doubtful at some points, it is indeed a necessary condition of a legal system existing, that not every rule is open to doubt on all points".[128]

This statement is extraordinary because Hart states that the fundamental constitutional rule may be a *legal* rule like all others and not factual assertions, as implied by his doctrine of a rule of recognition. Hart then adds this equally surprising statement: "The possibility of courts having authority at any given time to decide these limiting questions concerning the ultimate criteria of validity, depends merely on the fact that, at that time, the application of those criteria to a vast area of law, including the rules which confer that authority, raises no doubts, though their precise scope and ambit do".[129] The statement is surprising, because Hart once again considers fundamental constitutional matters to be ordinary legal matters.

VIII.2. MacCormick's internationalism

Whatever the meaning of Hart's ambiguous statements about constitutional law, a substantive idea of an international legal order, may be the most appropriate starting point for the status of EU law.[130] This was indeed MacCormick's final view. It is often missed by commentators that MacCormick offered a second theory, which he called "pluralism under international law".[131] Under this theory, MacCormick said, the potential conflict between EU law and domestic law would be resolved under a higher set of principles of international law that harmonised the rival claims. MacCormick, was aware that this model was not pluralist in the same way since it managed legal orders under a common framework of law. It could also be taken to be a form of monism "in Kelsen's sense", MacCormick said.[132]

MacCormick says at the end of his long discussion that he finds pluralism under international law the more attractive theory. Unfortunately, he did not discuss this proposal in any detail. He said that the internationalist theory was pluralistic in that it

[126] HLA Hart, *The Concept of Law* cit. 152.
[127] *Ibid*. 152.
[128] *Ibid*. 152.
[129] *Ibid*. 152.
[130] See further P Eleftheriadis, *A Union of Peoples* cit. 48–79.
[131] N MacCormick, *Questioning Sovereignty* cit. 120.
[132] *Ibid*. 121.

denied the constitutional dependency of a state by any other state or its validation by Union law. He accepted that under this theory too "for each state, the internal validity of Community law in the sense mandated by the 'supremacy' doctrine results from the state's amendment of constitutional and sub-constitutional law to the extent required to give direct effect and applicability to Community law".[133] MacCormick thus accepted that these were true legal obligations that had to be interpreted by both the European and the domestic courts, neither of whom should be taking unilateral decisions, in order to avoid the slow fragmentation of Union law.[134]

What MacCormick did not see was that placing state law and EU law under international law requires a rejection of Hart's theory of the legal system. For if the foundation of a legal order is the law in a self-reflective manner, then there is no room for Hart's idea of the legal system as a social fact.[135] International law is not a matter of fact. It is law, in the proper sense of the term. And if international law is the law of laws for the EU, then its rules are not to be incorporated one by one by each member state jurisdiction, but accepted on their own terms.[136] International law is an independent framework which has its own principles, institutions and judgments and which exists independently of EU law. It has a variety of sources, ranging from *ius cogens*, to custom, treaties and laws made by international institutions. It also has courts that have the power to adjudicate disputes among states. These principles and institutions apply among states, even though they occasionally create rights for individuals within states (*e.g*. prize law, international investment arbitration, the law of human rights).

IX. Conclusion: the principle of primacy

The case law of the Court of Justice of the EU has developed a conception of EU law as a legal order under international law, without any reference to the idea of separate legal systems. It tells us that EU law is part of domestic law and does not lie outside it. EU law is part of the domestic legal order. By suggesting in a number of cases that the member states have freely entered into the international treaties that have set up the Union, the CJEU clearly draws on this international law basis. The Court correctly concludes that a Member State "cannot, therefore, amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law", so that any regression in their laws and administration of justice would be a violation of EU law. It cannot because it would be unlawful, all things considered, for it to do so. This is what membership in the EU entails. The principle of primacy is therefore a principle of the priority of some common principles of the EU treaties, in the domestic legal order.

[133] *Ibid*. 117.
[134] *Ibid*. 120.
[135] See further P Eleftheriadis, 'Power and Principle in Constitutional Law' cit. 37–56.
[136] See P Eleftheriadis, 'The Law of Laws' cit.

The Court has always drawn attention to the fact that Poland has willingly joined the other member states by signing and ratifying treaties of public international law.[137] By focusing on this the Court adopts an inescapably internationalist outlook on the basis of a general dualism about international and national law. For if EU law were a unified constitutional or federal system, Poland's continuing consent would be irrelevant. Poland's consent is relevant, because it remains an independent state under international law. A clear account of these international obligations was given in one of a recent case, case C-791/19 *Commission v Poland*, where the Court of Justice once again took the opportunity to repeat some general principles of the relations between Union law and the member states. The international dimension is one essential part of these general principles because "the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in art. 2 TEU, which respect those values and which undertake to promote them".[138] The Court further adds that "mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded".[139] The obligations of the Treaties are relevant to the domestic legal order.

States enter into treaties so that they adjust their domestic executive and legislative powers. They commit to other states to change their internal arrangements and direct their conduct according to their commitments to one another. For example, not to develop nuclear weapons, not to harm the environment, to prosecute war criminals etc. The treaties do not belong to a different social world, say the world of diplomatic conferences as the legal pluralists imply. The Treaties are designed to be applied by state authorities and for that purpose is fully integrated within each domestic legal order. This is the case of the EU Treaties as well, since they make frequent reference to the constitutional law and the procedures of member states, on which they rely for their enforcement.

This is also recognised in the Polish Constitution, of which art. 9 states that ratified international agreements "shall constitute part of the domestic legal order" (para. 1), and that ratified treaties "shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes" (para. 2) and that if an agreement ratified by Poland "establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws" (para. 3). It follows that Poland is bound by the interpretations of EU law offered by the Court of Justice, including of art. 19 TEU and of the Charter of Fundamental Rights, since it recognises the jurisdiction of the CJEU under the treaties. The powers of the CJEU as a specialist court in all

[137] The Accession Treaty was signed in Athens on 16th April 2003. Poland held a referendum on 7 and 8 June 2003. A majority of voters chose in favour of ratification. The President of the Republic of Poland ratified the Treaty and Poland has been member since 1 May 2004.

[138] *Commission v Poland* cit. paras 50–51.

[139] *Ibid*. paras 50–51.

matters that have to do with EU law, are constitutionally recognised and protected as higher law by the Polish Constitution. This was even recognised by the Polish Constitutional Tribunal when Poland joined the EU in 2004.[140] Unfortunately, the Polish Constitutional Tribunal does not refer to this legal argument. Had it looked at art. 91, it would have to say that the Polish Constitution has given the CJEU the power to give judgment in cases such as case C-791/19 *Commission v Poland.* Just like other member states, Poland has adopted the primacy of EU law freely and willingly, under the terms of public international law, which continue to apply while Poland is a member state. Poland accepted primacy in the course of making its democratic constitution in 1997 and in including art. 91 in its text. So case K 3/21 was wrongly decided. This is true everywhere in the European Union, both in Brussels and in Warsaw.

Pluralism and monism presuppose, as we have seen, Hart's doctrine of the legal system as a hierarchical order of rules. That theory created, we saw above, many ambiguities and conflicts and could not offer a plausible account of EU law. The Polish government used these ambiguities in order to argue for a purely state-centred account of the relationship between the Union and its member states. Yet, pluralism and monism are erroneous theories. The very idea of a factual "legal system" is misleading. Constitutional practice normally ignores these theories: the constitution does not change each week that the majority's opinions shift.

Most courts and most practitioners have accepted a different theory. They take EU law to be part of the domestic constitutional order. There has been no sudden breach in the constitutional life of the member states. Direct effect tells us that parts of the EU Treaties and some of the secondary law made under them, take effect domestically on the basis of a general constitutional clause incorporating EU law. Primacy tells us that directly effective EU laws take priority over any domestic laws for the sake of the required uniformity of the single market, giving effect to the obligations of the parties to one another and to their own citizens. Autonomy tells us that the judgments of the CJEU are special. This is all there is to it. Each principle supports the others. These principles are accepted on the same ground that all other constitutional principles are established in each member states. They jointly create a Union of Peoples whose authority is accepted as a matter of course.[141] The domestic legal orders have not changed radically by adopting these principles. They have adjusted to the cosmopolitan spirit that comes with EU membership. The EU treaties take their place in the legal order of the member states as important but unexceptional episodes in the history of ordinary law-making.

[140] See the Polish Tribunal's earlier case law in cases K 18/04, K 32/09, SK 45/09 and the comments by S Biernat and E Łętowska, 'This Was Not Just Another Ultra Vires Judgment!: Commentary to the Statement of Retired Judges of the Constitutional Tribunal' (27 October 2021) Verfassungsblog verfassungsblog.de.

[141] I have offered a detailed account of these interpretive principles in P Eleftheriadis, *A Union of Peoples* cit.

ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

Edited by Justin Lindeboom *and* Ramses A. Wessel

DOES ANYTHING HANG ON THE AUTONOMY OF EU LAW?

GEORGE LETSAS*

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).

ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

Edited by Justin Lindeboom *and* Ramses A. Wessel

WEAVING THE THREADS OF A EUROPEAN LEGAL ORDER

PAULINE WESTERMAN*

ABSTRACT: Two assumptions dominate and frustrate the debate concerning the emergence and rapid expansion of the European legal order and its relation to national legal systems. The first is that the will and consent of sovereign powers should be seen as a (social) fact that is logically and practically unable to give rise to (legal) norms. The second is that legal orders are distinct systems demarcated by separate sets of criteria of validity. In this *Article* both assumptions are criticised. Facts are not mere facts. And legal orders are not "autonomous" buildings erected on separate foundations. In order to account for the ways in which the European order overlaps with international and domestic law normative orders a legal order may be more adequately pictured as a web. In such a web, rules are the threads that bind together things, persons and institutions. It is hypothesised that the density of such webs as well as their capacity to connect to other webs determine their weight and relevance as reasons for action and decision-making. This hypothesis is tested in the capacity of European adjudication and regulation to connect to and to include national actors and institutions.

KEYWORDS: validity – valency – actants – count-as rules – networks – democratic criteria.

I. INTRODUCTION

The emergence as well as the rapid expansion of the European legal order has led to a number of theoretical puzzles and hot debates. How can a new legal order arise from the will of sovereign states? Can a mere assertion of a court establish an autonomous legal

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order? And how should we understand the relation between European Union (EU) and national law? Which one is superior?

In this *Article* I will argue that in order to gain some light in these matters a couple of assumptions should be removed that currently dominate the debates. The first is the assumption that the consent of sovereign states is to be regarded as a "social fact". The second assumption is that legal orders should be conceptualized as separate entities, that owe their validity to different sets of principles and criteria.

In section II and III, I will argue – against the first assumption – that if we take into account the ways in which normative orders grow and develop there is no place for pure factuality. In sections IV and V, I will argue – against the second assumption – that normative orders should not be pictured as buildings, erected on firm foundations, but should be seen as webs that derive their strength from the number of connecting threads. I will argue that the stability and success of normative orders depend on the degree to which new actors are included in and empowered by such threads.

These insights will be applied to EU law, where I will try to explain the expansion of EU law by its ability to draw in and empower national actors. In section VI, I will explain how in adjudication this is done by the doctrine of direct effect and the possibility of preliminary rulings. In section VII, I will show how EU legislation succeeds in including national actors by the technique of outsourcing regulation and legislation. Section VIII concludes.

II. Actants

A persistent problem in legal theory is that it seems impossible to account for the emergence of legal orders. Any attempt will inevitably be circular. This circularity has to do with the relation of actors and rules. Can we conceive of the legal order as emanating from the will of a sovereign, singular or plural, secular or divine, in which case rules are the product of the actor? Or does the sovereign owe its legal competence to legislate to a pre-existing legal order in which case the sovereign is the product of (power-conferring) rules?

This chicken-and-egg problem has haunted natural law theory in its eternal dilemma between voluntarism and intellectualism: should we see natural law as the product of the will of God which *may be* whimsical and unintelligible or should we see it as the reasonable guide that informs God's will in which case we condemn God to impotence?[1] The dilemma surfaces again in our understanding of customary international law. We are constantly reminded by authors that state practice in itself is not enough and that we should supply it with *opinio juris*: the requirement that state practice should be accepted as law. An addition that unfortunately presupposes the very concept – law – that should

[1] See *e.g.* H Welzel, *Naturrecht und materiale Gerechtigkeit* (Vandenhoeck & Ruprecht 1951); M Villey, *La formation de la pensée juridique moderne: cours d'histoire de la philosophie du droit* (Presses Universitaires de France 1968).

be defined.[2] Finally, the age-old dilemma causes confusion and bewilderment at the phenomenon of a European court declaring that a "European legal order" exists.[3] What is happening here? Can a legal order just spring up from the assertion of a court or the consent of sovereign states? Or was there a pre-existing legal rule assigning and justifying this form of "Kompetenz-Kompetenz"?

There is a stubborn reluctance and even refusal to acknowledge that indeed such assertions and convergence of will *can* and *do* give rise to law. A theoretical objection against the idea that law arises from the will of actors (either citizens, judges or sovereigns) is that it presupposes a mysterious transition from facts into norms and would therefore be guilty of the logical trap of a natural fallacy. Social acceptance, agreement of wills or commands of a sovereign power are all seen as (social) facts that by themselves cannot give rise to norms. But also practical considerations explain the persistent aversion to derive normative force from social facts. Just as natural law seems to lose some of its force if it could in theory be discarded by God, there is the fear that international and EU law could be discarded if they were constantly at the mercy of factual consent or obedience. It is therefore generally maintained that legal norms should be seen as "autonomous": independent from the factual wills – and whims – of actors.[4]

These problems fade away, however, if we slightly adjust our view of what actors are. The 705 members sitting in parliament are more than just a set of physical beings. They are provided with a set of deontic attributes: rights, obligations, immunities that are bundled into their role as MPs and are therefore loaded with normativity. Nor are, for that matter, the sheets of paper which are before them to be regarded as mere "facts", devoid of any normative meaning. These papers *count as* legislative proposals, just as the individual members *count as* a legislative assembly. The hands they raise *count as* consent after which the proposals *count as* formal law. That means that the whole setting (gestures, persons, papers, and even the building in which they assemble) can be regarded as entities that are all loaded with normativity in the sense that they either *have* deontic properties such as rights and obligations, *signal* these rights and obligations or *give rise* to such deontic properties.

In this setting rules function as the vehicles of transport. These rules are of the logical form:

[2] Kelsen was one of the first to notice this, see H Kelsen, 'Théorie du droit international coutumier' (1939) Revue internationale de la théorie du droit 253, 263. A long list of objections against the two elements theory is finally summarized in the final Committee Report, International Law Association London Conference 2000, Committee of Formation of Customary (General) International Law.

[3] Case C-26/62 *Van Gend & Loos* ECLI:EU:C:1963:1; case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

[4] This objection is forcefully expressed by Pavlos Eleftheriades who fears that the social fact of disobedience would weaken the normative force of the legal system, see P Eleftheriadis, 'The Primacy of EU Law: Interpretive, not Structural' (2023) European Papers www.europeanpapers.eu 1255.

If conditions a, b, c apply then X counts as Y. If Y, then consequences d, e, f, will follow.[5]

Y is then the central element denoting the deontic status assigned to X. For instance:

A. If democratically elected, this group of people (X) counts as legislature (Y).

But the condition "democratically elected" is in itself a status Y that only is assigned to events on the condition that certain rules are followed:

B. If people can choose more than 1 candidate… etc. then election (X) counts as "democratic" (Y).

And when does something count as an "election"? Well, that is of course stipulated by a set of prior rules as well.

Not only are the conditions the result of many prior deontic propositions; the consequences also give rise to many subsequent status-assigning propositions:

C. If adopted by the legislature, this text counts as law

is a deontic proposition which of course gives rise to an enormous number of laws, each of which stipulates the conditions to be fulfilled for subsequent "X counts as Y" propositions. *Any rule is always just a link in an endless chain of prior and subsequent rules*.

Hart emphasized the importance of the latter count-as rule C and saw it as the distinctive trait of a legal order.[6] However, C is only one link in an entire chain of count-as rules, in which any new rule starts from an X term or from conditions that are the Y-terms of prior count-as rules. In the entire chain, rules transport statuses from one entity to another. Rules can therefore be pictured as the lines that connect nodal points such as papers, buildings, events and persons. These nodal points may be very different physically speaking but as carriers of deontic status they are functionally equivalent. Bruno Latour therefore suggested calling such functionally equivalent entities "actants".[7] Actants may be actors but they can also be documents or buildings. Their physical appearance is in principle irrelevant as long as their deontic status is preserved. The MPs may be dead or alive but may still count as "legislators". The papers may have perished but they still count as law. Conversely, it is possible that real debates among living persons, conducted in the presence of the entire press may nevertheless be considered as "null and void" as soon as a vital condition has not been met in order to be counted as proceedings that are assigned the status of "parliamentary debate".

In this sense, all normative orders, including ritual and religious ones have a certain autonomy. Rights, duties, exemptions and immunities travel independently from their carriers. This realization may dispel the fears that factual disobedience may defeat the

[5] Slight modification of Searle's proposition "X counts as Y in Context C", J Searle, *The Construction of Social Reality* (The Free Press 1995).

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

[7] See B Latour, 'On Actor-Network Theory: A Few Clarifications Plus More Than a Few Complications' (1996) Soziale Welt 369.

force of law. Coalitions of political parties may decide to actually disregard EU law but the consent of deontically loaded "sovereign States" to the primacy of EU law may still uphold the normative force of EU law (although consistent disregard by all who are involved may ultimately weaken its claims).

III. The absence of brute facts

One may wonder whether the view that actors such as MPs are loaded with normativity is really new. As I indicated above, H.L.A. Hart, although focusing on only two layers of count-as rules, maintained too that a "sovereign" is only a "sovereign" by virtue of a secondary rule of recognition which endows him or her with the competence to act as a sovereign.[8] It seems, then, that my network picture is not different from the (intellectualist) tradition that insists on the conceptual priority of norms over actors.

My view is, however, a bit more radical. Not only are legal actants loaded with normativity but there are hardly any actants *without* deontic statuses assigned to them. To speak of a pure *Sein*, or "brute facts"[9] presupposes a kind of Genesis-like starting point in which the whole world was "formless and empty". But it is hard to conceive of such a state of affairs. Searle points out that a derelict wall that is no more than a pile of stones may still retain its deontic status by virtue of our collective agreement on the proposition that "this pile of stones counts as a border". Searle claims that the X ("this pile of stones") is a brute fact to which – by virtue of our collective agreement – the deontic status is added of "border". But is this indeed a brute fact? It is not coincidental that we assign that status to *this* particular pile of stones, and not to stones haphazardly strewn across the earth. This particular pile of stones had already acquired a deontic status because of the repeated acts of actors who had grown used to their existence *as a border*.[10]

In his fascinating book on trails, Robert Moor describes how entire landscapes can be read as the expression of collective knowledge. The network of paths can be read as a meaningful embodiment of the deontic pathways mentioned above.[11] Social acceptance of that pile of stones as a border is not the result of our imposition of meaning on an otherwise empty and "objective" world of facts. This view of an objective heap of facts is itself the result of a (scientific) discourse and practice in which such facts are only *seen* as brute facts. In other practices they acquire different meanings.

[8] HLA Hart, *The Concept of Law* cit. chapter V.

[9] J Searle, *The Construction of Social Reality* cit.

[10] As Heidegger had already noted: we *see* something *as* something and this "seeing-as" is always embedded in and guided by a practical context: this is *in order to*... Not only epistemologically but also ontologically facts are never "brute". See M Heidegger, *Sein und Zeit* (Max Niemeyer Verlag 1979) 148–149.

[11] R Moor, *On Trails: An Exploration* (Simon & Schuster 2016).

It is only by disregarding this practice as a whole set of customs, social rules and norms[12] that John Austin's Rex can appear as the purely factual starting point of all law. This pure factuality is a myth. Rex can only be the X term in

A. Rex counts as lawgiver

by virtue of a prior deontic proposition such as

B. The owner of this land counts as Rex

which of course is preceded by another deontic proposition stipulating who would count as owner etc. *ad infinitum*. Obviously this applies to EU law as well. The will of sovereign states is not a fact, but owes its normative force from our notion of sovereignty, which in itself is the resulting Y-term of a large number of prior count-as rules, stipulating and elaborating the conditions for sovereignty. None of these count-as rules are to be seen as factual. They are just links in normative chains.

Infinite regress not only pervades any attempt to account for the emergence of the law. It pervades all our accounts of normative orders, *i.e*. orders in which deontic status is assigned to actants by means of (implicit or explicit) rules. I once had a very bright student who remarked, after I had explained Hart's rule of recognition: "We have at home a rule of recognition as well. That is: Mother's will is law". She left me speechless. It suddenly dawned upon me that secondary rules are employed in even the simplest normative orders and not only at a certain degree of complexity, as Hart thought. Not only legal orders are marked by self-referentiality. All normative orders have rules about rules. We might therefore safely say that the introduction of secondary rules is not necessarily unique to the emergence of a legal order. It is characteristic of *any* normative order. Moreover, as any "X counts as Y" proposition is preceded by conditions, which in turn are the products of a prior count-as rule, we can imagine endless chains of rules, not just two levels.

Where then does the legal begin? We might be tempted to go back to our chicken-and-egg dilemma and answer this question by reference to the actors: secondary rules are addressed to a class of officials. But the question immediately arises: who counts as an official? Does the mother of my student count as one? In some patrilinear societies uncles may have the obligation to marry their deceased brother's wife and thereby acquire the right to decide on the dowry of his niece. They are not officials in a complex bureaucracy but are still endowed with far-reaching powers, which effectively can change legal reality and those powers are bound by a set of rules. How then do we differentiate between uncles and officials? The demarcation between officials and laymen seems to be just as elusive as that between primary and secondary rules. It is hard if not impossible to trace the exact moment in which actants turn "legal". Their deontic loads (rights and obligations, their competences and immunities) are superimposed on already existent loads.

[12] GJ Postema, 'Custom, Normative Practice, and the Law' (2012) DukeLJ 707.

IV. Valency

So we end up with the picture of normative networks consisting of nodal points (actants with deontic statuses) and connecting dots (the rules connecting conditions to consequences). All sorts of normative practices can be conceptualized in this way and it is hard if not impossible to single out the characteristics of a truly "legal" network differentiating them from other normative networks.

All this sounds as abstruse philosophy that offers little help to practising lawyers. Yet, I think that it helps us to get rid of some problems when we try to understand the emergence of legal orders. They do not arise in a mysterious way from "facts" but slowly grow out of pre-existing networks by weaving (count-as) threads to actants that initially are no more than outposts but may or may not evolve into central hubs.

In order to see how normative orders evolve it is advisable to make full use of the metaphor of the network. That metaphor is not a very original one in these times of world-wide webs and network analysis and I may therefore be the victim of fashion.[13] But it may help us to discover characteristics that are hidden from our view as long as we cling to the dominant metaphor of the building[14] which underlies most theories of law. Kelsen's *Grundnorm* captures both image and idea: the ground or basis on which the entire edifice of law is erected (*Stufenbau*) and from which it derives its validity. Buildings should be freestanding ("autonomous"), built on solid "foundations" and by means of "hard" material. The discourse in which "soft" law is said to become "crystallised" in hard law, or the fear that (international) law is about to be "fragmented",[15] all testify to the undiminished dominance of the "building" metaphor.

The building metaphor is ill-suited to understanding our current situation of overlapping multiple legal orders (how can buildings overlap?) and is not very helpful in understanding situations in which the relevance of standards and actants is not answered

[13] The metaphor is as old as Heraclitus's comparison with the spider as the human soul in the web of the human body. See A Finkelberg, 'Heraclitus and Thales' Conceptual Scheme: A Historical Study' (2017) Jerusalem Studies in Religion and Culture 147, 147–148. Martha Nussbaum uses the metaphor for *moral* sensibility (the spider feeling the tugs in the web) in MC Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge University Press 2013) 69. I haven't seen it applied to law, although Postema comes very close to my view where he describes custom as a nodal point in a network. GJ Postema, 'Custom, Normative Practice, and the Law' cit. 707–738. A particularly powerful essay on the implications of the spider's web as metaphor is given by F Deligny, *The Arachnean and Other Texts* (Univocal Publishing 2015).

[14] Building metaphors are ubiquitous. See G Lakoff and M Johnson, *Metaphors We Live By* (University of Chicago Press 1980). Recently, HG Cohen, 'Metaphors in International Law' in A Bianchi and M Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (Oxford University Press 2021). I analysed the house metaphor for law in P Westerman, 'From Houses to Ships: Governance as a Form of Law' (2018) Le Libellio 5.

[15] M Koskenniemi, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (Report of the Study Group of the International Law Commission-2006) UN Doc A/CN.4/L.682.

by an all-or-nothing appraisal of validity but by means of a constant ranking and assessment of relative weight.[16] The network metaphor is better able to understand and to assess the different shades of relevance. It helps us to focus on an important characteristic if it comes to deciding on the resilience and success of normative orders: the number of *connections* between actants. If networks are very tightly woven they may *appear* hard but, in fact, their hardness is brought about by the density of the connecting lines.

My hypothesis is that the success of normative orders in providing relevant and weighty reasons for decision-making by adjudicators and regulators is to a large extent dependent on the degree to which actants connect with other actants. I decided to refer to this capacity to connect as "*valency*". In chemistry, valency refers to the ability of an atom or a group of atoms to combine with other atoms or groups of atoms. In microbiology the term is used for the capacity of antibodies to bind to an antigen and the degree to which it does so is vital for immune response. The term was transplanted to logic[17] and linguistics but as far as I know it was never adapted to law.

Yet, the importance of valency has in fact been acknowledged in the traditional emphasis on coherence as a virtue of law. Coherence expresses the degree to which legal concepts are connected to each other. They should be connected in such a way that they are *mutually* supportive.[18] The importance of coherence is more accurately pictured by webs than by buildings. Rather than seeking one hard and solid foundation for the entire building, the decisive issue is to what extent the elements can support *each other*. Just as the spider's web that is woven between multiple anchor points is more stable than the modest beginning of such a web in a single thread, we may consider normative systems by taking into account the number of actants that are linked with one another.

The problems of the building metaphor are obvious in the debates on the status of EU law. If we understand EU law as a self-standing legal system, we have difficulty in understanding the ways in which national and European rules and standards refer to each other. The recurrent debates between adherents of a "monist" and a "dualist" conception of EU law can be understood as being dominated by the building metaphor and in fact boil down to the question whether EU law can be understood as a freestanding house or a semi-detached one. None of these answers is satisfactory. Both start from the assumption that each legal order (conceptualized as a house) is erected on its own foundations: the criteria that determine validity. Validity is seen as determined by membership: does a certain rule or principle "belong" to EU-law or to the national legal

[16] Nearly all contributors to the volume *Soft Law and Validity* that I edited together with Hage, Kirste and Mackor tried to make room for a gradual concept of validity instead of a binary one. See P Westerman, J Hage, S Kirste and AR Mackor (eds), *Legal Validity and Soft Law* (Springer 2018).

[17] See CS Peirce, 'The Logic of Relatives' in CS Peirce (ed.), *'Studies in Logic' by Members of the Johns Hopkins University* (John Benjamins Publishing 1983, reprint of Boston edition 1883).

[18] R Alexy and A Pezcenik, 'The Concept of Coherence and Its Significance in Discursive Rationality' (1990) Ratio Juris 130.

system? A rule is either valid or invalid, and if valid it derives this validity from membership of either EU or domestic law. By clinging to the *Grundnorm* as the sole support of such a system, overlapping legal orders become a conceptual impossibility.

Yet, they do overlap. National courts and legislatures constantly refer to European standards, and vice versa: European regulation is constantly informed by existent national and international rules as well. Actants do not "belong" to any such order but are connected by several threads to each other. Such orders are strictly speaking not overlapping but interwoven.

V. Law as proliferation of power

Although the metaphor plausibly suggests that the number of connections strengthens the web, we should now approach the issue in more concrete terms: *Why* does the number of connections add to the weight of the norms in such a network?

In order to answer this question we should bear in mind what the linking threads in fact *do*. The linking threads are made up by X counts as Y rules. Y-terms denote the deontic properties that are attributed to the X-term. It assigns a *status* to X. This status consists of rights and obligations and usually the two are combined. The patrilinear uncle has the obligation to support the family and *by virtue of that obligation* he has the (deontic) power to decide on his niece's marriage. The official who is granted the right to raise taxes may exercise this right *on condition* that he conforms to the requirements attached to his office. In both cases, power is allocated to actors by rules and that power can only be exercised if the conditions imposed by the rules are fulfilled. In short: *rules are vehicles for power.*

People tend to think of power as being restrained by rules, and indeed that is the case if you take a look at rules as carriages that – by adding conditions – prevent powers from floating wildly in all directions. But we should not forget that rules also transport powers to other destinations. "Power" is not only something that is curbed or restrained by law but something which is *organised* by law. Rules enable power to circulate.[19] In Foucault's words: "[p]ower must, I think, be analyzed as something that circulates, or rather as something that functions only when it is part of a chain. It is never localized here or there, it is never in the hands of some, and it is never appropriated in the way that wealth or a commodity can be appropriated. Power functions. Power is exercised through networks [...]".[20]

Foucault does not elaborate on how the circulation operates but his idea can be made a bit more precise by combining it with Searle's notion of rules as depicted above. The "chain" that is mentioned here is just the chain that can be witnessed in any

[19] See also T Parsons, 'On the Concept of Political Power' (1963) Proceedings of the American Philosophical Society 232, 245.

[20] M Foucault, '"Society Must be Defended": Lectures at the Collège de France, 1975–1976' in M Bertani and A Fontana (eds), D Macey (trans), (Penguin Books 2003), Lecture of 14 January 1976, 29.

normative order and in which actor A has been conferred the competence x by virtue of rule r1, which owes its existence to the rulemaking power y of official B, who was given this competence by rule r2, which was drafted in agreement with the constitution r3 etc. The relays, that are mentioned by Foucault, can be understood more precisely as the rules themselves, which continually attach conditions to consequences.[21]

I would add to this that power is not only organised but also *grows* via this type of circulation. In order to see how this is possible, we should combine the structural analysis of networks with an analysis of the interests of the actors who are thus connected. First of all, since the exercise of powers is conditional, effective exercise of powers (*i.e*. whether they effectively bring about deontic changes) depends on the degree to which actors submit to the conditions under which they are conferred these powers. If they do not meet these conditions their acts are considered "invalid" and they cannot bring about any legal effect. Therefore, actors have a vital interest in conforming to the conditions; otherwise their acts would remain without effect.

Second, and more importantly, we should keep in mind that actors owe their deontic status to the normative chains in which they participate. If they do not enjoy such a status, they have literally nothing to lose and they will not consider the requirements of such a "stepmotherly" normative order as weighty reasons for action or decision-making. If normative orders are exclusive, *i.e*. if its rules grant powers to only supporters of one political party or one ethnic or religious group, their impact will be minimal. Not only will they fail to attract support and compliance by outsiders, but other rival normative orders (customary, religious, ideological) will occupy the niche. This phenomenon can be witnessed in so-called failed states[22] where people will turn to religious or ethnic groups or just one's –extended - family that promise a more secure status.

Conversely, we might expect that the higher the deontic status which they are accorded, the more the actors will have an interest in the continuity of the order to which they owe their deontic status. Moreover, it seems reasonable to suppose that an inclusive network that assigns rights and duties to many actors will be supported by more beneficiaries than a more exclusive one that reserves its deontic powers to just a happy few. By such a distribution its total power will increase. Power is not a zero-sum phenomenon in the sense that the more power is given to A, the less power B will enjoy.[23] It is the other way round: the more power is distributed, *i.e*. the more people are empowered, the greater it will become. Exactly this is what happens in EU-law, which we may consider as a normative web marked by high valency.[24]

[21] Foucault is ambiguous here and refers to the *individual persons* as relays.

[22] D Acemoglu and JA Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Profile Books 2012).

[23] T Parsons, 'On the Concept of Political Power' cit. 250 ff.

[24] For an account of normative orders with low valency see my P Westerman, 'Failures of Law: The Case of the Corrupt Official' (2023) Nalsar Law Review (forthcoming).

VI. Increasing adjudicative power

The rapid expansion and increasing weight of EU law, in particular the position of the European Court of Justice (ECJ), has met with considerable amazement and surprise. Political scientists explain this expansion by assessing the benefits and burdens anticipated by the member-states, such as awareness of common interests and the need to monitor compliance.[25] They mainly focus on the advantages of "a" legal system and neglect to take into account the special characteristics of EU law. Some political scientists do acknowledge the virtue of legal discourse, but they tend to see it mainly as a "mask" that conveniently disguises controversies.[26] These accounts may all contribute to our understanding of the EU but fail to take into account its special normative structure.

Legal theorists mirror this one-sidedness by emphasizing the normative content of EU law while neglecting interests and the distribution of power. High on their agenda are such things as the emergence of soft law, the relation between legislation and adjudication, the hierarchy between EU and national law and the way in which these orders are weighed in actual judicial decision making. They focus on law and neglect power.

The difference between the two perspectives is based on the familiar facts/norms dichotomy mentioned in sections II and III above. The interests of states are seen as "facts" that should be distinguished from "norms". What remains hidden from view is the connection between the two. Once we see legal rules as *vehicles* for power there is room for an analysis of the ways in which the very structure of the rules determines the number of actants involved as well as how deontic entities (powers, obligations, immunities) are arranged and distributed.

I think that on the basis of such an investigation, the emergence and rapid increase in importance of EU law can be understood. EU law manages to involve an enormous number of actors by conferring on them powers they would not have enjoyed without EU law.

In adjudication, this is manifest in the doctrine of direct effect and supremacy of EU law and art. 267 TFEU that provides the ECJ with the jurisdiction to give a preliminary ruling. The doctrine of direct effect has increased the valency of the EU legal order to an unprecedented degree. By giving *every citizen* of the EU the right to invoke EU law in their own national courts to challenge national legislation, power flows to an enormous number of actors who all enjoy powers and rights they would not have enjoyed otherwise. These actors have an interest in sustaining these new forms of appeal.

Moreover, connections are firmly established with the national courts that are empowered to ask for a preliminary ruling, and to apply that in their own decisions. Here

[25] G Garrett and B Weingast, 'Ideas, Interests, and Institutions: Constructing the EC's Internal Market' in J Goldstein and R Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change* (Cornell University Press 1993) 173.

[26] A-M Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) International Organization 41.

again, these connections add to the powers of these actors. As Weiler notes, art. 267 TFEU (by then art. 177 EC) was enthusiastically applied especially by lower national courts which, without that provision, had no or only limited powers to review national legislation.[27] As a consequence these courts did not regard EU Law as a competitor and became willing and integrated partners in the administration of EU law.[28] Weiler explains that in this way the circle of actors was widened: "individuals, corporations, pressure groups, and others who may build a stake and gain an interest in the effectiveness of Community norms".[29] As early as 1981, Stein even concluded that there is "a symbiotic relationship between national courts and the Court of Justice".[30] Even if that assessment may be exaggerated, it is still clear that without these crucial doctrines the role of the ECJ would have at best remained marginal. We would probably not even have considered *Van Gend & Loos* and *Costa v Enel* as "landmark" cases. Such epitheta are usually accorded after their consequences have manifested themselves.

It should be noted that the whole process of weaving a web cannot merely be understood as the result of the perceived short or long term interests of the weavers.[31] Since the threads consist of rules and since rules have the tendency to be applied, by means of analogy, to different spheres, the process acquires a momentum of its own. Karen Alter notes that the ECJ may originally have been established to keep the European Coal and Steel Community in check.[32] In terms of the Principal-Agent model we might then view the ECJ as the Agent of the member states.[33] But *once it was there*, the dynamic changed. The doctrine of direct effect and the possibility of asking for preliminary rulings seem to have inverted the relationship. The national legislatures of member-states are now kept in check by the ECJ. The ECJ may even be labelled as the Principal who has outsourced the task of administering EU law to national courts. It is a form of outsourcing that has enormously increased the impact of EU law.

VII. Increasing regulatory power

In regulation, a similar dynamic can be witnessed. The principles of subsidiarity and proportionality have effectively managed to involve a great many actors and institutions.

[27] JHH Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors' (1994) Comparative Political Studies 510, 523. Also KJ Alter, 'Who are the "Masters of the Treaty"? European Governments and the European Court of Justice' (1998) International Organization 121.

[28] JHH Weiler, 'A Quiet Revolution' cit. 518.

[29] *Ibid*. 520.

[30] E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) AJIL 1.

[31] See the abstruse but fascinating writings on the epistemological lessons of the spider web by F Deligny, *The Arachnean and Other Texts* cit.

[32] KJ Alter, 'Who are the "Masters of the Treaty"?' cit. 124.

[33] G Garrett and B Weingast, 'Ideas, Interests, and Institutions' cit., criticised by KJ Alter, 'Who are the "Masters of the Treaty"?' cit.

The principle of subsidiarity, which was adopted in the Treaty of Maastricht as one of the pillars of European unification, states that powers or tasks should rest with the lower-level sub-units of a certain political order unless allocating them to a higher-level central unit would ensure higher comparative efficiency or effectiveness in achieving the policies.[34] The principle of proportionality requires that one should not take any action that exceeds that which is necessary to achieve the desired aim.[35] According to this principle, in choosing between two options, legislators and regulators should always opt for the "lighter" means and avoid "heavy" regulative instruments.

The two principles are twins. What subsidiarity states about the levels of *actors* that should be entrusted with rulemaking, the proportionality principle says about the kind of *rules* that should be made: they express a preference for soft law such as guidelines, agreements, declarations, compromises, self-regulatory codes of conduct and other non-binding instruments. Here again we see the intricate connection between rules and actors.

In my book *Outsourcing the Law*[36] I analysed in detail how these principles are expressed in framework directives. Framework directives guide the Principal-Agent relation that underlies outsourcing relationships. They consist of three elements.
First of all, framework directives point out a certain goal to be reached: this may be an abstract one such as the protection of the marine environment[37] or a more concrete one such as the storage of electrical and electronic waste.[38]

Second, framework directives impose on the norm-addressee the obligation to further or to reach that goal. They may require norm-addressees to draft rules, to formulate or carry out policies, to set up a well-functioning organisation or to take other "appropriate measures", such as setting up inspection boards, or devising new schemes of financing. Usually, little information is provided on what these rules and policies should look like. Addressees are left free in their choice of how these goals should be pursued.

Third, framework directives impose a duty to report to what extent that goal has been reached. It requires that reports should be delivered concerning the measures that have been taken, the policies that have been pursued, annual reports or plans.

The choice of norm-addressees is inspired by the goal that is imposed. Although the primary norm-addressees of a framework directive are of course the member states, other institutional actors with more specific roles are also addressed. The Marine

[34] Definition by A Føllesdal, 'Survey Article: Subsidiarity' (1998) Journal of Political Philosophy 190.

[35] Art. 5(4) of the Consolidated version of the Treaty on European Union [2016].

[36] P Westerman, *Outsourcing the Law: A Philosophical Perspective on Regulation* (Edward Elgar 2018).

[37] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).

[38] Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on Waste of Electrical and Electronic Equipment (WEEE).

Strategy Framework Directive and the Water Framework Directive,[39] for instance, not only address member states but also and explicitly address various international river and regional seas commissions as well as sub-national actors. In other cases, further regulation is outsourced to standardization organisations. Monitoring and supervision are entrusted to newly created agencies and/or supervisory boards.

Even where the framework directive merely addresses member-states, the threefold structure of the directive is typically *reproduced* at lower levels. As I analysed in more detail, member states usually *repeat* the three elements of the directive, by making the goal more concrete, and by specifying the measures that should be taken as well as the reports that should be delivered. They give rise to an incredible number of norm-addressees – supervisory bodies, certification offices, monitoring and audit committees, steering committees etc. – who are all in the business of concretising and specifying these three elements further and further, giving rise to a host of targets, performance indicators, and best practices but also prescribing concrete formats in which reports should be delivered, etc. The proliferation of actors matches the proliferation of rules as well as rule-products such as certificates, licences etc.

This dynamic of differentiation can be deplored and in my book I outlined the disastrous effects of such outsourcing on the rule of law and democracy. However, this outsourcing strategy has greatly enhanced the valency of EU law. Outsourcing draws in – *and creates*! – an enormous number of actors who are linked together by an increasing number of rules. Moreover, these actors in the fields to be regulated are addressed *as Agents* and are therefore given the necessary powers. All kinds of informal bodies and agencies have sprung up which are given the powers to make, monitor and enforce rules. Their rule-products are given effect. As far as these actors have a deontic status that they would not have without these power-conferring rules (imagine the former teacher turned into a member of the audit committee), they have an interest in maintaining the rules even if they do not subscribe to their content.
Both in adjudication and regulation outsourcing may have "emptied" the centre but has led to the increasing impact of EU law.

VIII. Conclusion: the importance of inclusion and empowerment

The increasing impact of EU law teaches us the shortcomings of the traditional dichotomy between (social) facts and norms. The expansion of EU law shows us, moreover, how normative orders can develop and spread. Its development may therefore serve as an argument to abandon the traditional view of a legal order as a distinct entity, spatially

[39] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a Framework for Action in the Field of Water Policy.

confined and demarcated from other normative orders by a particular validating normative or factual source which is unique to that order.

Instead of searching for the origin of such orders either in the will of a sovereign or in some pre-existent rules, I have argued that we should be guided by the image of the network or web as an alternative to the image of an integrated system of building blocks. Rather than focusing on a fixed touchstone of validity, I suggested to take valency into account: the capacity of rules to link together actants (buildings, actors, events, as well as rule-products). Valency as the degree to which new actants are created, involved and empowered seems to be an important characteristic of viable normative orders. Moreover, as I have explained elsewhere,[40] their dynamic is to a large extent self-reinforcing.

The practical implication of this alternative view is that we should focus more on how the periphery – national courts, but also supervisory boards and private organisations – is organised. Do they gain or lose in status? How are their rights and duties tied to the other actants of the network? Are they connected by central hubs and well-trodden pathways or are they isolated outposts? Are they able to perform the functions granted to them by EU law? The position of the judiciary in Poland and Hungary has an immediate effect on the European normative network as a whole.

Viable and strong normative orders are not necessarily morally good or desirable ones. Expansive networks can also be stifling and their rules can be experienced as such weighty reasons for action and decision that freedom is seriously jeopardized. Yet, stable networks are important because they create a world in which rules may count as weightier reasons than money or violence. In order to forestall their decline and insignificance, it is important to understand the way they are born, grow, and spread.

[40] P Westerman, 'Validity: The Reputation of Rules' in P Westerman and others (eds), *Legal Validity and Soft Law* (Springer 2018).

ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

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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.

ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

Edited by Justin Lindeboom *and* Ramses A. Wessel

THE SPHERE OF INTERVENTION: EU LAW SUPRANATIONALISM AND THE CONCEPT OF INTERNATIONAL TREATY

JAKOB RENDL*

TABLE OF CONTENTS: I. Introduction. – II. The law of integration. – II.1. The *summa divisio* of the modern law and the autonomous "sphere of intervention". – II.2. The concept of law-making treaty and the search for a European constitution. – II.3. Jürgen Habermas and the revision of Kant's cosmopolitan right. – III. The law of intervention. – III.1. Two faces. – III.2. The concept of intervention treaty. – III.3. Post-war Europe. – IV. Joseph Weiler and the political messianism in EU law. – V. Conclusion.

ABSTRACT: In this *Article*, the EU Treaties which establish a new and autonomous legal order are analysed through the lens of Pierre Pescatore's qualification of their operating sphere as "sphere of intervention". Combining Jürgen Habermas' revision of Kant's concept of cosmopolitan law and Joseph Weiler's thesis on the messianic impact of the European integration process, a concept of international treaty is presented that is suitable for a proper analysis of the transformative character of the EU Treaties and the Common Market as such a "sphere of intervention". Highlighting implications of the theory of international treaty, legal philosophy and messianism, the concept of the European autonomous legal order, endowed with direct effect and supremacy, shall be proven to be the historical answer to the aporias of classical international law and to the totalitarian abuse of the law in the fascist regimes in Europe in the first half of the 20th century – not only on a symbolical level but also on the level of the concrete legal structure of the European integration process. The general aim of this *Article* is therefore to contribute to the debate about the nature of the EU Treaties as constituting an autonomous legal order from an international law perspective by identifying a type of international treaty suitable to explain the special character of a legal order that is identical neither with international nor with domestic law, but rather constituting a realm in-between the former and showing an independent legal standing in itself.

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I. INTRODUCTION

In its landmark decisions *Van Gend en Loos* and *Costa v ENEL*,[1] the European Court of Justice (ECJ) introduced three principles to the legal order of the European Union (EU) that extended and deepened the already peculiar character of the Treaties of the European Union (then the Treaty of the European Economic Community). The three interrelated principles of autonomy, direct effect and supremacy are to be regarded as key elements of the supranational character of EU law. The most influential branch in EU legal theory, the theory of constitutionalisation, even considered them as cornerstones of the emerging constitutional order in EU law.[2] According to this theory, the ECJ has interpreted the originally international treaties in a manner similar to the way national constitutional courts interpret their respective constitutions and thus completed the assumption of constitutional features on the international level of EU law.[3]

Through the concept of autonomy, the ECJ emphasises the independence of EU law. The origin of the Treaties may be the will of the consenting Member States, the validity of the new legal order they established is nevertheless considered to be underived and autonomous from the domestic legal orders.[4] The claim that the EU legal order is an autonomous legal order on the international level is without doubt historically unique. Considering its entailments – the direct effect of EU law within the territory and to the citizens of the Member States and its supremacy over domestic law –, such a concept stands against the traditional principles of international law, above all the principle of non-intervention and the principle of the mediation of the individual.[5] International law is in the end that legal order that seeks not to limit sovereignty[6] but to coordinate actions of sovereign states and to protect their internal affairs – their territory and their citizens – against any form of intervention. Furthermore, according to the principle of the mediation of the individual (in

[1] Case C-26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* ECLI:EU:C:1963:1; case C-6/64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66.

[2] For the theory of constitutionalisation see: A Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot 2001); E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) AJIL 1; JHH Weiler, 'The Transformation of Europe' (1991) YaleLJ 2403. For a critical account of the theory of constitutionalisation see A Somek, 'Constituent Power in National and Transnational Contexts' (2012) Transnational Legal Theory 31.

[3] See JHH Weiler, 'The Transformation of Europe' cit. 2407

[4] On the "autonomistic" account of EU law as the position of the ECJ see A Peters, *Elemente einer Theorie der Verfassung Europas* cit. 260

[5] On the non-intervention principle in international law see K Loewenstein, *Political Reconstruction* (Macmillan Company 1946).

[6] See on the so-called Lotus principle in Permanent Court of International Justice (PCIJ) *SS Lotus (France v Turkey)* [7 September 1927].

its classical form), the individuals cannot bear rights of international legal origin.[7] Their legal status is determined by the state (to which they belong) alone. Against the background of these main classical principles the question arises how the project of European integration may be conceptualised within the framework of international law.

Therefore, this *Article* aims to analyse the EU Treaties and their transformation through the jurisprudence of the ECJ in the light of basic principles of international law concerned with the protection of sovereignty. This perspective may be suitable to complement the narrative of constitutionalisation and to explain certain paradoxes in the European integration process and the relationships between its main players.

I will proceed in three steps. First, I will highlight certain aspects in Pierre Pescatore's *The Law of Integration*[8] that may allow taking his account as a starting point for thinking the project of European integration as something new in kind in the theory of polity. Since Pescatore was both – theorist and, as judge to the ECJ, influential practitioner –, his insights may offer a better understanding of the European integration process than many others. Therefore, his characterisation of the sphere the autonomous EU law relates to as the "the sphere of the Community's intervention"[9] appears to be a crucial qualification to start with.

The EU Treaties are often considered as progressive forms of law-making treaties. Law-making treaties in general establish a form of legislation on the international level.[10] Whereas classical law-making treaties address the states only,[11] the EU Treaties are said to establish a system similar to domestic constitutions, relating directly to individuals (and not only to states).[12] EU-law's claim that also the national citizens are legal subjects of the EU legal order reminds of the important paradigm change in the philosophy of international law that we find in Kant's concept of the cosmopolitan right.[13] In his critical revision and extension of this Kantian concept, Jürgen Habermas shows that the cosmopolitan right must be construed as breaking through the domains of national sovereignty and intervening in the realms formerly protected by international legal principles such as the non-intervention and the mediation principle.[14] I will show

[7] On the principle of the mediation of the individual see V Epping, 'Völkerrechtssubjekte' in K Ipsen, *Völkerrecht* (C.H. Beck 2018) 358.

[8] P Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, based on the Experience of the European Communities* (A.W. Sijthoff 1974) preface.

[9] *Ibid*. 28, 44.

[10] On the concept of law-making treaty see C Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' in M Browman, D Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 79.

[11] See H Triepel, *Völkerrecht und Landesrecht* (C.L. Hirschfeld 1899).

[12] For an overview see A Peters, *Elemente einer Theorie der Verfassung Europas* cit. 229.

[13] I Kant, *Metaphysics of the Morals: The Philosophy of Law* (Delphi Classics 2017) para. 62.

[14] J Habermas: 'Kants Idee des ewigen Friedens – aus dem historischen Abstand von 200 Jahren' in J Habermas, *Die Einbeziehung des Anderen. Studien zur Politischen Theorie* (Suhrkamp 1996). On the international legal principles of non-intervention and mediatisation see A Arnauld, *Völkerrecht* (C.F. Müller 2016) 17, 151.

therefore that Pescatore's idea of an intervention sphere and Habermas' account of the interventionist character of the cosmopolitan right perfectly fit together: EU law is the most progressive form of a cosmopolitan design in international law today.[15] The EU, as Habermas argues, is a community of states on the one hand and citizens on the other.[16]

However, if the EU legal order indeed shows a highly interventionist character, doubts may arise concerning the traditional qualification of the EU Treaties as law-making treaties. According to Heinrich Triepel, who has decisively shaped the theory of the law-making treaty, this kind of treaty respects the boundary between the international and national legal orders as separate realms of law.[17] But since – as, *e.g.*, Pescatore emphasises – within the framework of EU law this boundary is – though not completely abolished – challenged, questioned and blurred, the traditional qualification of the EU Treaties as law-making treaties can be called into question. In the second step, I will therefore try to identify some reasons why the classical qualification cannot satisfactorily explain the nature of the Treaties. Furthermore, I will briefly present a model of international treaty that may be more suitable for the task of conceptualising the interventionist character of the EU Treaties within the framework of international treaty law.

The general aim of this *Article* in its three steps is to contribute to the debate about the nature of the EU Treaties as constituting an autonomous legal order from an international law perspective by identifying a type of international treaty suitable to explain the special character of a legal order that is identical neither with international nor with domestic law, but rather constituting a realm in-between the former and showing an independent legal standing in itself. However, the idea of EU law's independence and autonomy must be understood not only in the context of a purely legal analysis of the relation between the EU, its Member States and its citizens. Having emerged as a sphere of legal, economic, and political interaction during the Cold War period, the project of European unification can be understood also as the expression of the attempt of self-assertion against the newly dominating superpowers of the East and West. As Joseph Weiler put it: "[t]he *Schuman Declaration* is Europe's declaration of independence".[18] And regarding Europe's dark past, the integration process may be understood as the process of the realisation of a promise – the promise of an alternative future for Europe after the horrors of the first half of the 20th century and of an answer to the fascist regimes in several European countries in particular. According to Joseph Weiler, this promise shows a messianic impact.[19] In a third and last, conclusive step I will

[15] For a different account of a "progressive internationalism" see P Eleftheriadis, *A Union of Peoples. Europe as a Community of Principle* (Oxford University Press 2020).

[16] J Habermas, *Zur Verfassung Europas. Ein Essay* (Suhrkamp 2011) 67.

[17] H Triepel, *Völkerrecht und Landesrecht* cit. 7.

[18] JHH Weiler, 'In the Face of the Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) Journal of European Integration 833.

[19] JHH Weiler, 'In the Face of the Crisis' cit. 833.

present an interpretation of the legal character of the EU Treaties and the supranational principles that may be understood as the attempt to prove Weiler's thesis right that political messianism "explains not only the persistent mobilising force (especially among elites and youth), but also key structural and institutional choices made".[20]

II. The Law of integration

II.1. The *summa divisio* of the modern law and the autonomous "sphere of intervention"

The law as a normative standard for behaviour and means to shape the relationships between the legal subjects it constitutes is related to spheres to which it is applicable to. In the case of modern law two spheres can be distinguished that are related to the two subtypes of modern law. The main actor here is the modern state. On the one hand, there is the sphere subordinated to the state, the internal or national sphere; on the other, there is the sphere of the relations between the different states, the external or international sphere. The former is the sphere domestic law relates to, the latter the sphere international law relates to. According to the *summa divisio* of modern law, any legal rule is either a rule of international law or a rule of domestic law.[21] *Tertium non datur*. The relationship between the two spheres and their legal framework is regulated by the state alone. Its sovereignty over internal affairs is guarded by the classical principles of the mediation of the individual and non-intervention; on the international level, state sovereignty is guarded by the principle that any rule of international law must rely on the state's consent. Even in the context of intensified cooperation in international organisations, this structure is protected due to the principle of representativity.[22]

Considering the legal structure of the European integration process, legal thinking is confronted with something showing a "qualitative difference" compared to classical international law.[23] As Pierre Pescatore in his 1972 *The Law of Integration* sets out: "Anyone who tries to interpret these new realities in the light of the well-worn conceptions of international law runs the risk of missing the substance of this special type of relationship between states".[24] This "special relationship between states" cannot be analysed by means of traditional legal categories: "this new reality being born before our

[20] *Ibid*.

[21] Classic authors like Vattel or Anzilotti have shaped the understanding that the two spheres are strictly separated. On the theory of dualism see D Anzilotti, *Lehrbuch des Völkerrechts* (De Gruyter 2019) vol. 1; J Klabbers, *International Law* (Cambridge University Press 2013) 288; V Epping: 'Völkerrecht und staatliches Recht' in K Ipsen, *Völkerrecht* cit. 48; H Triepel, *Völkerrecht und Landesrecht* cit. For a recent "internationalist" and dualist account of EU law see P Eleftheriadis, *A Union of Peoples* cit.

[22] P Pescatore, *The Law of Integration* cit. 5.

[23] *Ibid*. preface.

[24] *Ibid*. preface.

eyes, the law of integration, has not been recognised for the original phenomenon that it is, so much so that it has not yet found its *locus standi* within the established co-ordinates of legal categories. Are we here in the zone of public law, are we in the zone of international law, or must these boundaries be revised so as to assign its true place to this new field of action and knowledge?".[25]

The law of integration is therefore a *tertium* to national and international law that cannot be conceptualised through the categories of the classical *summa divisio*. The sphere the law of integration relates to is neither a purely internal nor a purely external sphere but a third sphere, autonomous from both. And the institutional authority operating in this sphere is as well neither national nor international. It is, according to Pescatore, the supranational authority,[26] "a real and autonomous power placed at the service of objectives common to several states".[27] The law of integration is supranational law.

Due to the ascribed autonomy, EU-law may be conceived as independent from international law and Member States law, and underived from both regarding its validity and interpretation.[28] To give the concept of autonomy meaning and effectiveness, it is accompanied by the principles of direct effect and supremacy.[29] These three supranational principles change Europe's legal landscape in a fundamental way, for it seems to show a double face henceforth. On the one hand, Member State territory is still the territory of the traditional European nation states and the individuals are national citizens; on the other, the domestic territories form together the territory of the Common Market and the individuals are bearers of directly applicable rights of European legal origin. Furthermore, since 1992, national citizens have had the status of EU-citizens. A unilateral, sovereign change of the status of individuals who are European citizens does not seem to be legally possible any longer – at least as long as the state concerned is a Member State.[30]

This double status structure is clearly the result of a fundamental "refashioning" of national sovereignty to which Pescatore dedicates a long chapter. This refashioning consists of the transformation of national law to achieve the goals of European integration.[31] The Treaties aim to change and transform that sphere which was formerly protected by the principle of non-intervention – the classical *domaine reservé*. The latter is without doubt the core concept of classic international law. National sovereignty is built

[25] *Ibid*. 2.

[26] *Ibid*. 26, 35.

[27] *Ibid*. 51.

[28] A Peters, *Elemente einer Theorie der Verfassung Europas* cit. 260.

[29] See case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ECLI:EU:C:1978:49 paras 14-18.

[30] See case C-135/08 *Janko Rottmann v Freistaat Bayern* ECLI:EU:C:2010:104. For a critical discussion see A Somek, 'Pragmatism, Innovation and Prophecy: Conjectures Concerning the Grounds of Belief in an Inventive Court' in T Capeta, I Goldner Lang and T Persišin (eds), *The Changing European Union: A Critical View of the Role of Law and the Courts* (Hart Publishing 2020).

[31] P Pescatore, *The Law of Integration* cit. 19.

on the idea of the exclusive right to shape, rule and determine the relationship between the members of a national community on a certain territory (conceived as impermeable), organised as a political entity in the modern state.[32] This exclusiveness entails that the individual belonging to a certain state is mediated *vis-à-vis* any other political entity and the realm of international law as such. According to the classical principle of the mediation of the individual, an individual cannot bear rights or duties of international legal origin – it has no international legal subjectivity and international law's jurisdiction ends at the national boarder. Sovereignty is nothing else than this claim for exclusiveness. *Any* dictatorial interference within that sphere from without is to be regarded as an intervention into domestic affairs – the *domaine reservé*.[33] (Understood in this technical sense, the notion of intervention comprises both military and peaceful intervention, regardless whether it is carried out by right or without).[34]

It is therefore not surprising at all that Pierre Pescatore calls the sphere that results from the opening of the *domaine reservé* and to which supranational authority refers to the "sphere of the Community's intervention".[35] From the perspective of international law, the communities' actions are conventionally justified interventions. And the crucial question Pecatore rises is: "[i]t must be asked what is the nature and intensity of the powers the Community is called upon to exercise in the spheres open to its intervention".[36] The question is which legal concept is suitable to analyse the sphere of intervention and the means of its regulation properly. The difficulty is that, according to Pescatore, "we must bear in mind that we are experiencing the beginning of a process which undermines categories of thought which have been settled for centuries [...]. [We must] understand the future potential comprised in these new forms of international relationships".[37] What is the supranational law of integration and the sphere of intervention it relates to?[38] What is this new "special type of relationship between states"? What is the nature of the EU Treaties?

II.2 The concept of law-making treaty and the search for a European Constitution

Pescatore's most interesting thesis is the radical antithesis to the classical *summa divisio*'s *tertium non datur*. It is important to bear in mind, that according to Pescatore, the supranational law of integration and the sphere it relates to do not constitute a classical international system nor a state system in whatever federal form.[39] The transformation

[32] G Jellinek, *Allgemeine Staatslehre* (Wissenschaftliche Buchgesellschaft Darmstadt 1959) 394, 406.
[33] See H Lauterpacht, *International Law: A Treatise* (Longmans 1955) 305.
[34] *Ibid*.
[35] See P Pescatore, *The Law of Integration* cit. 28, 44.
[36] *Ibid*. 28.
[37] *Ibid*. 4.
[38] *Ibid*. 52.
[39] *Ibid*. 55.

the law of integration performs consists therefore not of the transformation of the relations between the Member States into internal domestic relations in the full sense of the term. On the other hand, the new quality of these relations is not of international legal character *stricto sensu* either. Theory faces therefore a paradoxical situation. Considered through the perspective of what the EU Treaties are, we have formally international treaties. Considered from the perspective of what they do, they do not establish rules of classical international law, for classical international law is the legal order that is built up to avoid such a transformation of domestic law (as intended by EU law) that is *de facto* an intervention into domestic affairs.

Consequently, the question arises, how this peculiar character of the EU Treaties may be conceptualised as international treaties. The answer of the classical narrative of the constitutionalisation theory consists of a combination of international and domestic legal concepts, namely the concept of law-making treaty and constitutional law.[40] In order to understand this solution, it seems to be expedient to take a closer look on what international treaties do – to analyse their function. Arnold McNair divided the concept of international treaty in his functional approach into four categories:[41] by asking what treaties do, he distinguished between *i)* treaties of conveyance, *ii)* contract treaties, *iii)* law-making treaties and *iv)* charters of international unions, whereby he considered the latter as a special form of law-making treaties. Law-making treaties serve the stabilisation of international relations.[42] They do so by establishing a systematic set of objective rules binding for the consenting states (and sometimes even for third states)[43] or by the creation of a new legal subject of international law, be it a fully sovereign state (*e.g.*, the first German nation state in 1867),[44] or an international organisation. It was Heinrich Triepel, who gave the concept of the law-making treaty its canonical shape.[45] In his 1899 *Völkerrecht und Landesrecht* ("International Law and Municipal Law"), Triepel continued the international legal research that had emerged in German legal scholarship in the time

[40] About the theory of constitutionalisation in international law in general, see S Kadelbach, T Kleinlein, 'Überstaatliches Verfassungsrecht. Zur Konstitutionalisierung im Völkerrecht' (2006) Archiv des Völkerrechts 235; J Klabbers, A Peters and G Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press 2011).

[41] A McNair, 'The Functions and Differing Legal Character of Treaties' in A McNair, *The Law of Treaties* (Clarendon Press 1961) 739; DB Hollis, 'Defining Treaties' in DB Hollis (ed.), *The Oxford Guide to Treaties* (Oxford University Press 2020).

[42] On the concept of law-making treaty see C Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' in MJ Browman and D Kritsiotis, *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018); DB Hollis, 'Defining Treaties' in DB Hollis (ed.), *The Oxford Guide to Treaties* cit.; W Levi, 'Law-Making Treaties' (1944) Minnesota Law Review 247; A McNair, *The Law of Treaties* cit.

[43] A Peters, *Elemente einer Theorie der Verfassung Europas* cit. 229.

[44] See H Triepel, *Völkerrecht und Landesrecht* cit. 50.

[45] H Lauterpacht, *Private Law Sources and Analogies of International Law (with the Special Reference to International Arbitration)* (Longmans, Green & Co. Ltd. 1927) 158.

after the foundation of the first German nation state in 1867 and 1871.[46] The question at stake was whether it is possible to establish binding rules on the international level. The traditional theory affirmed the capacity of any international treaty to do so. Contrary to this approach, Triepel insisted on the distinction between treaties that followed the pattern of a private law contract[47] and treaties that showed a different structure regarding the form of the will underlying the understanding and its outcome, leaving behind the contract treaty model. In the latter model, "the will of one party is different from that of the other, the contract being here a means for achieving different and opposing ends".[48] International law in the full sense of the term is considered by Triepel as not achievable by means of the mere contract treaty. However, 19th century[49] saw the emergence of a new international legal format that Triepel called *gesetzgebende Vereinbarung* ("law-making agreement") which was later called "law-making treaty".[50] "[T]he agreement serves the purpose of realising identical aims".[51] Whereas the mere contract shall help to fulfil opposite interests, the agreement shall satisfy common interests.[52] It is explained not by the analogy with the private law contract but by analogy with the public law concept of law-making or legislation.[53] By means of the agreement based on a collective will, the new-born order attains a certain autonomy from the state will overcoming the latter as the only source of law.[54] The emerged entity is the result of a collective act (*Gesamtakt*).[55] (The examples Triepel gives are the 1815 *Final Act* of the Congress of Vienna, the *Paris Declaration Respecting Maritime Law*, the 1864 *Geneva Convention* and many others).[56] Triepel emphasises that the two realms of international law and domestic law remain strictly separated. Or to put it correctly: only the distinction between the law-making treaty as instrument to make international law and the domestic legislative process establishes the separation.[57]

[46] H Triepel, *Völkerrecht und Landesrecht* cit. 50.

[47] *Ibid*. 72.

[48] H Lauterpacht, *Private Law Sources and Analogies of International Law* cit. 158.

[49] H Triepel, *Völkerrecht und Landesrecht* cit. 70.

[50] See A McNair, *The Law of Treaties* cit. 729. For an overview on the typologies see C Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' cit. 79.

[51] H Lauterpacht, *Private Law Sources and Analogies of International Law* cit. 158.

[52] H Triepel, *Völkerrecht und Landesrecht* cit. 53.

[53] *Ibid*. 73.

[54] *Ibid*. 32.

[55] On the notion of the *Gesamtakt* see J Kuntze, *Der Gesammtakt, ein neuer Rechtsbegriff* (Leipzig 1892). On the application of that notion to the context of European integration see HP Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr 1972) 58.

[56] H Triepel, *Völkerrecht und Landesrecht* cit. 70.

[57] As Lauterpacht has pointed out, the distinction between contract treaties and law-making treaties should not lead to the misunderstanding that the former lack of legal character – a misunderstanding Triepel is said to be captured in. Contract treaties as well are sources of international law in the sense of

Whereas the classical concept of the law-making treaty that we find in Heinrich Triepel remains within the framework of a dualist approach to international law in accordance with the *summa divisio*, international legal scholarship in the 20th century interpreted the densification of the international legal landscape and the limitation of sovereignty it is said to entail as the assumption of constitutional structures similar to domestic constitutional law.[58] And the EU Treaties are considered as the most progressive form of the transgression of the conceptual boundaries of classic international law. The EU Treaties are said to be law-making treaties, a "collective act of state integration power"[59] that establish a rule of law describable by the terms of domestic law, namely constitutional law, in a more advanced sense than any other international legal framework. The EU is said to be, in principle, an international organisation that is, however, at the same time shaped as though it were a state or at least showing a similar structure.[60] It resembles an international organisation due to its international legal foundations. But, as Jan Klabbers has pointed out, the EU is not established for a concrete function as it has been the case with classical international organisations, *e.g.*, the International Meteorological Organisation.[61] It cannot be said that the EU is simply exercising tasks delegated by the Member States – as an autonomous entity the EU exercises its rights independently.[62] Creating a Common Market for 27 countries and more than 400 million citizens, establishing a system of legislation the legislative output of which touches nearly any policy field is by no means a "concrete" a concrete function in the sense of the functionalist theory. Against this background and regarding the objectives of art. 1 and art. 3(1) TEU the EU can be conceived of as institutionalisation of (European) human community as such.

In 1958, Pescatore conceived of the Treaty of the European Economic Community as being at once an "international treaty, a national law and the constitution for the Community".[63] In *The Law of Integration*, Pescatore seems to consider the concept of law-making treaty as a kind of a precursor concept to the EU Treaties. The law-making treaty

art. 38 of the Statute of the International Court of Justice. Contract treaties cannot be seen as mere application of law. See H Lauterpacht, *Private Law Sources and Analogies of International Law* cit. 158.

[58] S Kadelbach and T Kleinlein, 'Überstaatliches Verfassungsrecht. Zur Konstitutionalisierung im Völkerrecht' (2006) Archiv des Völkerrechts 244.

[59] HP Ipsen, *Europäisches Gemeinschaftsrecht* cit. 58; A Peters, *Elemente einer Theorie der Verfassung Europas* cit. 262.

[60] For an analysis of the constitutionalisation of the founding Treaties through the jurisprudence of the ECJ see JHH Weiler, 'The Transformation of Europe' cit. 2407.

[61] See J Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) EJIL 9, 30-33.

[62] According to Klabbers, functionalism stands and falls with the framework of delegation. See *Ibid*.

[63] P Pescatore, 'Les aspects fonctionnels de la Communauté Economicque européene, notamment les sources du droit' in Faculté de droit de l'université de Liège (ed.), *Les aspects juridiques du marché commun* (Faculté de droit de Liège 1958) 63.

is said to be the traditional way of establishing "common rules for several States, [creating] a community of law between [them]".[64] Traditional international organisations can be considered as the institutionalisation of such efforts, still acting in accordance with the principle of representativity. But then, Pescatore states against the qualification of the EU Treaties as classical law-making treaties that "the legislative system of the Communities far transcends the international precedents, both quantitatively and qualitatively".[65] Considering this transgression of the concept of law-making treaty, Pescatore suggests analysing the Treaty of Rome against the background of domestic legal concepts, constitutional concepts in particular.

So, in the end, the concept of law-making treaty is in a certain way rejected by Pescatore to render the analysis of the Treaties within a constitutional framework possible. Their international legal character is denied. Although having highlighted the special character of the law of integration as neither international nor national law at the outset, Pescatore now aims to apply constitutional categories to the Treaties. I think it is this point where critique should be applied. We remember: Pescatore highlighted the new, transgressive and progressive character of the Treaty of Rome. They were said to having left behind the classical *summa divisio* and they were said to be not categorisable within classical legal concepts that adhere to the *summa divisio*. But why then is constitutional terminology applied to them?

The rejection of the law-making treaty character of the EU Treaties is even more interesting considering the roots of the concept of law-making treaty in German legal scholarship in the late 19th century. Scholars like Bergbohm,[66] Binding[67] and Triepel[68] have created the concept of the collective act and the law-giving agreement to analyse the character of the foundation of the *Norddeutsche Bund* in 1867. This first German nation state was founded by an international agreement between the different German sovereign states.[69] By this agreement, the relations between these states were transformed from external relations between sovereign states into internal relations between constituent states (*Gliedstaaten*) of the new supreme federal state. The latter remained as the only entity endowed with international legal subjectivity in the full sense. Furthermore, the agreement explicitly referred to establishment a constitution for the new state.

Compared the foundation of the *Norddeutsche Bund* by means of international agreement, it is obvious that the EU Treaties do not at all exhaust the full scope of the capacity of international treaties. On the contrary, they remain far behind. They establish a new entity of international law, but neither do they transform the relations between

[64] P Pescatore, *The Law of Integration* cit. 56.
[65] *Ibid*. 57.
[66] C Bergbohm, *Staatsverträge als Quellen des Völkerrechts* (Dorpat 1876).
[67] K Binding, *Die Gründung des Norddeutschen Bundes* (Duncker & Humblot 1889).
[68] H Triepel, *Völkerrecht und Landesrecht* cit.
[69] For an overview over the literature see A Peters, *Elemente einer Theorie der Verfassung Europas* cit. 222.

the Member States into internal relations in the full sense nor do they shape *explicitly*[70] those relations in a constitutional mode. Though not going as far reaching in the transformation of the interstate relations as the 1867 treaty,[71] they are said to be nevertheless a constitution in itself. Considering the intensity of the integration power of the 1867 agreement, it seems therefore more likely to say that the EU Treaties have stopped halfway in the direction of the establishment of internal relations and a constitution. Against this background, the jurisprudence of the ECJ establishing the so-called "constitutional" principles of EU law appears to be nothing else than the attempt to subsequently complete a transformation that was originally not achieved or maybe not even intended at all. For where the ECJ alleged to having identified constitutional principles the Treaties themselves had remained loudly silent. Considered from the perspective of what law-making treaties actually *can* do the EU Treaties seem to be not a progressive successor but a rather weak example. Pescatore's rejection of this concept in the context of the analysis of the EU Treaties appears plausible only from this perspective. Yet is it comprehensible to call treaties of such ambiguous and undecided character a constitution?[72] Is something a constitution when it is necessary to *demonstrate* its constitutional character in a complex argument? As a consequence, the question arises: if the EU Treaties are international treaties but – according to Pescatore – not law-making treaties, what kind of treaty are they? If the EU Treaties do not transform international relations into domestic and constitutional relations *stricto sensu* – what is it these treaties are "doing"?

II.3. Jürgen Habermas and the revision of Kant's cosmopolitan right

a) The completion of public law in the cosmopolitan right

The EU Treaties obviously cannot be analysed exhaustively against the background of the classical categories of international treaty law. All of treaties discussed by McNair[73] remain within the framework of classical international law because any rule they establish is either a rule of international law or domestic law. (The most comprehensive form of the law-making treaty results in the establishment of a domestic constitutional order, whipping off the international legal character of formerly international relations completely). What the EU Treaties do cannot be achieved by neither of those types, for the latter remain formally and materially within the framework of the classical *summa divisio*. They are not about breaking through the *domaine reservé* to intervene into the domestic legal orders. They do not show an effective transformative function. But then

[70] M Cahill, 'European Integration and European Constitutionalism: Consonances and Dissonances' in D Augenstein (ed.), *'Integration through Law' Revisited: The Making of the European Polity* (Routledge 2011).

[71] For the opposite view see A Peters, *Elemente einer Theorie der Verfassung Europas* cit. 224.

[72] For a critical account of the theory of constitutionalisation see A Somek, 'Constituent Power in National and Transnational Contexts' cit.

[73] A McNair, 'The Functions and Differing Legal Character of Treaties' cit.; DB Hollis, 'Defining Treaties' cit.

the paradox of European integration is: The EU Treaties *are* international treaties and at the same time aim at the suspension of the classical *summa divisio* and therefore at the suspension of international law. How can this be possible?

Considering this paradox, the interventionist character of the EU Treaties appears to be crucial for their proper understanding. In order to achieve a suitable concept for what the EU Treaties do, it may be worth looking into the tradition of cosmopolitan thinking that takes Immanuel Kant's international legal conception as a starting point. By referring to Jürgen Habermas's 1995 paper on Kant's *Towards Perpetual Peace*,[74] my goal will be to demonstrate that the way Habermas reconstructs and refines Kant's conception of international law and the cosmopolitan right meets with Pescatore's notion of the sphere of the Community's intervention. For Habermas calls exactly for international legal rights that break through the *domaine reservé*.

According to Immanuel Kant, the precondition for a peaceful world order is the establishment of the rule of law on three levels.[75] On the level of a particular human community, it is necessary to establish a state and a constitution to overcome the state of nature between the individuals. On the level of the relations between the various political communities, an international legal order is indispensable to avoid war. This legal order seems to rest above all on the concept of international treaty. Kant seems to fully trust this instrument as suitable means to overcome the condition of the permanent threat of the outbreak of war in the inter-state domain. However, the rule of law must be completed in a cosmopolitan right the bearer of which are not the states but the individuals.[76]

Kant does not give much room for considerations on the implications of the legal quality of a cosmopolitan right as a right that is of international legal origin and – to make sense – must be observed by the states as a right individuals have against the state at the same time. Furthermore, it is a rather weak concept. As the right to visit any country and to offer contact, it follows from the fact that because men "are placed in [...] throughgoing relations of each other to all the rest, [...] they may claim to enter in intercourse with one another, and they have a right to make an attempt in this direction while a foreign nation would not be entitled to treat them on this account as enemies".[77] However, the simple fact that Kant conceives of the international legal order as imperfect as long as it does not grant individuals certain rights is worth dwelling on. And so does Jürgen Habermas. In his essay on Kant's Towards Perpetual Peace, Habermas argues that Kant's concept of the cosmopolitan right is to be revised and redefined to make it a tool of considerable relevance to the analysis of the current situation in international politics.[78] Having done important contributions to the theory of EU-law's constitutionalisation elsewhere,[79]

[74] J Habermas, 'Kants Idee des ewigen Friedens' cit.
[75] I Kant, *Metaphysics of the Morals* cit. para. 43.
[76] *Ibid*. 62.
[77] *Ibid*. para. 62.
[78] J Habermas, 'Kants Idee des ewigen Friedens' cit. 207.
[79] One for many, J Habermas, *Zur Verfassung Europas* cit.

Habermas concentrates in this context on questions about universal international law and critically reflects the United Nations-framework. However, since he suggests in his conclusion that a reform of the United Nations should take European institutions as a model, his principal and conceptual reflections that precede this conclusion seem to be applicable also to the realm of EU law and the question of its legal qualification.

b) Cosmopolitan right revisited

Similar to Pescatore, who had discussed the question of supranationality under the title of a "refashioning of sovereignty", Habermas starts his reflection on the revision of Kant's cosmopolitan right with the claim, that this conceptual revision concerns state sovereignty in in its two dimensions.[80] Furthermore, the developments of the 20th century regarding the "globalisation of risks" makes it necessary to reconceptualise the notion of peace as well.[81] What follows in Habermas's text then reads as if Habermas claimed to transfer the concept of the autonomous, directly effective and supreme rights that underlies the ECJ's jurisprudence on the European Fundamental Freedoms to the level of universal international law. Habermas shows that Kant's conception is not consistent. If the international federation relies on the respect of state sovereignty, then there is no room for an effective cosmopolitan right for it would be an obligation imposed on what is – in the strict sense of the term – unbound from any obligation.[82]

Contrary to Kant, Habermas claims that the "cosmopolitan right must be institutionalised in a way that binds the individual governments" and an effective mechanism of sanctions must be established. Only then the international state of nature will be overcome.[83] The consequence of such an institutionalisation would be the transformation of the former external relations between sovereign states into internal relations between organisation members that rely on a statute or constitution.[84]

According to Habermas, a nucleus of such a conception is realised in art. 2(4) of the United Nations Charter – the ban on war of aggression – in combination with the competence of the United Nations Security Council to take suitable military measures to react if there is a breach of the international peace according to Chapter VII of the Charter. But at the same time, the Charter prescribes the respect of national sovereignty and stipulates in art. 2(7) that nothing contained in the Charter "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state". Contrary to this stipulation, Habermas calls for a structure that should explicitly allow to intervene into the domestic affairs by relating directly to the individuals.

[80] J Habermas, 'Kants Idee des ewigen Friedens' cit. 208.

[81] *Ibid*. 208. One could argue that it is exactly this re-conceptualisation of the meaning of peace that we find in the *Schuman declaration*: Peace means to "make war materially impossible".

[82] J Habermas, 'Kants Idee des ewigen Friedens' cit. 208.

[83] *Ibid*. 208.

[84] *Ibid*. 208.

(The model would be the international legislation process of the EU).[85] The cosmopolitan association must be designed not as an association of states only but of cosmopolitan citizens as well.[86] The barrier of national sovereignty ought to be pierced through. Kant's tripartite conception of the public law – state law, international law and cosmopolitan right – only makes sense if "the citizens' autonomy is not mediated by the sovereignty of the states they belong to".[87]

What Habermas formulates here is nothing else than the complete rejection of the two fundamental principles the concept of state sovereignty relies on: the principle of the mediation of the individual on the one hand and the prohibition of intervention (as the complementary concept of the former) on the other: "[t]he punch line of cosmopolitan right [...] consists in relating directly over the head of the collective subjects of international law to the status of the individual legal subjects and founding a non-mediated membership of free and equal world citizens for them".[88]

Habermas suggests therefore a right of international legal origin that breaks through the states' sovereignty, and he addresses this breakthrough as an intervention.[89] Since these interventions are tasked to secure the legal status of individuals, they may be seen as the expression of a *protective interventionism*.

c) The concept of intervention

The interventions already observable in the 20th century show – as conventional interventions under, *e.g.*, the Charter of the United Nations – a peculiar character. When Habermas discusses the example of the military intervention into Iraq in 1991 by Western Allies, he refers to a structure that ought to be considered in more detail. That intervention was justified by Security Council Resolution 688[90] because the situation in Iraq was considered to be a threat for the international security. According to Habermas, from a perspective de jure, the Allies *did not* intervene (because Iraq was party to the Charter and therefore subjected to the sanction mechanism); but from a perspective de facto, they *did*.[91] What is a process that is de jure no intervention but *de facto*? What is something that is – and is not?

Habermas conceives of today's international situation as a situation of transition.[92] This situation can be – regarding the legal quality and functioning of the most important international legal instruments – analysed by mixed treaty concepts that formally respect sovereignty and devalue it materially at the same time. To assess the progressiveness of such mixed concepts, the standard appears to be the degree to which this material

[85] *Ibid*. 219.
[86] *Ibid*. 210.
[87] *Ibid*. 210 my translation.
[88] *Ibid*. 210 my translation.
[89] *Ibid*. 216.
[90] Security Council, Resolution 688 of 5 April 1991, S/RES/688 (1991).
[91] J Habermas, 'Kants Idee des ewigen Friedens' cit. 213.
[92] *Ibid*. 209.

devaluation is achievable, *i.e.*, how far the right to a conventional intervention goes. In the context of his essay, Habermas addresses the topic of intervention not only regarding military interventions (and he does so in accordance with international law – an intervention is *any* dictatorial interference with domestic affairs). In fact, the concept of peace as such is to be changed in the light of the concept of intervention. Peace (Habermas refers to Dieter and Eva Senghaas) is to be considered as "a *process*, that runs in a nonviolent way, that aims not only at the prevention of violence, but also at the fulfilment of the preconditions for an easy cohabitation of groups and peoples".[93] Such policies will take any measure below the threshold of violence "to influence the inner conditions of formally sovereign states, aiming at facilitating a self-sustaining economy and bearable social conditions, democratic participation and cultural tolerance. Such strategies of non-violent intervention in favor of democratization processes factor in that the global interconnection has made meanwhile *all* states dependent on their environment and susceptible to the 'soft' power of indirect influence – up to explicitly imposed economic sanctions".[94]

It is certainly not necessary to wait for the explicit reference to the EU a few pages later to recognise what Habermas thinks to be the model for the concept of "peace as process pushed ahead by strategies of nonviolent intervention". And furthermore, it is obvious that Habermas means a deepening of the interventionist character of international law when he speaks of the "expansion of supranational action capacities".[95] In a footnote to the "strategies of nonviolent intervention", Habermas refers to an article by the German peace researcher Ernst-Otto Czempiel in an affirmative way. In this article it reads as follows: "[i]n the European Community there is a[n incomparable high] degree of intervention, [...] insofar as foreign citizens are authorised to participate to the decisions of a state. In some sections the sovereignty of the Member States has been transferred to the European Community, although the notion of integration is used only seldom. Whatever the term may be – it demonstrates intervention to be the rule".[96]

Czempiel – and so does obviously Habermas – conceives of the European integration project as an interventionist project. The EU Treaties establish a system of conventional intervention. Due to the transformative function of the European legislation, domestic law is changed and due to the doctrine of direct effect certain rights of the EU Treaties refer directly to the citizens of the member states. If a state does not comply with EU-law, the sanction mechanism of the infringement procedure will be applied and, apart from that, the domestic legal rule that contradicts directly applicable EU law is to be disapplied by the

[93] *Ibid*. 216.

[94] *Ibid*. 216 my translation.

[95] *Ibid*. 217.

[96] EO Czempiel, 'Das Phänomen der Intervention aus politikwissenschaftlicher Sicht' in EO Czempiel and W Link (eds), *Interventionsproblematik aus politikwissenschaftlicher, völkerrechtlicher und wirtschaftswissenschaftlicher Sicht* (Engel 1984) 7 my translation.

national public authorities and courts according to the concept of EU law's supremacy.[97] Since national citizens can rely on their European rights vis-à-vis national public authorities, the European legal order shows exactly the structure described by Habermas: Europe is a community that consists not only of states but also of individuals.[98] One may argue in one direction or the other[99] – the functioning of the European legal order shows an interventionist character to a degree that is historically unique.[100]

"Intervention" is a word that always has a kind of negative flavour when used in a political debate. But as a legal concept it is simply the term for a certain process that is not originally bad or good as such. Procedural law knows the concept of the intervenient as well. As a procedural tool, intervention is a means to realise rights. The assessment depends on the perspective. This can be learned from Habermas's approach when he discusses Carl Schmitt's basic insights in and objections against developments in international law in the 20th century, the ban on the war of aggression and the concept of a cosmopolitan polity in particular.[101] Schmitt criticised the paradigm changes in international law and the League of Nations.[102] According to Schmitt, it was to conceive as major error to abolish the classical concept of the restricted and non-discriminating war between states as a legitimate means in international politics which was achieved by the 1928 Briand-Kellogg Pact. The combination of Human Rights, the criminalisation of aggressive war, the personal liability of individuals on the grounds of international criminal law leads – according to Schmitt – to a dangerous remoralisation of international politics and international law.[103] Since the *ius ad bellum* beyond any need for justification is constitutive for modern sovereignty, its abolishment is a serious threat to sovereignty and the world order built upon it as core concept.[104]

Though Schmitt's conclusion and assessment of the new international legal instruments is completely opposed to Habermas's assessment, Habermas interestingly concedes that Schmitt had understood very well the consequences of the imposture of that international legal structure that may be extracted from Kant's ideas, *i.e.*, that any individual shows in a certain sense a double status being at the same time cosmopolitan and national citizen.[105] In the next Section, I will show that Schmitt's observations concern also changes in the concept of international treaty that entail the establishment of a similar double status structure. The main question will be whether these observations

[97] See case C-6/64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66 para. 594.

[98] J Habermas, *Zur Verfassung Europas* cit. 62.

[99] EO Czempiel, 'Das Phänomen der Intervention' cit. 7 my translation.

[100] *Ibid*. 7.

[101] J Habermas, 'Kants Idee des ewigen Friedens' cit. 211 my translation.

[102] C Schmitt, 'Die Wendung zum diskriminierenden Kriegsbegriff' in C Schmitt, *Frieden oder Pazifismus. Arbeiten zum Völkerrecht und zur internationalen Politik 1924–1978* (Duncker & Humblot 2005) 518.

[103] J Habermas, 'Kants Idee des ewigen Friedens' cit. 232.

[104] *Ibid*. 227.

[105] See *ibid*. 211.

may be applicable to the EU Treaties as well. Similar to Habermas, I will try to show that, first, Schmitt's analysis gives certain insights in changes of the concept of international treaty and second that Schmitt is due to his ideological fanatism unwilling to recognize their suitability to progressive transformations if applied in a particular way.

III. The law of intervention

III.1. Two faces

As elaborated above, Habermas conceives of the international situation as a state of transition in which everything shows a double face. States are formally sovereign, but materially their sovereignty is devaluated. Individuals are national and (at least in the most progressive frameworks) international citizens at the same time. And so are the EU Member States, their territories, their citizens and their governments. The states are at the same time sovereign nation states and Member States that have given up parts of their sovereignty. Their territories are on the one hand still national territories but on the other they form together the territory of the Common Market. The citizens of the Member States are national citizens and EU citizens at once. And finally – the Members of the national governments are at the same time members of the Council of the EU and therefore part of the European legislative.[106] This is what was meant by Pescatore when he spoke about the "special relationship between states".

Regarding the transitional state, the notion of "constitutionalisation" is not completely wrong. What we can observe are indeed steps of a process that is routed in the hope to lead out of the international state of nature and to the state of the rule of law. We are in the midst of the "*exire e statu naturali*" in international law. In a state of transition, the interventions that happen are de jure no interventions but de facto. This is the paradox character of the legal situation of our time. Formally the *summa divisio* is intact, materially it is already overcome. The question then is how the concept of international treaty is affected by these developments and how its role is to be conceptualised. This question has been left open by Habermas and by Pescatore (the latter has even simply denied the international legal character of the EU Treaties). Is there a kind of international treaty that may be suitable to explain the paradox of the *de jure* and *de facto* intervention? Is there a treaty model for the conventional intervention? Are there "intervention treaties"?

[106] On the relation between EU law and domestic law see also P Eleftheriadis, 'The Primacy of EU Law: Interpretive, Not Structural' (2023) European Papers www.europeanpapers.eu 1255. See further J Lindeboom, 'Why EU Law Claims Supremacy' (2018) OJLS 328.

III.2. The concept of intervention treaty

The open question may be answered by analysing more of Schmitt's critical account of international law in the 20th century. As he pointed out, the new paradigm of imperialism and colonialism in the American era of international law in the 20th century is expressed in a new kind of treaty: the intervention treaty.[107] Schmitt shows further that the organisation of the United States colonial system is in important respects different from the European colonial system. The latter was built upon the distinction between the European territory (that was divided between sovereign states) on the one hand the non-European territory on the other. The non-European, colonised parts of the world were neither organised as (however dependent) states nor were they fully incorporated into the territory of the respective European colonial power. The conception of sovereignty was reserved for Europe alone.[108] Non-European territories have been often controlled by entities that were not a state but that were tasked with public authority (and sometimes even the right to declare war), the so-called chartered companies. Contrary to that, the United States did not intend to touch the sovereignty of the subjected countries. They rather used the concept of international treaty to establish and maintain a form of dependence that formally respected the subjected state's sovereignty. To achieve this was the task of the intervention treaty. The intervention treaty is a treaty that allows a state to intervene in the domestic affairs of another state subject to certain conditions.[109] Thereby a "special connection"[110] between the international and the domestic sphere was established,[111] for those treaties were not only treaties of international law but were also incorporated into the domestic legal orders of the participating national constitutional systems.[112] The intervention treaties left national sovereignty formally intact but suspended it as far as this was necessary to achieve the – primarily economic – goals of the United States' imperialism.[113] The subjected states had a government, international representation etc. but were subject to the effective control of the United States.[114] This control and domination "were based on interventions".[115] The classical principle of international law, the principle of non-intervention, became thus materially suspended. However, "[t]he controlling state's right of intervention was

[107] C Schmitt, 'Die USA und die völkerrechtlichen Formen des modernen Imperialismus' in C Schmitt, *Frieden oder Pazifismus? Arbeiten zum Völkerrecht und zur internationalen Politik. 1924–1978* (Duncker & Humblot 2005); C Schmitt, *The Nomos of the Earth* (Telos Tress 2006) 140.

[108] *Ibid.* See also S Larsen, 'European Public Law after Empires' (2022) European Law Open 6.

[109] See C Schmitt, 'Die USA und die völkerrechtlichen Formen des modernen Imperialismus' cit. 356.

[110] C Dupuis, *Le droit des gens et les rapports des grandes puissances avec les autres états avant le pacte de la Société des Nations* (Paris 1921).

[111] C Schmitt, 'Die Kernfrage des Völkerbundes' cit. 122.

[112] See C Schmitt, 'Die USA und die völkerrechtlichen Formen des modernen Imperialismus' cit. 356.

[113] See *ibid*. 359 and C Schmitt, *The Nomos of the Earth* cit. 252.

[114] C Schmitt, 'Die USA und die völkerrechtlichen Formen des modernen Imperialismus' cit. 356.

[115] C Schmitt, *The Nomos of the Earth* cit. 252.

recognised in treaties and agreements, so that, in a strictly legal sense, it was possible to claim that this was no longer intervention".[116] Therefore: what was *de jure* no intervention was an intervention *de facto* – a structure that meets precisely with that identified by Habermas. The concept of conventional intervention through these treaties led to a situation in which "territorial sovereignty was transformed into an empty space for socio-economic processes. The external territorial form with its linear boundaries was guaranteed, but not its substance, i.e., not the social and economic content of territorial integrity. The space of economic power determined the sphere of international law".[117]

Schmitt points out that the sovereignty is rendered void and meaningless in such a situation. Its internal dimension, its autonomy, is restricted by the interventions of the international "partner" that interferes directly with the internal sphere. It is therefore important to see that the aim of an intervention treaty is to break through the classical *domaine reservé* and to establish a special connection between the national and the international sphere – to establish a "special type of relationship between states" (to put it in the words of Pescatore). As a consequence, the situation shows legally a double face, for the subjected states are from the perspective of constitutional law foreign countries, but from the perspective of international law rather an interior part.[118] The relations between the states are therefore neither purely internal nor purely external.

III.3. Post-war Europe

Was the practice of such treaties first restricted to the Western Hemisphere, after the end of World War Two the United States have used their hegemonial position to establish a system of international treaties with European states that show striking similarities to the intervention treaties. As Mike Wilkinson has analysed in detail,[119] the United States secured their economic and geopolitical interests by the establishment of international organisations like the North Atlantic Treaty Organisation or legal orders of a structure similar to that of international organisations, like the General Agreement on Tariffs and Trade or the European Recovery Program ("Marshall Plan"), implementing far-reaching means to control the European states. Under the legal regime of the Marshall Plan, as Karl Loewenstein put it, "the United States reserved for itself – and persistently exercised – the right to supervise, control, and veto the recipients state's use of the economic assistance. […] Economic co-operation thus led to the right and the power of the United States to exercise far-reaching controls over the domestic economies, without, however, granting them any reciprocal rights".[120]

[116] *Ibid*. 252.

[117] *Ibid*. 252.

[118] C Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Duncker & Humblot 2017) 15.

[119] MA Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021) 81.

[120] K Loewenstein, 'Sovereignty and International Co-operation' (1954) AJIL 222, 230.

Without doubt, the model of this new international legal framework were the intervention treaties. Similar to the case of the states of the Western Hemisphere, national sovereignty of the European states was to be limited to the extent necessary to secure the goals of capitalism and "[i]n fact, in many instances the abdication of internal or external autonomy necessitated by the intensity of the co-operative conduct pattern would have been characterised, by the previous standards of unabridged sovereignty, as intervention which no self-respecting sovereign state normally would have accepted".[121]

Obviously, after the end of World War Two intervention was the rule. It is this atmosphere in international law in which the first serious attempts to get the process of European integration started have been made.[122] It can hardly be a contingent coincidence that exactly at this time the old idea of European unification got realised in a way that leads to the same double face structure as the intervention treaties establish. The "sphere of the Community's intervention" (as Pescatore put it) is neither an internal nor an external relation between the Member States, it is a sphere of a special connection that emerges out of the suspension of national sovereignty and the opening of the *domaine reservé*. National sovereignty is suspended to the extent necessary to make transnational economic transactions in the guise of the Fundamental Freedoms possible. The sphere that emerges out of the suspension is the Common Market of the Member States.

The legal framework for the reconstruction of Europe under the aegis of the United States was the model of the intervention treaty, an instrument of colonial ruling.[123] Against the background of the interventionist character of the EU Treaties it may be possible to understand the legal framework of the EU as continuation of this new paradigm in international law. Whereas the Treaties themselves had left the question about the supremacy (*i.e.*, the question of hegemony between the European and the national level) open, it was the ECJ that solved this question through the establishment of the supranational principles of EU law. Therefore, within the framework of the EU Treaties, the sphere which was formerly protected by the principle of non-intervention has been henceforth subject to a deep going transformation and national sovereignty has been rendered materially void.

This analysis may be disturbing. However, where is indeed the difference between what Habermas has called "executive federalism",[124] the unrestricted power to rule without involvement of Member States Parliaments at a time when the European

[121] *Ibid*. 226. As Loewenstein points out, similar developments can be recognised within the group of the Warsaw Pact.

[122] For an analysis of the integration process in this context see MA Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* cit.

[123] On the similarity between colonial governance and international organisations see J Klabbers, 'Theorizing International Organizations' in A Orford and F Hoffmann and M Clark (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2021) 625.

[124] J Habermas, *Zur Verfassung Europas* cit. 48.

Parliament was not part of the legislative procedure, on the one hand and the effective control in the United States colonial system on the other? Where is the difference between the latter and the activities of the Troika in Greece during the Euro-crisis? One may be convinced of the historical goodness and necessity of the project of European integration, but that there is also a darker side in the design of the EU cannot be neglected justifiably.[125] A democracy deficit is not mere cosmetic problem. Where democracy is missing, authoritarian structures fill the gap. The question therefore is how to democratise the system that was established by the Treaty of Rome. For there is still one important aspect about the EU Treaties, regarded as intervention treaties, to mention that should not be forgotten – an aspect that does not lead to their critical rejection (like Schmitt would have done presumably) but rather to awe and deep admiration. Outlining this aspect is now the task of the conclusive third and last part of this *Article*.

IV. Joseph Weiler and the political messianism in EU law

At first glance it may appear disturbing to compare the Treaty of Rome to the concept of the intervention treaty. It may be even more disturbing consulting the most problematic legal thinker of the 20th century. However, there is also a last important difference between the EU Treaties and the classical intervention treaties. Within the framework of the EU Treaties there is – at least regarding their basic concept – no hegemon like in the treaties controlled by the United States. Furthermore, intervening and intervened states are identical. Any state that is intervened is also intervenient – and the interventions are not led by a particular sovereign entity or state but by the community *on the consent of the Member States*. The EU Treaties may be understood as a progressive transformation of that concept, for they establish a system of mutual self-intervention under the rule of law with the goal of the transformation of Member State law in the light of the idea of anti-discrimination. Through this, the Treaties serve the historical goal of overcoming the aporias of the old international law (built upon the principle of non-intervention) and work for the promise of a different future. As Wolfgang Friedmann wrote in *The Changing Law of Nations*: "[T]he European Community movement is a possible precursor of a future universal integration of mankind".[126] The system of EU-law took over a concept of colonial suppression and turned it into a means of self-liberation also against Europe's dark past. They comprise the promise for a better future – they show, as Joseph Weiler put it, a messianic impact. [127]

[125] For recent accounts see M Wilkinson, *Authoritarian Liberalism* cit.; C Joerges and N-S Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart Publishing 2003).

[126] W Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964) 19.

[127] JHH Weiler, 'In the Face of Crisis' cit. 825.

According to Weiler, this impact is only little explored, but nevertheless, "[political messianism is the] central legitimating feature of Europe".[128] This new legitimating feature is explained by Weiler in distinction to input and output legitimacy as a "Telos Legitimacy [...] whereby legitimacy is gained neither by process nor output but by promise, the promise of an attractive promised Land".[129] In order to explore the messianic substance of Europe's founding documents, Weiler focuses on the *Schuman Declaration* of 1950, in which he claims to have found the "messianic substance" of the European integration: "the substance itself is messianic: a compelling vision which has animated now at least three generations of European idealists where the 'ever closer union among the people of Europe', with peace and prosperity an icing on the cake, constitutes the beckoning promised land".[130]

The vision drawn by the *Schuman Declaration* as answer to World War Two was without doubt fundamentally different from the measures the Allied Powers had taken after the end of World War One. Instead of the "post-WWI Versailles version of peace [...] tak[ing] yesterday's enemy, diminish[ing] him and keep[ing] his neck under one's heels", Germany after World War Two was regarded 'as an equal'.[131] Governed by the idea of equality and a call for forgiveness, the *Schuman Declaration* evokes according to Weiler the "two most potent visions of the idyllic 'Kingdom' – the humanist and religious combined in one project".[132]

It cannot be doubted that an analysis of European integration must take into account the promise that was and still is connected to the idea of European unification. The EU was never a simple international organisation established to merely enhance international cooperation. The foundation of the EU shows a historical scope, marking a turning point in European history: it should (again according to the *Schuman Declaration*) make war in Europe materially impossible. It should not end this or that war but – in Kantian terms – war as such.[133] Therefore the *Schuman Declaration* is also the declaration of independence from the past – the declaration of the "Never again".

For sure, one should be careful when applying concepts like that of political messianism. As Weiler himself points out, the 20th century has seen many ideologies operating with a narrative of promises and telos legitimacy.[134] However, concerning the process of European integration, political messianism seems to be the "feature which explains not only the persistent mobilising force (especially among elites and youth), but also key structural and institutional choices made".[135] Considering this messianic element the question arises how

[128] *Ibid*. 826.
[129] *Ibid*. 828.
[130] *Ibid*. 834.
[131] *Ibid*. 834.
[132] *Ibid*. 835.
[133] See I Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (Suhrkamp 2011) 27.
[134] See JHH Weiler, 'In the Face of the Crisis' cit. 842.
[135] *Ibid*. 833.

to conceive of it in the context of European integration properly. What may be such a key structural choice? My suggestion would be that the most important structural choice, *i.e.*, the way in which the EU Treaties are structured, may be the best example.

The situation in Europe in the 20th century is (with regard to the concept of international treaty) not without precedent. History has seen once before the progressive transformation of an international legal means of suppression into a means of self-liberation. At the time when the Jewish Bible has been written in the first millennium BCE, the New-Assyrian Empire had established its sphere of influence (comparable to the United States and the Union of the Socialist Soviet Republics in the 20th century).[136] The Assyrian Empire was the hegemon of the ancient Near East and had subjected the whole Levantine. The conquest of the Levantine was also used for the spreading of the Assyrian religion, a form of polytheism with Assur as the god of king and empire at its centre. "[A]ll subjected people were required to recognise his predominance".[137] The subjected states and peoples were linked to the Assyrian empire by means of vassal treaties.[138] By these treaties they were obliged to accept the Assyrian king as a ruler and the primacy of the high god Assur.[139] The states of Israel and Judah were subjected in the 8th century BCE.

As scholars like Eckart Otto,[140] Moshe Weinfeld,[141] Robert Bellah[142] and Peter Zeillinger[143] have pointed out, the conception of Biblical texts in that time was influenced by the ancient Near Eastern ideologies of the first millennium BCE. Above all it has been suggested that "it was the Assyrian treaty model that had the decisive influence on Deuteronomy".[144] The writers took over the form of the New-Assyrian vassal treaties. However, it was an assumption that consisted of a critical transformation. As Robert Bellah pointed out, the "enormous creativity of Israelite religion [...] must be seen [...] as in part responses to the Assyrian challenge".[145] The Deuteronomists attempted to overcome the Assyrian power, its colonial subjection and religious suppression. The Jewish Bible is a document of political and intellectual resistance against heteronomous suppression. Furthermore, it should not be forgotten that the emergence of Jewish monotheism is one of the historical breakthroughs of rationality.[146] The Deuteronomists' strategy was to take

[136] R Bellah, *Religion in Human Evolution* (Harvard University Press 2001) 283.

[137] *Ibid*. 307.

[138] *Ibid*.

[139] *Ibid*.

[140] E Otto, *Das Deuteronomium: politische Theologie und Rechtsreform in Juda und Assysrien* (De Gruyter 1999).

[141] M Weinfeld, *Deuteronomy and the Deuteronomic School* (Oxford University Press 1972).

[142] R Bellah, *Religion in Human Evolution* cit.

[143] P Zeillinger, 'Repräsentation einer Leerstelle, oder: Auszug ins Reale. Zur politischen Bedeutung des biblischen Exodus, der historisch nicht stattgefunden hat' (2019) Interdisciplinary Journal for Religion and Transformation in Contemporary Society 212.

[144] R Bellah, *Religion in Human Evolution* cit. 306.

[145] *Ibid*. 307.

[146] K Jaspers, *Vom Ursprung und Ziel der Geschichte* (Muttenz/Basel 2017).

over and transform subversively the structure of these vassal treaties.[147] It were therefore "the vassal covenants that provided the basic structure of Deuteronomy and its central formulation of Israelite religion".[148] However, whereas the Assyrian covenants were between ruler and subject, "the Israelite covenants were between God and human beings".[149] The framework of the Israelite religion emerged out of the resistance against the colonial system of an international aggressor. And in its centre there was JHWH – the name for the promise of the covenant, the union with the Israeli people.

An instrument of colonial suppression was therefore subverted and used for self-liberation. Such vassal treaties defer in nothing essential from the modern intervention treaties and the gesture underlying the EU Treaties seems to operate in a similar way as the Deuteronomy has transformed the Assyrian vassal treaties. On top is not this or that national sovereign entity, but the idea of the "ever closer union". The *raison d'être* of the EU is, as the ECJ put it,[150] the integration in itself – the promise of the covenant, expressed in the directly applicable rights of European legal origin.[151] And exactly this, the formulation of *European* rights is the central feature of progress compared to the old international law. It is something different whether a right is a domestic right or a right grounded in the international agreement to cooperate for a common good. This is the reason why – to put in the words of Alon Harel – European law "matters".[152] The question by which institution a legal rule is pronounced is not negligible.[153] Being part of the European legal order means being part of the joint answer to the crimes of fascism in the first half of the 20th century. It means to be part of a legal framework that is structured by the progressive subversion of an international legal instrument, eliminating the concept of a fixed national identity on which sovereignty was built upon and to put the idea of the union in that position that decided formerly on the question between friend and enemy. The position of sovereignty is left open[154] and therefore the EU Treaties may show what Peter Zeillinger has described as a monotheistic structure in his account of the biblical Exodus-narrative: "the absence of an identifiable, sovereign instance of last resort [*Letztinstanz*]".[155] This monotheistic structure is manifest in an "intervention into the established order".[156]

[147] R Bellah, *Religion in Human Evolution* cit. 307.

[148] *Ibid*. 308.

[149] *Ibid*.

[150] Case C-294/83 *Parti ecologiste 'Les Verts' v European Parliament* ECLIEU:C:1986:166.

[151] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 172.

[152] A Harel, *Why Law Matters* (Oxford University Press 2014).

[153] *Ibid*. 148.

[154] That the question of sovereignty is left open in the European integration process is also the starting point of S Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2020), however, with a different outcome.

[155] P Zeillinger, 'Repräsentation einer Leerstelle' cit. 238 fn 64.

[156] *Ibid*. 220 fn 13.

Therefore, it may be possible to say, that unwittingly the European reply to the Nazi regime was to align itself with the legal structure of Judaism in order to lay the foundation of another Europe. If this is the case, this account meets with Pescatore's concept of the law of integration. As Julio Baquero Cruz set out: "the experience of war and barbarism at the heart of Europe was the fundamental explanation for the existence of the law of integration. Without it, integration and its law could never have come into existence and would not exist today. The Treaties should thus be seen not only as documents of civilisation, but also as documents of the barbarism which made them possible".[157]

V. Conclusion

The purpose of this *Article* was to contribute to the debate on the legal nature of the EU Treaties. These Treaties show a paradoxical structure. On the one hand, they are international treaties regarding their genesis; on the other, they far transcend international law regarding their content and suspend traditional international legal principles concerned with the protection of sovereignty because of their interventionist character. This interventionist character has been deepened through the jurisprudence of the ECJ. Whereas the so-called theory of constitutionalisation identifies the transformation of the Treaties through this jurisprudence as resulting in a constitution, I argued to take into account that the Treaties are a figure of transition. Their task is to lead out of the post-war situation in Europe and pave the way for the establishment of a European federation as it has been projected in the *Schuman Declaration*. However, while concerned with the precondition of a constitutional framework for Europe, the Treaties should not be considered as a constitution themselves. The first part of the paper brought to mind that the Treaties do not go as far as historical international treaties that indeed have established a new state and a new constitution. It seems that the function of the Treaties consists rather of the dismantling of the barriers erected by national sovereignty than constituting a new European identity. The Common Market is realised to the degree to which national sovereignty is dismantled by the Community's interventions. Against the background of Jürgen Habermas's account of Kant's cosmopolitan right, my aim was to show that the sphere of the Community's intervention may be the nucleus for a new, cosmopolitan order for Europe.

Since the Treaties are neither a constitution *stricto sensu* nor explainable through the canonical models of international treaty (above all the law-making treaty), the second part of the *Article* aimed to identify a model of international treaty suitable for the categorisation of the function of the Treaties. Taking the interventionist character of the Treaties as a starting point, the concept of the intervention treaty has been presented as such a model. Intervention treaties have been used as an instrument to stabilize the

[157] J Baquero Cruz, *What's Left of the Law of Integration? Decay and Resistance in European Union Law* (Oxford University Press 2018) 22.

hegemonial position of the United States in the first half of the 20th century in the Western Hemisphere and after World War II in Europe. The right to intervene has been shaped as a unilateral right. On the one hand, the EU Treaties seem to be understandable against the background of the concept of the intervention treaty, for the former establish a sphere of intervention, a special connection between states. On the other hand, the right to intervene that the treaties establish is not the unilateral right of a hegemon. European states grant each other a reciprocal right to intervene and task a joint organisation with its exertion. The result is a structure of self-intervention for the sake of the ever closer union. The intervention is therefore exercised for the realisation of the promise of a deeper covenant between the European states in order to overcome the aporias of classical international law. Joseph Weiler identified this promise structure as messianic. In the third and last part of the *Article*, I make a suggestion how this messianic feature may be understood. For this purpose, I have reconstructed the progressive transformation of the Assyrian vassal treaties by the authors of the Jewish Bible. In both the Jewish texts and in the Treaties of the EU we may observe the transformation of a hegemonial and unilateral power structure into a relation of reciprocity and trust. The position of the sovereign is replaced by the idea of the covenant respectively the idea of the ever-closer Union. Messianism as presented here is not to be confused with an irrational and undetermined desire for a better future. Messianism has been presented as a concept of a precise meaning and function: leading out of a unilateral relation of suppression into a condition of reciprocity and non-discrimination.

ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

Edited by Justin Lindeboom *and* Ramses A. Wessel

FEDERAL AUTONOMY AND LEGAL THEORY IN US ANTEBELLUM CONSTITUTIONALISM: A VIEW FROM EUROPE

JUSTIN LINDEBOOM*

TABLE OF CONTENTS: I. Introduction. – II. The autonomy of the federal legal order in US antebellum constitutionalism. – III. Justifying legal order. – IV. Autonomy, dual federalism and the monism–dualism dichotomy. – V. Conclusion.

ABSTRACT: This *Article* analyses debates in US antebellum constitutionalism on the "autonomy" of the US federal order in light of similar debates in contemporary EU constitutionalism. In the early American republic, two interrelated questions permeated constitutional theory: what was the nature of the federal order that had been created by the ratification of the US Constitution, and who was the final arbiter in constitutional questions. Today, EU constitutional lawyers would have no trouble recognising these debates, which are essentially re-enacted both in scholarly discussions and in collisions between the Court of Justice and national constitutional courts. This *Article* starts with a brief historical overview of some of the main constitutional debates in US antebellum constitutionalism, showing that these debates were remarkably similar to issues recently presented by the *PSPP* judgment of the German Federal Constitutional Court and the K 3/21 decision of the Polish Constitutional Tribunal. Secondly, this *Article* shows that both debates are characterised by a similar asymmetry: proponents of an autonomous federal legal order mainly use functionalist arguments, while proponents of the sovereignty of the states mainly use arguments about the "nature" or "origin" of the federal order. Thirdly, the *Article* contrasts the framing of the debate about the autonomy of the US federal order with the monism–

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dualism dichotomy that is central to our thinking about the relationship between national and international law. It shows how this distinction was not relevant to constitutional debates in the early American republic, and how that could cast a different light on the EU legal order today.

KEYWORDS: US antebellum constitutionalism – federal autonomy – nullification – primacy – monism – dualism.

I. INTRODUCTION

In the early American republic, two interrelated questions permeated constitutional debates: who was the final arbiter in constitutional questions surrounding the vertical division of powers between the Union and the States, and at a more abstract level, what was the nature of the federal order that had been created by the ratification of the US Constitution. Today, roughly 200 years later, EU constitutional lawyers would have no trouble recognising these debates, which are essentially re-enacted both in scholarly discussions about the autonomy of the EU legal order and the jurisdiction of the European Court of Justice (Court of Justice or ECJ), and in collisions between the Court of Justice and national constitutional courts.

Constitutional questions and conflicts in the early American republic were indeed remarkably similar to the issues presented recently by, for example, the *PSPP* judgment of the German Federal Constitutional Court[1] and the K 3/21 decision of the Polish Constitutional Tribunal.[2] Both the normative independence of the American federal legal order and the position of the US Supreme Court were heavily debated, both in judicial dialogues, politics and the popular media. In the wake of the emergence of judicial review of statutory legislation, the US Supreme Court steadily assumed the role of the final constitutional arbiter, even though this position remained fragile until well into the 20th century.[3] Along the way, the Supreme Court also sanctioned the deeply controversial view that the US Constitution did not derive its legality and legitimacy from the States or their State constitutions, but directly from "the people of the United States".

[1] German Constitutional Court judgment of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 (*PSPP*).

[2] Polish Constitutional Tribunal judgment of 7 October 2021, Ref. no. K 3/21.

[3] Examples include the backlash after the US Supreme Court mandated school racial desegregation in *Brown v Board of Education*, 347 U.S. 483 (1954) and after it declared the death penalty – as applied in specific cases – unconstitutional under the Eighth Amendment in *Furman v Georgia*, 408 U.S. 238 (1972). For roughly a decade after *Brown*, southern schools overwhelmingly remained segregated, and the Court's judgment induced massive political resistance in the southern states. For analysis, see *e.g.* MJ Klarman, 'How *Brown* Changed Race Relations: The Backlash Thesis' (1994) Journal of American History 81. The allusion in *Furman* to the unconstitutionality of the death penalty *in general* created a political backlash that culminated in the US Supreme Court's judgment in *Gregg v Georgia* 428 U.S. 153 (1976), in which it backtracked and held that the death penalty as such was not unconstitutional.

This *Article* analyses debates in US antebellum constitutionalism on the "autonomy" of the US federal order and the question of what institution was the final constitutional arbiter in light of similar debates in contemporary EU law. The aim of this *Article* is to determine what the history of the early American republic can teach us about the autonomy of the EU legal order, the final arbiter in conflicts between national law and EU law, and the nature of constitutional debates about such questions more generally.

In describing their federal political and legal order, early-Republic Americans did not employ the term "autonomy". Indeed, in several ways the federal order was *not* autonomous. For example, US Senators were initially elected by the State legislatures.[4] The President is (still) elected by the Electoral College, the electors of which are selected according to a method specified by the State legislatures.[5]

In a similar sense, the political and legal order of the EU is not "autonomous" either. The Council, for instance, comprises of representatives of the Member States at ministerial level,[6] and the President of the European Commission is nominated by the European Council,[7] itself consisting of the heads of State and government of the Member States.[8] The enforcement of EU law takes place overwhelmingly by national administrative and judicial institutions.[9] Therefore, the "autonomy" of the EU legal order may be understood in a more limited sense as the normative self-referentiality of the EU legal order. This normative self-referentiality means that the validity and interpretation of EU law does not depend on national (or international) law.[10]

This understanding of "autonomy" as normative self-referentiality provides a helpful framework to understand US antebellum constitutionalism as well. In other words, even though the contemporary actors of the early American republic did not use the term "autonomy", their constitutional debates centred on the same questions that are central to debates about the autonomy of EU law: whether the common political and legal order that had been created by the States was normatively independent from the political and legal

[4] US Constitution, art. I, section 3, clauses 1 and 2. Since 1912, the 17th Amendment has provided for the direct election of US Senators by the people of each State.

[5] US Constitution, art. II, section 2, clause 2.

[6] Treaty on European Union (TEU), art. 16(2).

[7] *Ibid*. art. 17(7).

[8] *Ibid*. art. 15(2).

[9] See N MacCormick, *Questioning Sovereignty: Law State and Nation in the European Commonwealth* (Oxford University Press 1999) 117; P Eleftheriadis, *A Union of Peoples* (Oxford University Press 2020) 90–91, 136–137.

[10] See to this effect *e.g*. C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review 1; J Lindeboom, 'The Autonomy of EU Law: A Hartian View' (2021) European Journal of Legal Studies 271; K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' (2021) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 47. For an analysis of this normative self-referentiality from a substantive point of view, see D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' (2023) European Papers www.europeanpapers.eu 1403.

orders of the States,[11] and which institution was the final arbiter in questions of constitutional interpretation.[12] Thus, approaching US antebellum constitutionalism from the perspective of the question whether the US Constitution had created an autonomous federal order is a fruitful start for a comparative analysis with contemporary EU constitutionalism.[13]

This Article quotes rather extensively from primary sources. Though these quotations add considerably to the *Article's* length, using the contemporary actors' actual words, rather than relying on paraphrasing or explanation, helps to better identify the similarities and differences between US antebellum constitutional debates and debates in contemporary EU constitutionalism.

The remainder of this *Article* is structured as follows. Section II provides an overview of the main constitutional debates, roughly from the late 1790s until the early 1830s on the "autonomy" of the US federal order and the question of what institution should be the final arbiter in constitutional questions within that order. Sections III and IV provide a preliminary comparative analysis of US antebellum constitutionalism and contemporary EU constitutionalism. Section III compares the rhetorical structure of debates in US antebellum constitutionalism and current debates on the autonomy of the EU legal order. In both cases, proponents of an autonomous federal legal order mainly use functionalist arguments, while

[11] See section II.2. of this *Article*. In the context of EU constitutionalism, see *e.g.* N MacCormick, *Questioning Sovereignty* cit. 117; K Lenaerts and D Gerard, 'The Structure of the Union According to the Constitution for Europe: The Emperor Is Getting Dressed' (2004) ELR 289, 293–297; P Eleftheriadis, *A Union of Peoples* cit. 3–7.

[12] See section II.3 of this *Article*. The literature on the final say in regard to constitutional questions in EU law is vast. See *e.g.* JHH Weiler and UR Haltern, 'Autonomy of the Community Legal Order – Through the Looking Glass' (1996) HarvIntLJ 411; G Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation' (2018) ELJ 358.

[13] By conceiving of US antebellum constitutional debates in terms of whether the US Constitution had created an "autonomous federal order", contrary to contemporary parlance, a certain degree of anachronism is inevitable. Anachronism is sometimes regarded as the classic sin of historical analysis. According to the classical view associated with the so-called "historicist" tradition, the aim of the historian should not be to provide a history useful to the present times, but merely to show "what actually happened". This view is attributed to the nineteenth-century historian Leopold von Ranke: "Man hat der Historie das Amt, die Vergangenheit zu richten, die Mitwelt zum Nutzen zukünftiger Jahre zu belehren, beigemessen: so hoher Aemter unterwindet sich gegenwärtiger Versuch nicht: er will blos zeigen, wie es eigentlich gewesen" (L von Ranke, *Geschichten der romanischen und germanischen Völker: von 1494 bis 1535* (Reimer 1824) v-vi). At the same time, *all* historic research is shaped by contemporary concerns and interests. This point was eloquently made by the Italian philosopher and historian Benedetto Croce, who remarked that "all true history is contemporary history" (*ogni vera storia è storia contemporanea*). Croce elaborated this claim as follows: "The practical requirements which underlie every historical judgment give to all history the character of 'contemporary history' ['storia contemporanea'] because, however remote in time the events there recounted may seem to be, the history in reality refers to present needs and present situations wherein those events vibrate" (B Croce, *La storia come pensiero e come azione* (Laterza 1938) 5, quoted and translated in D Armitage, 'In Defense of Presentism' in DM McMahon (ed.), *History and Human Flourishing* (Oxford University Press 2023) 59, 65.

proponents of the sovereignty of the States mainly use arguments about the "nature" of the federal order. This comparative rhetorical analysis aims to unveil an important *similarity* between US antebellum constitutionalism and contemporary EU constitutionalism. By contrast, section IV focuses on a fundamental *difference* between these two streams of constitutional debate. It contrasts the debate about the autonomy of the US federal order with the monism–dualism dichotomy, which is central to our contemporary thinking about the relationship between national and international law. It shows how this distinction was irrelevant to the constitutional debates in the early American republic, and how that could cast a different light on the EU legal order today as well. Section V concludes.

II. The autonomy of the federal legal order in the early American Republic

This section aims to provide the groundwork for an analysis of the autonomy of the EU legal order based on a historical comparison with constitutional debates on the autonomy of the nascent US federal legal order. Legal-historical comparison between the US and the EU is obviously not new. Following the *Integration Through Law* project in the 1980s,[14] major contributions to US–EU comparative constitutional law and history have been made by, among others, Leslie Friedman Goldstein,[15] Robert Schütze,[16] Andrew Glencross,[17] and Signe Larsen.[18] This *Article* aims to complement these contributions by focusing in more detail on the constitutional debates in the very first decades of the American republic from the perspective of the issue of "federal autonomy".

To this end, this section shows how constitutional debate in the first decades of the US Constitution centred on the question of whether the Constitution had created something more than a so-called "compact" between sovereign States. Notwithstanding the Supremacy Clause in the US Constitution,[19] proponents of a "compact theory" insisted that the Constitution had merely maintained a confederation among States which had remained sovereign entities.

Moreover, constitutional debates in the early American republic soon focused on the question of who was the final arbiter regarding vertical division of powers between the

[14] M Cappelletti, M Seccombe and JHH Weiler, *Integration Through Law: Europe and the American Federal Experience* (de Gruyter 1985).

[15] L Friedman Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (Johns Hopkins University Press 2001).

[16] R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009).

[17] A Glencross, *What Makes the EU Viable? European Integration in the Light of the Antebellum US Experience* (Palgrave Macmillan 2009).

[18] S Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021).

[19] US Constitution, art. VI, clause 2.

federal government and the States. The US Constitution did not, and still does not, unambiguously stipulate the final interpretative authority of the US Supreme Court, whose appellate jurisdiction to State court judgments was hotly contested. This led to a series of threats of, and sometimes actual, defiance of US Supreme Court judgments and federal laws by both northern and southern State officials. In US constitutional history, much attention is usually given to the so-called South Carolina nullification crisis in 1832 and 1833, when South Carolina nullified the federal tariff within its territory, and President Andrew Jackson subsequently threatened with federal military action.[20] South Carolina's nullification was however only one of several refusals to apply federal law by State institutions.[21] The intellectual foundation of such defiance throughout the antebellum period was the Virginia and Kentucky Resolutions from 1798 and 1799.

II.1. The Virginia and Kentucky Resolutions

In the Virginia and Kentucky Resolutions of 1798, the Virginia State legislature and the Kentucky State legislature protested against the supposed unconstitutionality of the so-called Alien and Sedition Acts of 1798. In the late 1790s, as the United States was on the brink of an undeclared naval war with France,[22] the Federalists believed that the large number of immigrants, as well as the increasing amount of government-critical, Jeffersonian press, posed a major threat to the US government and the American society.[23] Thus, the Alien and Sedition Acts restricted the immigration and rights of non-citizens, and freedom of speech.[24] The Alien Friends Act[25] and the Sedition Act in particular were widely

[20] See generally W Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836* (Oxford University Press 1992).

[21] Other than in the South Carolina nullification crisis, these refusals to apply federal law typically did not formally "nullify" federal law, but involved the refusal of State political and judicial institutions to follow the case law of the federal courts. Most instances of defiance of federal (case) law by State courts could therefore be compared to the German Federal Constitutional Court's refusal to follow the ECJ's judgment in case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000 German Constitutional Court judgment of 5 May 2020 cit. or the Danish Supreme Court's refusal to follow the ECJ's judgment in case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* ECLI:EU:C:2016:278 in case C-15/2014 *Dansk Industri (DI) acting for Ajos A/S vs The estate left by A*. For some examples of such defiance, see section II.3 below. While the distinction between "nullification" and "disapplication" is an important one, both theoretically and practically, this *Article* does not provide an elaborate analysis of this distinction for reasons of space.

[22] This so-called "Quasi-War" between the United States and France was fought between 1798 and 1800.

[23] GS Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* (Oxford University Press 2009) 246–250.

[24] The Alien and Sedition Acts comprised four acts: the Naturalization Act, which increased the residency requirement for aliens to be eligible for US citizenship from five to fourteen years; the Alien Enemies Act, which gave the president the power to arrest, relocate or expel non-citizens in times of war; the Alien Friends Act, which gave the president the power to expel non-citizens he considered "dangerous to the peace and safety of the United States", and the Sedition Act, which criminalised the expression of "any false, scandalous, and malicious writing or writings against [the federal government]".

[25] *Ibid*.

condemned by Jeffersonians because it allegedly went beyond the enumerated powers of Congress, and because the Sedition Act encroached upon freedom of speech.[26]

Both the 1798 Virginia Resolutions, authored by James Madison, and the 1798 Kentucky Resolutions, written by Thomas Jefferson, asserted that the States had retained the sovereign right to decide on the extent of the powers conferred to the federal government.[27] Since the federal government had been created by a "compact" among sovereign States, the Virginia and Kentucky Resolutions insisted that only the States themselves could be the final arbiter on the delineation of powers of the federal government. As the Virginia Resolutions specified, the States had maintained the right to condemn "*deliberate, palpable and dangerous*" exercises of federal power:

> "That this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact, to which the states are parties; as limited by the plain sense and intention of the instrument constituting the compact; as no further valid that they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them".[28]

Both State legislatures emphasised that the Alien and Sedition Acts were unconstitutional.[29] But neither the Virginia Resolutions nor the Kentucky Resolutions from 1798

[26] See S Elkins and E McKitrick, *The Age of Federalism: The Early American Republic, 1788–1800* (Oxford University Press 1993) 700–701.

[27] Madison's authorship of the Virginia Resolutions 1798 is somewhat remarkable, as one decade before he had espoused the supremacy of the federal government: "[I]n controversies relating to the boundary between the [federal and State] jurisdictions, the tribunal which is ultimately to decide, is to be established under the general Government" (J Madison, 'Federalist No 39' in A Hamilton, J Madison and J Jay, *The Federalist, with Letters of "Brutus"* (T Ball ed, Cambridge University Press 2003) 186. Madison's radical change of mind was probably caused by his severe dissatisfaction with the expansive interpretation of federal powers by the Federalist governments of the 1790s. See *e.g.* N Feldman, *The Three Lives of James Madison: Genius, Partisan, President* (Farrar, Straus and Giroux 2017) 372–440.

[28] Virginia Resolutions of 1798. The Kentucky Resolutions of 1798 similarly stated "[t]hat the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self–government; [...] that, as in all other cases of compact among powers having no common judge, *each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress*" (emphasis added).

[29] "That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts' passed at the last session of Congress; the first of which exercises a power no where delegated to the federal government, and which by uniting legislative and judicial powers to those of executive, subverts the general principles of free government" (Virginia Resolutions of 1798); "That this commonwealth does therefore call on its co-states for an

were clear about the remedy against such "deliberate, palpable and dangerous" exercises of federal power; the word "interpose" in the Virginia Resolutions at most alluded to nullification of the federal law. After the Resolutions sorted little effect and were condemned by most of the other States,[30] Kentucky adopted another set of Resolutions in 1799. In contrast to the 1798 Resolutions, the Kentucky Resolutions of 1799 stated expressly "[t]hat the several states who formed [the US Constitution], being sovereign and independent, have the unquestionable right to judge of its infraction; and, *[t]hat a nullification, by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy*".[31]

In private correspondence to Madison, moreover, Jefferson endorsed State secession – perhaps *instead* of nullification of federal law – if the Resolutions were unable to achieve their objectives.[32]

Despite the inherent ambiguity surrounding the 1798 Resolutions, particularly regarding the available remedy against purportedly unconstitutional acts, the Virginia and Kentucky Resolutions of 1798–1799 unequivocally asserted that the ultimate authority to determine whether the federal government had exceeded its specifically enumerated powers rested with the individual States. Over the subsequent six decades, the Virginia and Kentucky Resolutions, partly owing to the esteemed status of their authors, provided an intellectual basis for State defiance of federal laws and the US Supreme Court's case law. Such defiance was in large part triggered by the nationalist jurisprudence that emerged during the Chief Justiceship of John Marshall.

II.2. The Marshall Court's nationalism and compact theory

After the 1800 presidential election, the Federalists lost political power. Thomas Jefferson became the first non-Federalist President after George Washington and John Adams. The Alien and Sedition Acts expired in 1800 and 1801, and the Republicans – the political faction which had grown out of the Jeffersonians – came to dominate national politics for

expression of their sentiments on the acts concerning aliens, and for the punishment of certain crimes herein before specified, plainly declaring whether these acts are or are not authorized by the federal compact" (Kentucky Resolutions of 1798).

[30] See *e.g.* FM Anderson, 'Contemporary Opinion of the Virginia and Kentucky Resolutions' (1899) American Historical Review 45. For a recent re-assessment that offers a somewhat more nuanced view, see W Bird, 'Reassessing Responses to the Virginia and Kentucky Resolutions: New Evidence from the Tennessee and Georgia Resolutions and from Other States' (2015) Journal of the Early Republic 519.

[31] Kentucky Resolutions of 1799 (emphasis added). According to Akhil Amar, Jefferson's reference to "sovereign and independent" states "were 1776 words and 1781 words, not 1788 words", and his endorsement of nullification was "absurd" because "[n]o one had said anything of the sort in the great national conversation of 1788", see A Amar, *The Words That Made Us: America's Constitutional Conversation, 1760–1840* (Basic Books 2021) 455. Nonetheless, threats of unilateral nullification and disobedience of federal law continued up until the Civil War.

[32] T Jefferson, 'Letter to James Madison' (23 August 1799).

the decades to come. Towards the conclusion of his presidency, however, John Adams appointed numerous Federalist judges to the federal courts,[33] and nominated Secretary of State John Marshall for Chief Justice of the US Supreme Court.[34]

In the subsequent three decades, Chief Justice Marshall would establish a legal framework emphasising federal autonomy that consolidated national power, at least from a legal perspective. The Marshall Court's jurisprudence revolved around two dimensions of federal autonomy. First, it endorsed a broad interpretation of national powers, justified by the autonomy of the federal government *vis-à-vis* the States. Second, the Marshall Court managed to legitimise, by skillful judicial maneuvering, the role of the US Supreme Court as the final arbiter of an autonomous federal legal order.

Today, the autonomy of the US federal government in relation to the States is undeniable, whether one looks at its pervasive role in the daily lives of Americans or its raw political, judicial and military power. In the late eighteenth and early nineteenth century, however, the power and legitimacy of the federal government was nascent, and still fragile.

The US Constitution had formally been adopted and ratified by the 13 individual States, each acting in their sovereign capacities.[35] The Marshall Court nonetheless

[33] The Federalists' attempt to cling to power by entrenching themselves in the federal judiciary led to the US Supreme Court's landmark judgment *Marbury v Madison* 5 US 137 (1803), in which the Supreme Court asserted the power to invalidate congressional statutes (for an insightful analysis, see S Levinson and JM Balkin, 'What Are the Facts of *Marbury v. Madison*?' (2003) Constitutional Commentary 255. Even though *Marbury v Madison* became – in retrospect – the most celebrated judgment in US constitutional law, the Federalists' attempt of "court-packing" *avant la lettre* was a failure. As Daryl Levinson aptly summarises, "of course Jefferson and his fellow Republicans had no intention of allowing this strategy to succeed. The Republican Congress promptly repealed the 1801 Judiciary Act [which had expanded the federal judiciary], began impeaching Federalist judges, and successfully intimidated the Federalist-controlled Supreme Court into political docility" in DJ Levinson, 'Parchment and Politics: The Positive Puzzle of Constitutional Commitment' (2011) HarvLRev 657, 683, fn 79.

[34] Initially, Adams nominated John Jay for the position of Chief Justice of the US Supreme Court. Jay declined the honour, observing that the judicial system was so defective that the Court "would not obtain the Energy weight and Dignity which are essential to its affording due support to the national Governmt.; nor acquire the public Confidence and Respect, which, as the last Resort of the Justice of the Nation, it should possess" in J Jay, 'Letter to John Adams' (2 January 1801).

[35] After the Philadelphia Constitutional Convention had agreed on the text of the US Constitution, it was sent to the Confederation Congress. In the accompanying Resolution, the Constitutional Convention expressed its view as to how the ratification of the Constitution should proceed: "Resolved [...] That the proceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled". The cautious phrasing ("it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates [...]") shows that the sovereignty of States in regard to the ratification procedure was undisputed. A proposal by Gouverneur Morris that the State legislatures ought to call ratifying conventions was rejected because there was no way for the Constitutional Convention to force the States into a particular mode of ratification, see MJ Klarman, *The Framer's Coup* (Oxford University Press 2016) 417–422. Initially, 12 states chose to

managed to develop a jurisprudence predicated on the notion that the US Constitution had created a new political and legal community whose legitimacy and legality did not depend on that of the States. This jurisprudence leaned heavily on the first words of the Constitution – "we the people of the United States" – to show that the federal government derived its legitimacy from the people, rather than from the States.[36] In today's European vocabulary, the key objective of the Marshall Court was to establish and legitimise an "autonomous" federal political and legal order.

First and foremost, such an autonomous federal legal order required a consistent and effective application of the Supremacy Clause. Today, the supremacy of federal law in the US and of EU law in the EU is considered crucially important for their effectiveness. At the Philadelphia Convention, however, the Supremacy Clause had been a major concession for the Federalists, including Madison.[37] Madison's Virginia Plan had proposed a national veto over state legislation,[38] which was rejected by the Convention, and upon leaving Philadelphia, Madison was disheartened by the compromise reached regarding the Supremacy Clause.[39] The efficacy of the Supremacy Clause was far from certain, especially as it was not evident that it could be judicially enforced. In the 1780s and early 1790s, constitutional review of legislation was still in its infancy, and remained controversial.[40]

organize a ratifying convention to vote on the Constitution. Rhode Island organised a popular referendum, in which the Constitution was rejected. One year later, after the Constitution had already been put into effect and Rhode Island had remained out of the Union, Rhode Island finally organised a ratifying convention as well, and joined the Union in 1790, see MJ Klarman, *The Framer's Coup* cit. 516–530).

[36] Both legally and historically, this claim was dubious. At the time of Founding, "we the people of the United States" was understood to mean that "the people" of Massachusetts, of New York, of New Jersey, etc., were to ratify the Constitution, instead of the state legislatures. However, because the Constitution stipulated that it would turn into effect as soon as nine (out of 13) states had ratified it, it was impossible to know in advance how many and which states would become bound by the Constitution. See M Farrand, *The Framing of the Constitution of the United States* (Yale University Press 1913) 190–191. See also J Madison, 'Federalist No 39' cit.: "On examining the first relation, it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves. The act, therefore, establishing the Constitution, will not be a NATIONAL, but a FEDERAL act".

[37] Madison was a Federalists at the time of the Philadelphia Convention, but in the course of the 1790s aligned with Jefferson and the Republicans.

[38] Virginia Plan, 29 May 1787, resolution 6, edu.lva.virginia.gov ("Resolved [...] that the National Legislature ought to be empowered [sic] [...] to negative all laws, passed by the several States, contravening in the opinion of the National Legislature the articles of Union - and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof"). See also MJ Klarman, *The Framer's Coup* cit. 154–62.

[39] MJ Klarman, *The Framer's Coup* cit. 254–55.

[40] See LD Kramer, 'The Supreme Court 2000 Term Forward: We the Court' (2001) HarLRev 4; WM Treanor, 'Judicial Review before *Marbury*' (2005) Stanford Law Review 455.

One of the early cases in which the supremacy of federal law and its interpretation by federal courts was tested, was *United States v Peters* (1809).[41] This case concerned the Pennsylvania legislature's refusal to apply a decree of the Committee on Appeals of the Continental Congress, which had been affirmed by a federal district judge. While the Pennsylvania legislature claimed the authority to independently interpret federal law, the US Supreme Court ordered the State to follow the federal court's ruling. It was James Madison, however, who had by now become President, who ensured that Pennsylvania could not defy the US Supreme Court's judgment. When Governor Snyder of Pennsylvania's request to Madison to intervene on Pennsylvania's side, Madison instead threatened to use federal force if the state did not obey the Supreme Court's judgment.[42] As Madison's authorship of the Virginia Resolutions was at odds with what he had written in Federalist n. 39,[43] his correspondence with Snyder seems to provide yet another change of perspective – possibly because of a corresponding change in role.[44]

Supremacy of federal law over State law, as such, did not suffice to establish a genuinely independent federal political and legal order. Such autonomy also required the capability to exercise federal powers effectively. The most important Supreme Court judgment, in this context, was *McCulloch v Maryland* (1819).[45] This case concerned an attempt of the state of Maryland to tax the Second National Bank of the United States. This attempt raised two questions: not only whether a State could interfere with a federal institution through taxation, but also whether the federal government had the power to establish a national bank in the first place. This second question had preoccupied politicians since Alexander Hamilton's first proposal for a national bank in 1790.[46]

In *McCulloch*, the US Supreme Court confirmed Congress's power to establish a national bank, and denied Maryland the right to tax the Second National Bank in view of the Supremacy Clause. It should be noted that, as such, the constitutionality of a national

[41] US Supreme Court *United States v Peters* 9 U.S. 115 (1809).

[42] In Madison's words: "the Executive of the U. States, is not only unauthorized to prevent the execution of a Decree sanctioned by the Supreme Court of the U. States, but is expressly enjoined by Statute, to carry into effect any such decree, where opposition may be made to it" see J Madison, 'Letter to Simon Snyder' (13 April 1809) founders.archives.gov.

[43] J Madison, 'Federalist No 39' cit. 186.

[44] On Madison's multiple identities, including that of a Federalist and main designer of the Constitution in 1787, Virginian statesman and Republican politician in the 1790s, and President in the early nineteenth century, see N Feldman, *The Three Lives of James Madison* cit.

[45] US Supreme Court *McCulloch v Maryland* 17 U.S. 316 (1819).

[46] In 1790–1791, James Madison, Thomas Jefferson and Edmund Randolph argued against the constitutionality of Hamilton's proposal for a national bank, and advised President George Washington to veto the bill after it had passed Congress. Washington decided to follow Hamilton's position, and signed the bill into law. See S Elkins and E McKitrick, *The Age of Federalism* cit. 226–233. This charter of this First National Bank expired in 1811 and was not renewed. In 1816, however, the Second National Bank of the United States was established, after the monetary and fiscal utility of a national bank had become clear during and after the War of 1812 with Britain.

bank had become considerably less controversial in the 1810s than it had been in the 1790s.[47] But *any* discussion of the autonomy and extent of federal powers was bound to be highly controversial in light of the vertical division of powers in regard to slavery.[48] Slavery rather than banking made *McCulloch* a controversial case.[49]

The US Constitution did not expressly grant Congress the power to establish a national bank. Marshall, however, held that the Second National Bank was constitutional because Congress had an implied power to this effect based on the "necessary and proper clause".[50] Leaving aside the technicalities of the case, three aspects of the judgment are particularly important for the establishment of a federal political and legal order.

Firstly, Marshall emphasised that the Constitution derived its authority from "the people", and not from the sovereign States. The counsel for the State of Maryland had argued that the Constitution emanated "as the act of sovereign and independent states", which "alone are truly sovereign".[51] As noted above, this was accurate from a strictly legal perspective.[52] Marshall, however, dismissed this argument on the basis of a nationalist understanding of the Founding:

> "'in order to form a more perfect union,' it was deemed necessary to change this alliance [the Articles of Confederation] into an effective Government, possessing great and sovereign powers and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The

[47] See *e.g.* B Hammond, *Banks and Politics in America: From the Revolution to the Civil War* (Princeton University Press 1957) 233.

[48] From the Philadelphia Convention to the Civil War, slavery permeated US constitutional debates. Questions included the constitutionality of the Fugitive Slave Act 1793, which authorised the seizure and return of slaves who had escaped into a free State or a federal territory, and whether the federal government had the power to prohibit slavery in the federal territories. In US Supreme Court *Prigg v Pennsylvania*, 41 US 539 (1842), the US Supreme Court held that the Fugitive Slave Act 1793 was constitutional, and in *Dred Scott v Sandford*, 60 US 393 (1857), it held that the federal government could not bar slavery in the federal territories. On the role of slavery at the Philadelphia Convention, see MJ Klarman, *The Framers' Coup* cit. ch. 4. On the role of slavery in constitutional debates in the antebellum period, see generally DE Fehrenbacher and WM McAfee, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (Oxford University Press 2002).

[49] *McCulloch* was decided three weeks after Congress started debating the admission of Missouri as a slaveholding state, which put the question of whether Congress had the power to admit new states on the condition that slavery was barred squarely within national politics. See DE Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (Oxford University Press 1978) 102–104. On the reception of *McCulloch* in light of concurrent debates on federal powers in relation to slavery, see MJ Klarman, 'How Great Were the "Great" Marshall Court Decisions?' (2001) VaLRev 1111, 1140–1144.

[50] US Constitution, art. I, section 8: "The Congress shall have Power [...] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof".

[51] *McCulloch* cit. 402.

[52] M Farrand, *The Framing of the Constitution of the United States* cit. 190–191; MJ Klarman, *The Framers' Coup* cit. 417–422.

> Government of the Union then (whatever may be the influence of this fact on the case) is, emphatically and truly, a Government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit".[53]

Since the authority of the federal government derived from the people themselves, federal powers had to be interpreted broadly, Marshall claimed. For him, the US Constitution could not have been supposed to "contain an accurate detail of all the subdivisions of which its great powers will admit".[54] Instead, "only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves".[55] By way of conclusion, Marshall reminded the reader, that "we must never forget that it is *a Constitution* we are expounding".[56] In other words, the autonomous legitimacy of the Union could only be guaranteed by granting the federal government sufficiently flexible powers to legislate. As Koen Lenaerts, José Gutiérrez-Fons and Stanislas Adam observed, the logic of *McCulloch* resonates in the autonomy of the EU legal order and the broadly construed legislative powers of the EU legislature.[57]

Thirdly, after having concluded that the Second National Bank was constitutional, the Supreme Court held that Maryland could not tax the Bank. In response to Maryland's claim to exercise its sovereign right to tax corporations within its jurisdiction, Marshall responded as follows:

> "The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the

[53] *McCulloch* cit. 404–405.

[54] *Ibid*. 407.

[55] *Ibid*.

[56] *Ibid*.

[57] "The philosophy underpinning [Marshall's] famous passage ['we must never forget that it is *a Constitution* we are expounding'] finds an echo in the autonomy of the EU legal order: since the EU legal order is a self-referential system of norms that is both coherent and complete, the Treaties and the Charter must be read with sufficient flexibility in order for the EU legal system 'to endure for ages to come, and consequently to be adapted to the various crises of human affairs'" in K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' cit. 84. The connection between the autonomy of the legal and political order and the broad powers of the EU legislature is visible in the ECJ's case law on the interpretation of art. 114 TFEU. See *e.g.* case C-482/17 *Czech Republic v Parliament and Council* ECLI:EU:C:2019:1035 para. 77: "With regard to judicial review of compliance with those conditions, the Court has accepted that in the exercise of the powers conferred on it the EU legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus, the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue […]".

> United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a Government whose laws, made in pursuance of the Constitution, are declared to be supreme [...] The American people have declared their Constitution and the laws made in pursuance thereof to be supreme, but this principle [for which Maryland contends] would transfer the supremacy, in fact, to the States".[58]

Taken together, these three points purported to establish the political and legal autonomy of the federal government as a matter of black-letter constitutional law.[59] Politically, the federal government derived an autonomous legitimacy from the people, independently of the state governments. For Marshall it followed that, legally, the Constitution should be broadly construed to grant the federal government the powers to legislate for the benefit of the people. The Supremacy Claus put the icing on the cake by pre-empting state legislation contrary to federal law in the name of "the people of the United States".

Marshall's construction of broad congressional powers so as to ensure the autonomy of the federal government led to strong resistance. In a series of pseudonymous newspaper articles following *McCulloch*, for example, "Amphictyon" and "Hampden"[60] scolded Marshall's denial that federal powers were delegated by the States.[61] Both Amphyctyon and Hampden argued that *McCulloch* gave Congress unlimited legislative power, which consolidated the national government and destroyed the sovereignty of the States.[62]

[58] *McCulloch* cit. 429.

[59] The efficacy of this black-letter constitutional law was another question. In defiance of *McCulloch*, for example, the State of Ohio persisted in imposing a State tax on the Second Bank after 1819. Only in 1824, a case against the Ohio State authorities reached the US Supreme Court, which held the Ohio State tax was unconstitutional (US Supreme Court *Osborn v Bank of the United States*, 22 US 738 (1824)).

[60] The pseudonymous essays published under the name "Amphictyon" were probably authored by Judge William Brockenbrough of the General Court in Virginia. "Hampden" was probably a pseudonym for Judge Spencer Roane of the Virginia Supreme Court of Appeals.

[61] *E.g*. Amphictyon, 'Essay in the *Richmond Enquirer*' (30 March 1819) reprinted in G Gunther (ed.), *John Marshall's Defense of McCulloch v. Maryland* (Stanford University Press 1969) 55–56: "Who gave birth to the constitution? The history of the times, and the instrument itself furnish the ready answer to the question. The federal convention of 1787 was composed of delegates appointed by the respective state legislatures; and who voted by states; the constitution was submitted on their recommendation, to conventions elected by the people of the several states, that is to say, to the states themselves in their highest political, and sovereign authority: by those separate conventions, representing, not the whole mass of the population of the United States, but the people only within the limits of the respective sovereign states, the constitution was adopted and brought into existence".

[62] See *e.g*. *Ibid*. 57–58: "The doctrine [of *McCulloch v. Maryland*, if admitted to be true, would be of fatal consequences to the rights and freedom of the people of the states. If the states are not parties to the compact, the legislatures of the several states, who annually bring together the feelings, the wishes, and the opinions of the people within their respective limits, would not have a right to canvass the public measures of Congress, or of the President, nor to remonstrate against the encroachments of power nor to resist the advances of usurpation, tyranny and oppression".

In practice, these debates remained largely theoretical because the federal government did not heed the Court's invitation to exercise broad federal powers.[63] Several internal improvement bills[64] were vetoed by presidents James Madison, James Monroe and Andrew Jackson in the 1810s to 1830s, and the federal government would not pass any substantial federal legislation until after the Civil War.[65] However, the broad construction of national power in *McCulloch* did legitimise the Federalist conception of a powerful national government with its own sovereign rights and competences, and provided a precedent that paved the way for consolidating federal powers in the twentieth century.

II.3. Establishing federal judicial supremacy

In addition to asserting a nationalist interpretation of the federal order, the Marshall Court also claimed to be the final arbiter in all constitutional questions. This claim held significant importance for the vertical division of powers between the States and the Union. In the first decades of the American republic, several State supreme courts claimed to possess ultimate authority over the meaning of the US Constitution.

Determining which institution had the final word on the meaning of the Constitution, and whether this authority would be vested in a *judicial* institution at all,[66] was not an easy question. The Constitution had established the US Supreme Court, but had left the establishment of other federal courts to Congress.[67] Soon after the Founding, a system of federal courts was set up by the Judiciary Act of 1789. A pivotal provision of that Act was Section 25, which granted the US Supreme Court jurisdiction to review judgments of the highest State courts pertaining to the interpretation of federal law. However, up until the Civil War several State supreme courts challenged the constitutionality of Section 25 Judiciary Act 1789, and asserted their prerogative to decide on the meaning of the Constitution within their respective jurisdictions.[68] Without denying the supremacy of federal law as such, these State courts claimed that *they* possessed the ultimate authority to interpret federal law.

One of the most important judgments in this regard was *Martin v Hunter's Lessee* (1816).[69] This case arose out of the confiscation of British Loyalists' property by the Commonwealth of Virginia during the American Revolution. The Treaty of Paris between Great Britain and the United States had provided for the return of this property to their original owners. The case concerned the property of the Loyalist Thomas Lord Fairfax, which he

[63] See also MJ Klarman, 'How Great Were the "Great" Marshall Court Decisions?' cit. 1130–1131.

[64] "Internal improvement bills" were congressional acts providing for federally funded projects to improve American transport infrastructure, particularly by building roads and digging canals.

[65] See MJ Klarman, 'How Great Were the "Great" Marshall Court Decisions?' cit. 1132–1133.

[66] See *e.g.* the Virginia and Kentucky Resolutions of 1798 and 1799.

[67] Art. III of US Constitution.

[68] For an overview, see L Friedman Goldstein, *Constituting Federal Sovereignty* cit. 169–170.

[69] US Supreme Court *Martin v Hunter's Lessee*, 14 U.S. 304 (1816).

had left to Denny Martin. The property, however, had also been confiscated by Virginia and had been legally transferred to David Hunter.

In 1810, the Virginia Supreme Court of Appeal – the highest Virginia State court – reversed the Virginia district court's judgment and dismissed Martin's claim for return of his property.[70] The US Supreme Court, exercising appellate jurisdiction under Section 25, reversed the Court of Appeal's judgment based on the Treaty of Paris and the Supremacy Clause.[71] On remand, however, the Virginia Supreme Court of Appeal plainly ignored the US Supreme Court's judgment and claimed that Section 25 was unconstitutional. It held that "the 25th section of the act of congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the constitution of the United States".[72] According to Judge Cabell, the US Supreme Court simply could not have appellate jurisdiction in relation to a state court: "[t]he term appellate, however, necessarily includes the idea of *superiority*. But one Court cannot be correctly said to be *superior* to another, unless both of them belong to the same sovereignty".[73]

The forceful assertion of sovereignty by the Virginia Court's *vis-à-vis* the US Supreme Court is especially visible in the following observation in Judge Cabell's Opinion, where he compares the relationship between Virginia and the Union to the relationship between a foreign country and the Union:

> "It has been contended that the constitution contemplated only the objects of appeal, and not the tribunals from which the appeal is to be taken; and intended to give to the Supreme Court of the United States appellate jurisdiction in all the cases of federal cognizance. But this argument proves too much, and what is utterly inadmissible. It would give appellate jurisdiction, as well over the courts of England or France, as over the State courts; for, although I do not think the State Courts are foreign Courts in relation to the Federal Courts, yet I consider them not less independent than foreign Courts".[74]

When the case again reached the US Supreme Court, Justice Story not only declared Section 25 constitutional, but also insisted on the Supreme Court's right to decide on the constitutionality of federal law. He relied on multiple arguments to this effect, such that the Constitution "was ordained and established not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by 'the people of the United States'".[75] Thus, for Story there could be "little doubt [...] that the people had a right to prohibit to the States the exercise of any powers which were, in their judgment,

[70] Virginia Supreme Court of Appeal *Hunter v Fairfax's Devisee*, 15 Va. (1 Munf.) 218 (1810).
[71] US Supreme Court *Fairfax's Devisee v Hunter's Lessee*, 11 US 603 (1813).
[72] Virginia Supreme Court of Appeal *Hunter v Martin*, 18 Va. (4 Munf.) 1, 59 (1815).
[73] *Ibid*. emphasis in the original.
[74] *Ibid*.
[75] US Supreme Court *Martin v Hunter's Lessee* cit. 324.

incompatible with the objects of the general compact, to make the powers of the State governments, in given cases, subordinate to those of the nation [...]".[76]

Story subsequently noted that "[f]rom the very nature of things, the absolute right of decision, in the last resort, must rest somewhere".[77] And the only way to guarantee the equal rights of all citizens was to grant the final word on the meaning of the Constitution to the *federal* courts[78] – an argument that echoes in recent debates about the primacy of EU law as well.[79]

Martin v Hunter's Lessee was not the final word on the division of powers between the State and federal courts. Throughout the antebellum period, compact theory continued to inform both judicial and political resistance to the position of the US Supreme Court as the final arbiter in constitutional questions.[80] Relying on the basic point made by the Virginia and Kentucky Resolutions, Amphictyon for instance argued that the US Supreme Court could never be the final arbiter on the meaning of the Constitution. The US Supreme Court was, after all, a federal institution and could itself transgress the powers delegated to it by the States: "the ultimate right of the parties to the Constitution, to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority, as well as by another; by the judiciary, as by the executive, or the legislature".[81]

In the early 1830s, this same argument was also central to South Carolina's resistance of a federal protective tariff.[82] This tariff set taxes on imported goods that harmed the southern economy, and ultimately led to its unilateral nullification by South Carolina in 1832.[83] The South Carolinian politician and political theorist John C. Calhoun was one of the most visible defenders of the sovereign right of the States to judge whether the

[76] *Ibid.* 325.

[77] *Ibid.* 345.

[78] *Ibid.* 348-349.

[79] K Lenaerts, 'No Member State is More Equal than Others: The Primacy of EU Law and the Principle of the Equality of the Member States before the Treaties' (8 October 2020) verfassungsblog.de: "[i]t is only by the judicial enforcement of uniformity and primacy of EU law that European citizens find equal justice under that law".

[80] See *e.g.* Georgia Supreme Court *Padelford, Fay & Co. v Mayor & Aldermen of City of Savannah*, 14 Ga. 438 (1854); California Supreme Court *Johnson v Gordon*, 4 Cal. 368 (1854); Wisconsin Supreme Court *Ableman v Booth*, 11 Wis. 498 (1859). For an overview, see L Friedman Goldstein, *Constituting Federal Sovereignty* cit. 169–170.

[81] Ampictyon, 'Letter to the Richmond Enquirer' (30 March 1819).

[82] Federal import tariffs had been installed since 1816 in order to protect American manufacturers, which were mainly based in the northeastern States. The southern economy, however, was heavily focused on agriculture and was mostly harmed by the tariff, which made imported British goods more expensive and also affected cotton export to Britain.

[83] South Carolina Ordinance of Nullification of 24 November 1832. South Carolina's resistance to the federal tariff was probably caused by a combination of the sluggish economy in the 1820s and political opposition to the exercise of federal power against the background of slavery. See WW Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina* (Oxford University Press 1192) chs. 2–3.

federal government had transgressed its competences. In his famous Fort Hill Address on 26 July 1831, when he was still Vice President,[84] Calhoun recalled the main principles from the Virginia and Kentucky Resolutions, which had likewise informed Amphictyon:

> "The judges are, in fact, as truly the judicial representatives of this united majority, as the majority of Congress itself, or the President, is its legislative or executive representative; and to confide the power to the Judiciary to determine finally and conclusively what powers are delegated and what reserved, would be, in reality, to confide it to the majority, whose agents they are, and by whom they can be controlled in various ways
> […]
> Were it possible that reason could settle a question where the passions and interests of men are concerned, this point would have been long since settled for ever by the State of Virginia. The report of her Legislature […] says: 'It has been objected' (to the right of a State to interpose for the protection of her reserved rights) 'that the judicial authority is to be regarded as the sole expositor of the Constitution […] But the proper answer to the objection is, that the […] resolution supposes that dangerous powers, not delegated, may not only be usurped and executed by the other departments, but that the Judicial Department may also exercise or sanction dangerous powers, beyond the grant of the Constitution'".[85]

Irrespective of the normative question of whether the US Supreme Court ought to be the final arbiter, the actual ability of US Supreme Court to ensure enforcement of its judgments was highly limited. Notwithstanding the bold proclamation of judicial review of federal legislation in *Marbury v Madison* (1803) and of State legislation in *Fletcher v Peck* (1810),[86] the vulnerability of the Court's position was obvious to both its interlocutors and the Justices themselves. For instance, merely six days after *Marbury* the Supreme Court rejected a constitutional complaint against the so-called 1802 Repeal Bill, which repealed the 1801 Judiciary Act,[87] even though internal correspondence proves that at least two Justices considered the Repeal Bill unconstitutional.[88] The Justices seemed to have been

[84] Calhoun was Vice President between 1825 and 1832. In December 1832, he resigned after he had been elected to substitute Robert Hayne as US Senator from South Carolina.

[85] JC Calhoun, 'Address on the relation which the States and General Government bear to each other', Fort Hill, South Carolina, 26 July 1831 (hereinafter 'Fort Hill Address'). Calhoun quotes here from a Virginia legislature's committee report drafted by James Madison in response to the criticisms targeted at the Virginia Resolution of 1798 ('Report of the Committee to whom were referred the communications of various states, relative to the Resolutions of the last General Assembly of this state, concerning the Alien and Sedition Laws', House of Delegates, Session of 1799–1800 (7 January 1800)).

[86] US Supreme Court *Fletcher v Peck*, 10 US 87, 136 (1810).

[87] The 1801 Judiciary Act was part of the Federalists' attempt to maintain a power base in the federal judiciary, among others by reducing the number of Supreme Court Justices from 6 to 5 and by expanding the lower federal judiciary. It was promptly repealed by the new Republican Congress by the 1802 Repeal Bill, which thereby also abolished the tenures of newly appointed federal judges.

[88] US Supreme Court *Stuart v Laird*, 5 US 299 (1803). After *Marbury*, it took more than half a century for the Supreme Court to invalidate a second federal law in *Dred Scott v Sanford*, 60 US 393 (1857). The Court

well aware that if they invalidated the Repeal Bill, they would simply be ignored or even impeached.[89]

One of Marshall's renowned tactics to avoid defiance was to establish precedents for federal judicial supremacy that simply could not be defied.[90] In 1820, for example, two brothers – P.J. Cohen and M.J. Cohen – were fined for selling National Lottery tickets in Virginia in violation of a Virginia law. On appeal to the US Supreme Court, the Cohens argued that the Virginia law violated the federal act establishing the National Lottery. The resulting judgment in *Cohens v Virginia* became a landmark judgment for confirming the Supreme Court's appellate jurisdiction.[91] In response to Virginia's argument that the US Supreme Court lacked jurisdiction, Marshall emphasised the Supreme Court's right to determine the final meaning of the Constitution: "[T]he necessity of uniformity, as well as correctness in expounding the Constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved".[92]

Therefore, "[t]he evident aim of the plan of the national convention is that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the Courts of the Union".[93] Knowing that the Virginia courts would refuse to follow a US Supreme Court's judgment against Virginia, however, Marshall decided against the Cohens, denying the Virginia courts the possibility to defy his judgment.[94]

During most of his tenure, Marshall was able to maneuver between judicial integrity and politics, steadily building a nationalist jurisprudence while avoiding overt clashes in

invalidated a State law for the first time in 1810, in the *Fletcher v Peck*, 10 US 87 (1810). See further section IV.2. of this *Article*).

[89] See DJ Levinson, 'Parchment and Politics' cit. 683, fn 79.

[90] Marshall used the same tactic in *Marbury v Madison*. Marshall's proclamation that "[i]t is emphatically the duty of the Judicial Department to say what the law is" would have been inconsequential if the judgment could have been defied by the federal government. But Marshall decided in favour of President Jefferson by denying the Supreme Court's jurisdiction to issue a writ of mandamus. The Court struck down Section 13 of the Judiciary Act of 1789 – which had provided for the Supreme Court's jurisdiction in this case – knowing that the newly installed Republican Congress would never re-instate it. Hence, while Jefferson was reportedly outraged by the judgment, there was nothing he could do to defy the precedent.

[91] US Supreme Court *Cohens v Virginia*, 19 US 264 (1821).

[92] *Ibid.* 416.

[93] *Ibid.* 420.

[94] Deciding the case in favour of Virginia did not, however, subdue principled criticism. Spencer Roane, now writing under the pseudonym Algernon Sidney, commented on *Cohens v Virginia* in a five-part opinion piece in the Richmond Enquirer. In the first article, he wrote among others: "It is of no account, that the judgment in question was rendered *for* the state of Virginia. That great and opulent state is, indeed, permitted to retain the paltry sum of one hundred dollars: but this permission is only grounded, if I may so say, upon the defectiveness of the pleadings [...] The case is, most emphatically, decided against them. It is so decided, on grounds and principles which go the full length, of destroying the state government altogether, and establishing on their ruins, one great, national, and consolidated government" see A Sidney, 'On the Lottery Decision. No. 1' (Richmond Enquirer, 25 May 1821).

which the Court's authority could be defied.[95] This jurisprudence became the foundation of what we may call the autonomy of the US federal legal order. Throughout the 1830s to the 1850s, Marshall's interpretation of the Constitution remained contested, and it could not avoid the increasingly poisonous relationships among the States over slavery. This history, which culminated in the Civil War, is however beyond the scope this *Article*.[96]

I want to end this overview with two interconnected episodes from the early 1830s that are indispensable to understand both the fragility of both the Supreme Court and the federal government, as well as its growing strength.

From 1830 to 1833, Georgia bluntly undermined federal law in a land dispute with the Cherokee Nation. In a series of treaties between the US federal government and the Cherokee, the latter had been given federal guarantees to their sovereignty.[97] These Cherokee lands were however contested by the Georgian State, which claimed full sovereignty of the land. In 1829, Georgia entered the Cherokee lands and confiscated their property.[98] What is more, in 1830 Georgian authorities bluntly defied a US Supreme Court order. A Georgia State court had convicted a Cherokee man named George Corn Tassel for murder within Cherokee territory. When the US Supreme Court accepted Tassel's appeal, Georgian authorities ignored the Supreme Court's writ of habeas corpus and promptly executed Tassel.[99]

Two years later, at the Cherokees' second attempt[100] at targeting Georgia's violation of federal treaties, the US Supreme Court in *Worcester v Georgia* (1832) struck down Georgia's emergency session laws over the Cherokee land dispute.[101] The Justices knew that their judgment would be defied if not backed by federal power, which seemed unlikely, but felt they had no choice but to do their constitutional duty.[102]

[95] After 1827, in the last years of his tenure, Marshall became more sensitive to States' rights and deferential to the States' regulatory freedom. See RK Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Louisiana State University Press 2007) 410–413.

[96] For a magisterial history, see Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (University of North Carolina Press 1981).

[97] S Breyer, 'The Cherokee Indians and the Supreme Court' (2003) Georgia Historical Quarterly 408, 409–410.

[98] *Ibid*. 411.

[99] J Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (McGraw-Hill 1996) 95–98.

[100] In the first case, the US Supreme Court declined original jurisdiction to adjudicate the case, which was a direct lawsuit by the Cherokees against the State of Georgia. The US Supreme Court held that the Cherokee were not a "foreign State" in the sense of art. III section 2 of the US Constitution, so that it could not sue Georgia (*Cherokee Nation v Georgia*, 30 US 1 (1831)).

[101] US Supreme Court *Worcester v Georgia*, 31 US 515 (1832).

[102] C Warren, *The Supreme Court in United States History* vol. 1 cit. 755–762; RK Newmyer, *John Marshall and the Heroic Age of the Supreme Court* cit. 451–458. On 8 March 1932, five days after the US Supreme Court had delivered its judgment in *Worcester v Georgia*, Justice Story wrote in private correspondence: "Georgia is full of anger and violence. What she will do, it is difficult to say. Probably she will resist the execution of our judgment, and if she does, I do not believe the President will interfere unless public opinion among the religious of the Eastern and Western and Middle States should to bear strong upon him. The rumor is, that

Around the same time, as mentioned above, South Carolina decided to finally act upon the theory of the Virginia and Kentucky Resolutions, and nullified the federal tariff within its territory after a long dispute with the federal government.[103] Few States endorsed South Carolina's nullification ordinance,[104] and President Andrew Jackson threatened with federal enforcement to uphold the federal tariff.[105] While Jackson allegedly sympathised with Georgia in the Cherokee case, it was hardly possible to distinguish the position of Georgia from that of South Carolina.[106] Georgian authorities recognised that Jackson had little choice but to back the US Supreme Court, and agreed to a compromise with the federal government in the case that had given rise to *Worcester v Georgia*.[107]

Consequently, "[w]ith this union of [President] Andrew Jackson, [Senator] Daniel Webster[108] and John Marshall in support of the supremacy of the Nation, the [US Supreme] Court [...] now found itself in a stronger position than it had been for the past fifteen years".[109] Indeed, the US Supreme Court's ability to consolidate its position as the final arbiter in constitutional questions between the 1800s and 1830s – in the face of continuous, fierce resistance from both State courts and other State authorities – might have been caused by the multilateral context of conflicts between the federal and State governments.[110] While the US Supreme Court had too little power to prevail in bilateral conflicts with any of the States, it could usually rely on the support of several other States which had an interest in opposing the State that claimed to have the power to defy federal law.[111] Although State supreme courts continued to question, and sometimes defy, the US Supreme Court throughout the 1840s and 1850s, no State or State court could gather sufficient support from the other States to really threaten the Supreme Court's

he has told the Georgians he will do nothing [...] The Court has done its duty. Let the Nation now do theirs" (cited in C Warren, *The Supreme Court in United States History*, vol. 1 cit. 757).

[103] South Carolina Ordinance of Nullification, 24 November 1832.

[104] See WW Freehling, *Prelude to Civil War* cit. 323–327.

[105] A Jackson, 'Proclamation to the People of South Carolina' (10 December 1832). Jackson was given the power to enforce federal law against obstructions to its execution by the states in the Force Bill of 1833.

[106] C Warren, *The Supreme Court in United States History*, vol. 1 cit. 775–776.

[107] *Ibid*. 776.

[108] Daniel Webster was a distinguished lawyer and politician, who had won, among others, the *McCulloch* case before the US Supreme Court, and who was a Senator from Massachusetts from 1827 to 1841. During his time as a Senator, he became a leading defender of nationalism and a staunch critic of unilateral nullification by States.

[109] C Warren, *The Supreme Court in United States History*, vol. 1 cit. 778.

[110] Similarly, the multilateral context of conflicts between national (constitutional) law and EU law has also come to the attention of several commentators. See F Fabbrini, 'After the *OMT* Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2015) German Law Journal 1003; V Perju, 'Against Bidimensional Supremacy in EU Constitutionalism' (2020) German Law Journal 1006; K Lenaerts, 'No Member State is More Equal than Others' cit.

[111] See also SJ Boom, 'The European Union after the *Maastricht* Decision: Will Germany Be the "Virginia of Europe?"' (1995) AmJCompL 177, 194.

authority. In the multilateral context of US antebellum federalism, there was no other institution that could legitimately claim to be the final arbiter.[112]

III. Justifying legal order

The previous section aimed to show, by way of an overview to some key constitutional events in US antebellum history, that the early American federal experience reveals interesting and pertinent similarities with current constitutional debates in the EU. This section and the following one provide a preliminary legal-theoretical analysis of these similarities. In this section, I focus on the *rhetorical structure* of constitutional debate.

Before diving into the structure of legal arguments purporting to justify a particular understanding of legal order, however, I wish to make a brief point about the (re-)construction of legal orders in general. Recent scholarship on constitutional pluralism in the EU has emphasised the importance of distinct perspectives on the normative structure of legal orders.[113] From the perspective of the ECJ, the EU Treaties are the highest source of law within the EU legal order.[114] From the perspective of, for instance, the German Federal Constitutional Court, the highest legal source is the German Basic Law.[115] Thus, there are currently at least 28 different perspectives on what "really" is the highest legal source (the perspective from the EU Treaties, plus the perspectives from the 27 Member States presumably recognising their own constitutions as the highest legal source[116]). This empirical fact has led to abundant scholarly analyses on how these perspectives can be reconciled, whether it makes sense to consider one perspective more correct than the other, and whether traditional legal theory is capable of explaining these concurrent perspectives on legal order.[117]

[112] See also CG Haines, *The Role of the Supreme Court in American Government and Politics, 1789–1835* (University of California Press 1944) 562, 661–662.

[113] See *e.g.* N MacCormick, 'The *Maastricht-Urteil*: Sovereignty Now' (1995) ELJ 259; N Walker, 'The Idea of Constitutional Pluralism' (2002) ModLRev 317; M Poiares Maduro, 'Three Claims of Constitutional Pluralism' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012); K Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press 2014)

[114] See *e.g.* Opinion 2/13 *Accession of European Union to the ECHR* ECLI:EU:C:2014:2454 para. 193.

[115] See *e.g.* German Constitutional Court judgment of 5 May 2020 cit. para. 101.

[116] Exceptions may include the case law of the Netherlands Supreme Court and the Estonian Supreme Court, which appears to recognise the validity and primacy of EU law independently of their respective constitutions. See Hoge Raad (Netherlands Supreme Court) Judgment of 2 November 2004 NL:HR:2004:AR1797 paras 3(5) and 3(6); Riigikohus (Estonian Supreme Court) Judgment of 11 May 2006 3-4-1-3-06, para. 16.

[117] Among numerous insightful contributions, see *e.g.* J Dickson, 'Towards a Theory of European Union Legal Systems' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012); G Letsas, 'Harmonic Law' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012); and K Culver and M Giudici, *Legality's Borders* (Oxford University Press 2009). In his insightful contribution to this special issue, George Letsas

In this *Article*, I do not want to discuss the question which perspective on the "real" structure of the legal order is correct, nor enter into the debate of whether the concept of legal order or legal system is even helpful to understand law as a social and moral practice.[118] Instead, I want to focus on the rhetorical dimensions of perspectivism, which is less emphasised in the literature. By "rhetorical dimensions", I refer to the argumentative practices which parties to constitutional debates employ to try to *persuade* their audiences of their claims about the structure of legal order. Both in the EU and in the early American republic, debates about federal autonomy appear to be asymmetric, which leads them to often talk past one another.

III.1. The asymmetry of constitutional debates in the EU

In the EU, arguments purporting to demonstrate that the EU legal order is "autonomous" are generally *functionalist* arguments, while arguments aimed at showing that EU law derives its legality from, and is ultimately dependent on the national legal orders, are generally arguments based on constitutional authorisation and the "nature" or "identity" of the EU Treaties.

Already in *Costa v ENEL*, the Court of Justice provided a functionalist argument for the autonomy and primacy of EU law: "the executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in article 5(2) and giving rise to the discrimination prohibited by article 7".[119]

The Court subsequently also noted: "[t]he precedence of Community law is confirmed by article 189, whereby a regulation "shall be binding" and "directly applicable in all member state". This provision, which is subject to no reservation, would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over community law".[120]

The logic of this argument is basically as follows. The objectives of the Treaties cannot be attained without uniform, effective application of EU law. Uniform and effective application requires EU law to be autonomous from national law.

As the subsequent case law of the Court elaborated, uniform and effective application also requires one central umpire to decide on the interpretation of EU law in order

forcefully claims such discussions are not really helpful to either legal theory or legal practice. See G Letsas, 'Does Anything Hang on the Autonomy of EU Law?' (2023) European Papers www.europeanpapers.eu 1293.

[118] See P Westerman, 'Weaving the Threads of a European Legal Order' (2023) European Papers www.europeanpapers.eu 1301; P Eleftheriadis, 'The Primacy of EU Law: Interpretive, Not Structural' (2023) European Papers www.europeanpapers.eu 1255. See also D Burckhardt, 'The Relationship between the Law of the European Union and the Law of its Member States – A Norm-based Conceptual Framework' (2019) EuConst 73.

[119] Case C-6/64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66 594.

[120] *Ibid*.

to ensure its uniform meaning.[121] The justification for autonomy is therefore thoroughly functional.[122]

This is quite different for the argument for the supremacy of the national legal orders and their respective courts, which translates into the possibility of some form of *ultra vires* control by the national courts.[123] There are few truly functionalist arguments available to this position. Justifications for this claim usually involve arguments about the nature of the EU as a treaty between sovereign States, and the limits of constitutional authorisation by the Member States.

I call this authorisation-based and identity-based argument a "formal" – as opposed to a functionalist – argument because it essentially appeals to the formal nature of the EU. The EU is not autonomous because it has been created by the adoption and ratification of a treaty in accordance with the formal requirements of constitutional and international law. As the German Federal Constitutional Court, in its *Maastricht* judgment, recalled, "[t]he exercise of sovereign powers by a compound of States such as the European Union is based upon authorisation by States which retain their sovereignty".[124]

It is usually inferred from this nature of the EU that the relevant judicial institutions of the Member States *must* remain the final arbiter of questions about the vertical division of competences. It they do not, the premise of contingent authorisation and the retention of sovereignty arguably would not hold.[125] The Federal Constitutional Court's *Honeywell* judgment puts the argument succinctly:

> "As autonomous law, Union law remains dependent on assignment and empowerment in a Treaty. For the expansion of their powers, the Union bodies remain dependent on amendments to the Treaties which are carried out by the Member States in the framework of the respective constitutional provisions which apply to them and for which they take responsibility [references omitted]. The applicable principle is that of conferral (Article 5.1 sentence 1 and Article 5.2 sentence 1 TEU). The Federal Constitutional Court is hence empowered and obliged to review acts on the part of the European bodies and institutions with regard to whether they take place on the basis of manifest transgressions of competence or on the basis of the exercise of competence in the area of constitutional identity

[121] See also case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* ECLI:EU:C:1982:335 para. 7; case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452 para. 15–16.

[122] See also J Lindeboom, 'The Autonomy of EU Law' cit. 282–293; and in relation to the nexus between effectiveness and primacy, J Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the *PSPP* Judgment' (2020) German Law Journal 1032.

[123] *E.g.* German Constitutional Court judgment of 5 May 2020 cit. para. 105.

[124] German Constitutional Court judgment of 12 October 1993 - 2 BvR 2134/92, 2 BvR 2159/92.

[125] One may point out that art. 50 TFEU defeats this argument. Thus, the Member States retain their sovereignty because they are free to leave the EU. Judicial *ultra vires* control by the national constitutional court is not necessary for a Member State to retain its sovereignty. However, my point in this section is not to ascertain whether the arguments in favour and against the autonomy of EU law are correct, but merely to identify a central asymmetry in this debate.

> which is not assignable (Article 79.3 in conjunction with Article 1 and Article 20 of the Basic Law) [references omitted], and where appropriate to declare the inapplicability of acts for the German legal system which exceed competences".[126]

In various forms and shapes, the same argument can also be seen in the vast literature on the topic. In his famous exchange with Joseph Weiler and Ulrich Haltern, Teodor Schilling asserted for instance: "[t]he international law interpretation of the European Treaties thus leads to the conclusion that the ECJ is not the ultimate umpire of the system [...] The constitutions of the Member States generally do not allow the transfer of *Kompetenz-Kompetenz* to the Community. Therefore, the Member States, individually, must have the final word on questions concerning the scope of the competences they have delegated to the Community".[127]

Thus, while proponents of a strong version of the autonomy of the EU legal order – including the Court of Justice as the final arbiter on the interpretation of the EU Treaties – focus on the functional need to ensure the effectiveness of EU law, proponents of some form of *ultra vires* control by the Member States rely on "formal" arguments about the nature of the EU and the constitutional authorisation by the Member States.

It is important to note that the argument for some form of *ultra vires* control usually includes what may be called a "functional concession". If Member State sovereignty implies that the national constitutional or supreme courts necessarily are the final arbiters within their jurisdiction, formally there is no apparent reason why the national court could not always substitute the Court of Justice's interpretation of EU law with its own.[128] Within the domestic legal order, the domestic judiciary is always supreme, regardless of the magnitude of the alleged infraction.[129] This position, of course, would destroy effectiveness and uniformity. Again the German Federal Constitutional Court's jurisprudence shows how the formal argument against autonomy is usually mitigated by a functional concession:

> "If any Member State could readily invoke the authority to decide, through its own courts, on the validity of EU acts, this could undermine the precedence of application accorded to EU law and jeopardise its uniform application. Yet if the Member States were to completely refrain from conducting any kind of ultra vires review, they would grant EU organs exclusive authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences [...] The ultra vires review must be exercised with restraint, giving effect to the

[126] German Constitutional Court judgment of 6 July 2010 – 2 BvR 2661/06 para. 55.

[127] T Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) HarvIntLJ 389, 407.

[128] See also *ibid*. 408.

[129] In some jurisdictions, there may be a constitutional provision mandating a degree of deference towards the ECJ, such as art. 23 of the German Basic Law. However, this provision as such can also be regarded as legitimising a functionalist concession to the primacy of the Basic Law.

> Constitution's openness to European integration [...] Yet the mandate conferred in Art. 19(1) second sentence TEU is exceeded where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States are manifestly disregarded [...] The mandate, conferred upon the CJEU in Art. 19(1) second sentence TEU, to ensure that the law is observed in the interpretation and application of the Treaties necessarily entails that the CJEU be granted a certain margin of error".[130]

The formal argument against the autonomy of EU law, and the functionalist argument for the autonomy of EU law permeate constitutional debates about the nature of EU law. This may not be surprising. While both side of the debate usually present their arguments as inevitable truths about *the* structure of legal order, the choice for a particular kind of argument is obviously influenced by the strengths and weaknesses of the respective position. The argument against the autonomy of EU law is weak from a functional perspective. It *needs* the formal argument based on sovereignty and constitutional authorisation to protect the identity of the constitution document. In contrast, the argument in favour of autonomy is weak from a formal perspective. The EU is indisputably based on a treaty ratified by States in their sovereign capacities. The claim for autonomy *needs* a functional argument, which takes account in particular of the multilateral context of European integration and the mutual relationships between the Member States.[131]

III.2. The asymmetry of constitutional debates in the US

Debates on US antebellum constitutionalism were similar in their rhetorical structure to those in current European constitutionalism. Compact theorists strongly relied on the fact that the US Constitution was formally ratified by the States. They frequently also added functionalist arguments, such as the argument that the US Supreme Court was an agent of the federal government and had an interest in expanding federal powers beyond their lawful limits.[132] These functionalist arguments, however, remained premised on the formal argument that the US Constitution was a compact of States.

Reversely, while nationalists sometimes purported to make a similar formal argument by claiming that the US Constitution was ratified by "the people of the United States",[133] they mostly relied on functional arguments like the need to have a uniform interpretation of federal law. This functionalism, similar to the Court of Justice's case law on primacy of EU law, is clearly visible in *United States v Peters* (1809), *Martin v Hunter's Lessee* (1816) and *Cohens v Virginia* (1821).

[130] German Constitutional Court judgment of 5 May 2020 cit. paras 111–112 (references omitted).

[131] F Fabbrini, 'After the OMT Case' cit.; V Perju, 'Against Bidimensional Supremacy in EU Constitutionalism' cit.; K Lenaerts, 'No Member State is More Equal than Others' cit.

[132] For the argument that the US Supreme Court could not possibly be a neutral arbiter in a conflict between the federal government and a State, see *e.g.* Amphictyon, 'Letter to the Richmond Enquirer' cit. 58; JC Calhoun, 'Fort Hill Address' cit.

[133] See *e.g.* US Supreme Court *Martin v Hunter's Lessee* cit. 324; *McCulloch* cit. 429–430.

In *United States v Peters*, Chief Justice Marshall clearly stated his view on the possibility for States to defy a federal court judgment:

> "If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all, and the people of Pennsylvania, not less than the citizens of every other State, must feel a deep interest in resisting principles so destructive of the union, and in averting consequences so fatal to themselves".[134]

A very similar functionalism is visible in Justice Story's Opinion in *Martin v Hunter's Lessee*. One of his arguments against the supposed unconstitutionality of Section 25 of the Judiciary Act of 1789 specifically addresses the need for a central umpire deciding on the interpretation of the US Constitution:

> "A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity, of uniformity of decisions throughout the whole United States upon all subjects within the purview of the Constitution. Judges of equal learning and integrity in different States might differently interpret a statute or a treaty of the United States, or even the Constitution itself; if there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two States. The public mischiefs that would attend such a State of things would be truly deplorable, and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution. What, indeed, might then have been only prophecy has now become fact, and the appellate jurisdiction must continue to be the only adequate remedy for such evils".[135]

In *Cohens v Virginia*, Marshall again emphasised the consequences of denying the US Supreme Court the final word:

> "'Thirteen independent Courts,' says a very celebrated statesman (and we have now more than twenty such Courts) 'of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.' Dismissing the unpleasant suggestion that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a State or its Courts, the necessity of uniformity, as well as correctness in expounding the Constitution and laws of the United

[134] US Supreme Court *United States v Peters* cit. 136.
[135] US Supreme Court *Martin v Hunter's Lessee* cit. 347–348.

> States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved".[136]

Compact theorists, instead, relied mostly on formal arguments regarding the nature of the Constitution as a compact between States. Legally, they emphasized that the US Constitution had not been adopted by "the people" as a whole, but rather by the separate States and by the means chosen by those States themselves.[137] They concluded that the states necessarily had retained the sovereign right to decide on "deliberate, palpable and dangerous" exercises of federal power. In response to *McCulloch*, for instance, Amphictyon, wrote: "[t]he Constitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitimate and solid foundation".[138]

The same view was famously expressed by John Calhoun in his Fort Hill Address in 1831:

> "The great and leading principle is, that the General Government emanated from the people of the several States, forming distinct political communities, and acting in their separate and sovereign capacity, and not. from all of the people forming one aggregate political community; that the Constitution of the United States is, in fact, a compact, to which each State is a party, in the character already described and; that the several States, or parties, have a right to judge of its infractions; and in case of a deliberate, palpable, and dangerous exercise of power not delegated, they have the right, in the last resort, to use the language of the Virginia Resolutions, 'to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them'".[139]

The limitation to "deliberate, palpable and dangerous" infractions of the Constitution is essentially a functional concession similar to today's concessions on part of, for example, the German Federal Constitutional Court.[140] Notwithstanding their principled arguments about the States' authority to declare federal laws invalid, compact theorists

[136] US Supreme Court *Cohens v Virginia* cit. 415–416.

[137] M Farrand, *The Framing of the Constitution of the United States* cit. 190-191; MJ Klarman, *The Framers' Coup* cit. 417-422.

[138] Amphictyon, 'Essay in the Richmond Enquirer' cit. 61-62.

[139] JC Calhoun, 'Fort Hill Address' cit. (emphasis in original).

[140] See *e.g.* German Constitutional Court judgment of 5 May 2020 cit. paras 110: "The Court may only hold that an act violates the principle of conferral where institutions, bodies, offices and agencies of the European Union have exceeded the limits of their competences in a manner that specifically runs counter to the principle of conferral (Art. 23(1) GG); in other words, *it must be established that the violation of competences is sufficiently qualified*. This requires that the act manifestly exceeds EU competences, resulting in a structurally significant shift in the division of competences to the detriment of the Member States" (emphasis added).

understood that a general States' right to declare any federal violation of the Constitution invalid would be unworkable.[141]

IV. Autonomy, dual federalism and the monism–dualism dichotomy

This section discusses the relevance of the monism–dualism dichotomy in constitutional debates in the early American republic and functionally similar debates in the present EU. By "monism" I refer to the view there necessarily is only one legal order, either globally[142] or within a particular geographical territory.[143] By "dualism" I mean the view that international law and each of the domestic legal orders are legally separate. This distinction is central to our contemporary thinking about the relationship between international (including supranational) and national law. This could not have been more different in the early American republic, decades before the theories of monism and dualism even emerged.

While the previous section revealed a deep rhetorical *similarity* between constitutional debates in the early American republic and in the contemporary EU, this section emphasises a major *difference* between both streams of constitutional debate. Consequently, antebellum constitutional debates about the relationship between the federal and State legal orders in the US may help us better understand the (ir)relevance of this dichotomy to both the US and the EU legal landscape.

IV.1. The autonomy of EU law and the monism–dualism dichotomy

According to some scholars, the autonomy of the EU legal order implies a monistic relationship between EU law and the law of the Member States. Christina Eckes, for example, has described EU law as the "poster child of Kelsen's *Pure Theory of Law*" and argued that "[w]ithin the EU legal order, that is vis-à-vis national law, the ECJ adheres closely to Kelsen's monism".[144]

[141] See *e.g.* JC Calhoun, 'Fort Hill Addess' cit.: "I am not ignorant that those opposed to the doctrine have always, now and formerly, regarded it in a very different light, as anarchical and revolutionary. Could I believe such, in fact, to be its tendency, to me it would be no recommendation. I yield to none, I trust, in a deep and sincere attachment to our political institutions and the union of these States [...] With these strong feelings of attachment, I have examined, with the utmost care, the bearing of the doctrine in question; and, so far from anarchical or revolutionary, I solemnly believe it to be the only solid foundation of our system, and of the Union itself; and that the opposite doctrine, which denies to the States the right of protecting their reserved powers, and which would vest in the General Government (it matters not through what department) the right of determining, exclusively and finally, the powers delegated to it, is incompatible with the sovereignty of the States, and of the Constitution itself, considered as the basis of a Federal Union".

[142] *E.g.* H Kelsen, *Introduction to the Problems of Legal Theory* (Clarendon Press 1992) 113.

[143] See *e.g.* P Elefetheriadis, 'The Primacy of EU Law: Interpretive, Not Structural' cit. 1270-1274, 1279-1281.

[144] C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review 1.

Others have analysed the relationship between EU law and national law in dualistic terms. Pavlos Eleftheriadis, for instance, has argued that the EU legal order and the national legal orders do not overlap, and conceives of the EU legal order as a cosmopolitan construct that is part of the law of nations.[145] Elsewhere I have put forward a different dualist understanding of the autonomy of EU law, in which EU law and national law are legally separate but geographically overlapping normative orders that compete for the social practices of legal officials.[146]

In their traditional formulations, both monism and dualism are difficult to apply to the European legal landscape, in which the legal orders of the EU and the Member States are legally interconnected, without abolishing their normative separation.[147] The EU legal order and the national legal orders are connected, to name one example, through the preliminary reference procedure.[148] National courts operate as EU courts when they apply EU law.[149] Reversely, the EU legislature obtains its identity in part through concepts and institutions from the national legal orders.[150] This legal interconnection – which is both structural and geographical – fits uncomfortably with the formal separation of legal orders according to dualism. Thus, dualism must lose its sharp theoretical edges in order to be compatible with the actual claims and behaviour of the relevant legal officials.[151]

[145] P Eleftheriadis, *A Union of Peoples* cit.

[146] J Lindeboom, 'The Autonomy of EU Law' cit.

[147] As Lenaerts and Gutiérrez-Fons observed, for example, the autonomy of the EU legal order essentially means that the EU legal order has its own rule of recognition (K Lenaerts and JA Gutiérrez-Fons, 'A Constitutional Perspective' in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law* (Oxford University Press 2018) 107). In J Lindeboom, 'The Autonomy of EU Law' cit., I took a stab at formulating the rule of recognition of the EU legal order.

[148] Art. 267 TFEU.

[149] See *e.g.* case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ECLI:EU:C:1978:49 paras 20–21.

[150] For example, according to art. 16(2) TEU the Council "shall consist of a representative of each Member State at ministerial level". Therefore, the Council can only be identified by reference to national laws which determine the natural persons who are at any given moment ministers of the national government.

[151] Pavlos Eleftheriadis has offered a sophisticated and strictly dualistic account of EU law in P Eleftheriadis, *A Union of Peoples* cit. Eleftheriadis' dualism entails, in my view, a *theoretically* coherent theory of how EU law and national law relate to each other. The challenge for this theory is that it fits uncomfortably with the case law of the ECJ on the autonomy, primacy and direct effect of EU law, and the EU law obligations for national authorities within their own national legal orders. To be clear, the internal point of view and self-understanding of (some of) the participants of a legal order need not correspond to the best available theory of that legal order. To use an analogy borrowed from A Marmor, *Foundations of Institutional Reality* (Oxford University Press 2023) ch 6, the "internal point of view" that two spouses take towards the institutions of "family" and "marriage" might be that marriage is an expression of love and equal respect. According to some feminist critiques of the institution of the family, however, marriage *really* is an expression of patriarchy and female subordination. The best available theory of some social practice *might* therefore well be different from the internal point of view of the participants of that social practice, or the subjective rationalization of the social practice by its participants. However, the internal point of view of the

At the same time, monism is not a viable theory of the EU legal order, as Eleftheriadis in my view rightly observed.[152] The EU legal order does not subsume the national legal orders, nor does EU law control the validity of national legal norms.[153] While the case law of some of the Member States' constitutional courts could be described as "national law monism",[154] this case law cannot serve as a compelling normative basis for the multilateral context of the European legal landscape. Genuine national law monism only considers its own domestic legal order as "law", which results in national legal solipsism.

Accordingly, neither monism nor dualism accurately describes the relationship between EU law and national law. This conclusion appears to leave us in *aporia*. From an international law perspective, there is no third alternative between monism and dualism. However, in US antebellum constitutional debates neither term was used, even though these debates were similar to contemporary debates in EU law, and compact theorists in particular considered the relationship between State law and federal law as similar to the relationship between State law and international law. The absence of a monism–dualism dichotomy in the early American republic, then, may tell us something about the (ir)relevance of this dichotomy to EU law today.

IV.2. Competing monisms in the early American republic

In contrast to otherwise similar debates in EU constitutionalism, antebellum constitutional debates about the nature of the US Constitution and the final say about its meaning were not framed in terms of monism and dualism.

At first glance, it seems that this distinction simply was not relevant to the antebellum period for two reasons. Firstly, the Constitution makes clear that federal law is supreme over State law,[155] and that the federal government can act directly on individuals,[156] which suggests that applying a dichotomy central to the relationship between national and international law is a category mistake. Secondly, the monism–dualism dichotomy

participants of a practice should, in my view, still be part of the relevant empirical factors that a theory of that practice seeks to explain.

[152] P Eleftheriadis, *A Union of Peoples* cit. ch. 3.

[153] Case C-13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn* ECLI:EU:C:1962:11 p. 49–50; joined cases C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl, and Others* ECLI:EU:C:1998:498 para. 21. See also J Lindeboom, 'The Autonomy of EU Law' cit. 302.

[154] For a classic formulation of "national law monism", see H Kelsen, *General Theory of Law and State* (Transaction Publishers 2006 [1949]) 382–386.

[155] Art. VI of US Constitution.

[156] See *e.g.* US Constitution, art. I, section 8: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; [...] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes".

itself is a product of late-nineteenth century and early twentieth century legal theory.[157] Both reasons suggest that the dichotomy simply does not make sense in the context of US antebellum constitutionalism.

The first objection, however, can be discarded quickly. As the analysis in sections II and III above aimed to show, the United States did not comprise a consolidated legal order, and the nationalist view of the Constitution was at the time most likely a minority view.[158] While it was recognised that the Constitution had created a federal government that was in some way "national",[159] and the relationship between the States differed from the relationship between States in international law,[160] the distinction between "federal" and "international" remained blurry and ambiguous.[161]

On the second point, it is true that the monism–dualism dichotomy was foreign to US antebellum constitutionalism. Dualism as a theory of law emerged in the second half of the nineteenth century, and is particularly associated with the work of Heinrich Triepel.[162] According to Cassese, monism as a theory of law was first proposed by the German legal theorist Wilhelm Kaufmann,[163] and is of course mainly associated with the work of Hans Kelsen.[164]

[157] Until far into the nineteenth century, there was no need for a theory of the relationship between national and international law, as they were regarded as strictly separate. See also J Rendl, 'The Sphere of Intervention: EU Law Supranationalism and the Concept of International Treaty' (2023) European Papers www.europeanpapers.eu 1333.

[158] See JR Paul, *Indivisible: Daniel Webster and the Birth of American Nationalism* (Riverhead Books 2022).

[159] See *e.g.* J Madison, 'Federalist No 39' cit. 187: "The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national".

[160] This was particularly clear in the context of slavery. As Lord Mansfield had recognised in the *Somerset* judgment (Court of King's Bench *Somerset v Stewart* (1772) 98 ER 499), slavery could only be introduced by positive (domestic) law. Whenever an enslaved person set foot on a country in which slavery did not exist, the enslaved person would become free. The *Somerset* judgment was extensively discussed in US constitutional law. The northern states which had abolished slavery nonetheless were bound by the Fugitive Slave Clause (US Constitution, art. IV, section 2, clause 3) and the Fugitive Slave Act 1793. They also recognised the right of slaveowners to bring their slaves with them on travels to the northern states without those slaves acquiring freedom until roughly the 1830s. See Finkelman, *An Imperfect Union* cit. 70–100.

[161] See DM Golove and DJ Hulsebosch, 'The Federalist Constitution as a Project in International Law' (2021) Fordham Law Review 1831. This ambiguity was partly rooted in the origin of the term "federal" which was – unlike its common meaning today – closely related to the terms "international" and "confederal". See R Schütze, 'On "Federal" Ground: The European Union as an (Inter)national Phenomenon' (2009) CMLRev 1069.

[162] H Triepel, *Völkerrecht und Landesrecht* (C.L. Hirschfeld 1899).

[163] P Gaeta, JE Viñuales and S Zappalá, *Cassese's International Law* (Oxford University Press 2020 3rd edn) 220.

[164] See *e.g.* H Kelsen, *General Theory of Law and State* cit. 363–382.

Nonetheless, it is possible to *reconstruct* early antebellum constitutional debates in terms of monism. Both nationalists and compact theorists initially took what we would call monistic views on the nature of the US legal order. Nationalists believed that the ratification of the Constitution had been a sovereign act of the people, and that the States were legally subordinate to the federal legal order that had been created. This became clear soon after the Founding in the remarkable case of *Chisholm v Georgia* (1793).[165] This case dealt with the question whether a State could be sued against its will in a federal court by a citizen of another State. In his Opinion, Justice Wilson dramatically set the scene as follows:

> "This is a case of uncommon magnitude. One of the parties to it is a State – certainly respectable, claiming to be sovereign. The question to be determined is whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others more important still, and, may, perhaps, be ultimately resolved into one no less radical than this: 'do the people of the United States form a Nation?'"[166]

Wilson answered this question in the affirmative, and concluded – like a majority of the Justices – that Georgia indeed could be sued. The vulnerability of nationalist monism became immediately clear by the reception of the Supreme Court's judgment. As Gordon Wood observes, "[t]his decision represented such a serious assault on state sovereignty that it could not stand; even Federalists in Massachusetts were appalled by it".[167] Within two years, the judgment was overruled by the ratification of the Eleventh Amendment.[168]

A second example of nationalist monism is the landmark judgment *Fletcher v Peck* (1810), in which the Supreme Court, for the first time, struck down State legislation for violating the Constitution. In his Opinion, Marshall observed among others:

> "But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own Constitution. She is a part of a large empire; she is a member of the American Union; and that Union has a Constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several States which none claim a right to pass. The Constitution of the United States declares that no State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts".[169]

[165] US Supreme Court *Chisholm v Georgia*, 2 US 419 (1793).

[166] *Ibid*. 453.

[167] GS Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* (Oxford University Press 2011) 415.

[168] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State".

[169] US Supreme Court *Fletcher v Peck* cit. 136.

Though Marshall used different terms, in effect this claim amounts to what we would call "national law monism" or perhaps in this case "federal law monism". The State was not supposed to be regarded as the highest source of legal authority, and State law would be normatively subordinate to federal law.

Compact theorists also presupposed monism, by claiming that the Constitution derived its legality and legitimacy from the ratification by the separate States.[170] The Virginia and Kentucky Resolutions of 1798–1799 amounted to what we might call "State law monism". Since the US Constitution was a compact among sovereign States which had retained sovereignty, State laws and State courts were the highest legal authority, from which the federal government's authority derived.

Both nationalists and compact theorists could explain the nascent federal legal order from their respective monist perspectives. In the day-to-day functioning of federal and State law, which of the two monisms was correct often did not matter. However, in cases of overt conflict between a State and the federal government, or between a State court and a federal court, a choice had to be made as to which institution *really* was the final arbiter. This choice could not be made on legal grounds, but was rather a matter of power, rhetoric and perhaps ethics.[171]

In most situations of constitutional crisis, the federal government seemed to prevail in fact.[172] Nonetheless, compact theory and States' rights theories continued to resist nationalist monism. After the South Carolina nullification crisis, overt conflicts remained limited, also because the US Supreme Court by and large became more sensitive to States' rights[173] – that is, outside the context of slavery.[174] Competing monisms were substituted by an ostensibly clear separation of powers between the federal and State governments under the name of "dual federalism". While this development could not avoid escalating animosity between the northern and southern States in regard to slavery,[175] the move towards dual federalism nonetheless shows how the US antebellum constitutionalism purported to grapple with the impasse created by competing monisms.

[170] See *e.g.* JC Calhoun, 'Fort Hill Address' cit.

[171] In the EU context, I have argued elsewhere that the question of whether national law or EU law takes ultimate precedence is also not a legal but an ethical question. See J Lindeboom, 'Legal Embarrassment after PSPP and K 3/21: The Bogus Distinction between Primacy- and Supremacy and the Need for an Ethics of EU Law Supremacy' (2 November 2021) EU Law Live eulawlive.com.

[172] SJ Boom, 'The European Union after the *Maastricht* Decision' cit. 194.

[173] See *e.g.* US Supreme Court *Charles River Bridge v Warren Bridge*, 36 U.S. 420 (1837); *Briscoe v Bank of Commonwealth of Kentucky*, 36 U.S. 257 (1837); *Cooley v Board of Wardens*, 53 US 299 (1851).

[174] Within the context of slavery, the U.S. Supreme Court rather took a nationalist approach in *Prigg v Pennsylvania*, 41 U.S. 539 (1842). In that case, the Court held constitutional the Fugitive Slave Act of 1793 and declared unconstitutional a Pennsylvania law banning the kidnapping of black people to another State in order to enslave them. *Prigg* led to further resistance towards the Fugitive Slave Act in the northern States.

[175] See generally P Finkelman, *An Imperfect Union* cit. chs 5–7.

IV.3. From competing monisms to dual federalism

Dual federalism refers to the legal theory which stipulates that the US Constitution provides for a strict separation of powers between the federal government and the State governments. Consequently, each government is supreme within its own jurisdiction. In *Ableman v Booth* (1859), a case concerning the status of enslaved persons accompanying their slave-owners in northern States, Chief Justice Roger Taney described dual federalism as follows: "[t]he powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres".[176]

Disputes between States and the federal government were to be resolved by the US Supreme Court. After the South Carolina nullification crisis, it had become clear that the only alternative to a common final arbiter was anarchy:

> "And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it, to make the Constitution and laws of the United States uniform, and the same in every State, and to guard against evils which would inevitably arise from conflicting opinions between the courts of a State and of the United States, if there was no common arbiter authorized to decide between them".[177]

This theory of dual federalism in US constitutionalism shares with contemporary dualism the separation of spheres of legitimate authority. However, dual federalism differs from dualism in emphasising the *legal* interconnections of the State and federal legal orders. Dualism implies that national legal orders and the international legal order are *legally* separate. Consequently, their respective legal norms do not relate to each other in a legally meaningful manner.[178] By contrast, dual federalism recognised the substantively and geographically overlapping sources of authority of the States and the federal governments.

In the context of the dormant Commerce Clause doctrine,[179] for example, the federal courts purported to delineate unjustifiable interferences by the States with interstate commerce and the legitimate exercise of the States' police power.[180] Since the federal

[176] US Supreme Court *Ableman v Booth*, 62 U.S. 506, 516 (1859).

[177] *Ibid*. 518–519.

[178] D Dyzenhaus, 'Kelsen's Contribution to International Law' (4 May 2020) papers.ssrn.com 37.

[179] The "dormant Commerce Clause doctrine" refers to the application of the Commerce Clause of the US Constitution (art. I, section 8, clause 3) to State laws. The Commerce Clause grants Congress the power "to regulate Commerce [...] among the several States" and could in this sense be compared to art. 114 TFEU in EU law. The US Constitution, however, does not contain explicit provisions similar to the fundamental freedoms of the EU internal market. The dormant Commerce Clause doctrine "remedies" this defect insofar as the Commerce Clause is understood as limiting the States' ability to regulate interstate commerce, even if Congress has not yet exercised its powers to adopt federal legislation.

[180] See *e.g*. US Supreme Court *Willson v. Black-Bird Creek Marsh Co*., 27 U.S. 245 (1829); *Cooley v Board of Wardens* cit.

power to regulate commerce among the States and the State police powers inevitably overlapped both geographically and substantively, the courts were forced to delineate the federal and States' respective spheres of authority through legal doctrine.[181]

The application of, and interaction between, legal orders was complex and messy, if only because both legal orders applied within the same geographic territory, and were applied by the same (State) courts. From the 1930s, the influence of dual federalism in US constitutional law increasingly waned.[182] As a legal *theory* about how the federal and State governments and their respective legal orders relate to each other, however, arguably dual federalism is still central to US constitutionalism. Since the 1830s, competing monisms have never resurfaced effectively.[183]

IV.4. The irrelevance of monism and dualism to US and EU constitutionalism

Based on the analysis of the development towards dual federalism in the early American republic, and its similarities with the US constitutional structure, I tentatively suggest that the monism–dualism dichotomy is ultimately unhelpful both to US and to EU constitutionalism for two reasons:

i) in both cases, a consistently applied theory of monism seems legally and politically untenable legally and politically, as it fails to recognise that the legal orders remain, in a particular way, distinct, even though they are legally and factually interconnected.

[181] In US Supreme Court *Cooley v Board of Wardens* cit., for example, the Supreme Court held that the States retained the power to legislate in "local" aspects of commerce as long as Congress had not exercised its commerce power, while the States lacked the power to legislate in relation to commerce of a "national" character. In *United States v E.C. Knight Co*., 156 U.S. 1 (1895) and *Carter v Carter Coal Co.*, 298 U.S. 238 (1936), the Supreme Court somewhat differently relied on the distinction between "direct" and "indirect" effects on interstate trade to delineate the scope of the dormant commerce clause.

[182] See *e.g.* US Supreme Court *NLRB v Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), overturning the approach in *Carter v Carter Coal Co.* cit.; *United States v Darby Lumber Co.*, 312 U.S. 100 (1941), overturning *Hammer v Dagenhart*, 247 U.S. 251 (1918). For an overview, see E Ryan, *Federalism and the Tug of War Within* (Oxford University Press 2012) 84–98. Dual federalism is, however, still visible in the anti-commandeering doctrine, according to which the federal government cannot command State authorities to adopt or execute federal laws. See *e.g.* US Supreme Court *New York v United States*, 505 U.S. 144 (1992); *Printz v United States*, 521 U.S 898 (1997). The idea of dual federalism has also resurfaced in the Supreme Court's recent case law limiting the scope of federal powers under the Commerce Clause: *United States v Alfonso D. Lopez, Jr*., 514 U.S. 549 (1995); *United States v Morrison*, 529 U.S. 598 (2000); and *National Federation of Independent Business v Sebelius*, 567 U.S. 519 (2012).

[183] After the Supreme Court's judgment in *Brown v Board of Education* cit., the spirit of the Virginia and Kentucky Resolutions of 1798–1799 emerged briefly in so-called statements of interposition that were issued in some southern States. These interposition statements protested against the Supreme Court's judgment and declared it unconstitutional. See *e.g*. Interposition Resolution by the Florida Legislature in Response to *Brown v Board of Education*, 2 May 1957; Act No. 2 of First Extraordinary Session, LSA-R.S. 49:801 of 4 November 1960.

ii) in both cases, the legal and factual interconnectedness of legal orders is such that dualism must lose its sharp theoretical edges in order to be compatible with the actual claims and behaviour of the relevant legal officials.

In contemporary legal theory, it is hard to imagine a "third alternative" between monism and dualism. However, the inescapability of the monism–dualism dichotomy is itself the product of an "international law framing" of the relationship between international or supranational and national law. The monism–dualism dichotomy only appears unavoidable because the distinction between national and international law is usually the starting point for analysing the idiosyncracies of EU constitutionalism.

The history of the early American republic shows, however, that international law need not be the starting point for conceptualising a supranational, or in the US context a "supra-State",[184] legal order.[185] The American Founders and their successors were aware that they had, in Justice Kennedy's words, "split the atom of sovereignty"[186] and had created something *sui generis*.[187] The subsequent development into dual federalism in US antebellum constitutionalism is compatible with neither monism nor dualism.

From a jurisprudential perspective, dual federalist doctrine in US constitutional law may be explained by Joseph Raz's and John Gardner's theories of law.[188] Raz and Gardner built on HLA Hart's theory of law, according to which legal systems are characterised by a union of primary and secondary rules that is identified by a "rule of recognition" reflecting the social practices of "legal officials".[189] Raz and Gardner followed Hart in identifying

[184] In the European context, the term "supranational" is obviously well-known, while the term "supra-State" is hardly used. The latter is also true in the American context, arguably because the commonplace term "federal" obviates any reference to the "supra-State" governance exercised at federal level. Of course, the term "national" is deeply confusing in any US–EU comparative constitutional analysis, since it refers to the respective sub-entities within the EU constitutional structure, while it refers to the federal government in US constitutionalism.

[185] Though it should be noted that the Framers were heavily influenced by international law, as David Golove and Daniel Hulsebosch recently showed. See D Golove and DJ Hulsebosch, 'The Federalist Constitution as a Project in International Law' cit.

[186] US Supreme Court *U.S. Term Limits, Incl. et al. v Thornton et al*., 514 U.S. 779, 838 (1995), concurring opinion of J Kennedy.

[187] Robert Schütze has argued against the use of the term "*sui generis*" both in the context of US federalism and that of EU constitutionalism. In both cases, he claims, the constitutional structure is best described as a "federation of States". See Schütze, 'On "Federal" Ground' cit. In my view, Schütze somewhat underestimates the ambivalence of the constitutional structure that the US Constitution had created, and the persistent disagreements even among the Founders. While some of them, such as Washington and Hamilton, were strong nationalists in favour of a consolidated government – much like the European States at the time – others, such as Madison and Jefferson, espoused a more restrictive, "internationalist" interpretation of federal powers.

[188] See generally J Raz, *The Concept of a Legal System* (2nd edn Clarendon Press 1980); J Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn Oxford University Press 2009); J Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012).

[189] HLA Hart, *The Concept of Law* (3rd edn Clarendon Press 2012) ch 5.

legal systems on the basis of the social practices of legal officials. Hart probably believed that each political community could have only legal system and one rule of recognition.[190] By contrast, Raz and Gardner left open the possibility that conflicting norms as well as multiple rules of recognition can be applied within the same geographic territory by a group of legal officials.[191] These legal officials, moreover, need not necessarily be uniform in their beliefs or commitments, as Alexander Somek observed.[192]

The interaction between the EU and the national legal orders could be conceptualised in similar terms.[193] Such a theory could recognise that the EU legal order operates as a self-referential legal system with its own "rule of recognition", without either claiming that the EU legal order absorbs all national legal orders,[194] or claiming that these legal systems are legally or otherwise normatively closed to each other.[195]

A theory of the EU legal order, however, need not be a "positivist" one. As I argued elsewhere,[196] the best jurisprudential theory of the EU legal order may need to recognise that what legal officials treat as the rule of recognition of their legal order may be different from what actually *is* the rule of recognition of their legal order.[197] Distinguishing between what people consider to be the rule of recognition of their legal order, and what actually is the rule of recognition of that legal order, gives rise to numerous complex and intriguing legal-philosophical questions, which cannot be discussed in this – already long – *Article*.[198] This distinction may, however, explain an important part of the social practices of judges and other legal officials. Rather than taking for granted that whatever most of

[190] See *e.g*. *ibid*. 105–107; P Eleftheriadis, 'The Primacy of EU Law: Interpretive, Not Structural' cit.

[191] See *e.g*. J Raz, *Practical Reason and Norms* (Clarendon Press 1979) 146–148; J Gardner, *Law as a Leap of Faith* cit. 281–288 (as applied to EU law); J Gardner, 'Fifteen Themes from *Law as a Leap of Faith*' (2015) Jurisprudence 601, 605.

[192] A Somek, *The Legal Relation: Legal Theory after Legal Positivism* (Cambridge University Press) 69–72.

[193] J Gardner, *Law as a Leap of Faith* cit. 281–288; NW Barber, 'Legal Pluralism and the European Union' (2006) ELJ 306; J Lindeboom, 'Why EU Law Claims Supremacy' (2018) OJLS 328.

[194] See *e.g*. J Lindeboom, 'The Autonomy of EU Law' cit.

[195] While I recognised elsewhere that autonomous legal systems need not be entirely closed *vis-à-vis* each other in an *extra-legal* sense (J Lindeboom, 'Why EU Law Claims Supremacy' cit.; J Lindeboom, 'The Autonomy of EU Law' cit.), in those writings I aimed to explore the "internal point of view" of certain legal officials within the EU legal system. This led me to conclude that the EU legal system may be cognitively open, but is closed to other (legal) systems from a legal-normative point of view. However, I have come to realise that the intricate *legal-normative* relationship between *e.g*. the US federal and State legal systems shows that separate legal systems can be *legally* connected to each other in a particular way, notwithstanding each of them having their own rules of recognition. This may also affect how legal systems interact with each other from the internal point of view.

[196] J Lindeboom, 'The Autonomy of EU Law' cit. 303–305.

[197] For a jurisprudential theory focusing on the distinction between what rule is treated as the rule of recognition within a certain community and what rule is the rule of recognition within that community, see K Toh, 'Legal philosophy à la carte' in D Plunkett, SJ Shapiro and K Toh (eds), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press 2019).

[198] See *e.g*. K Toh, 'Legal philosophy à la carte' cit.

their fellow judges treat as law *is* the law, judges frequently cast doubt on what other judges – rightly or mistakenly – take to be the law, even if the latter are in the majority.

One may even doubt whether it is useful to conceive of the relationship between legal orders, as well as between courts within overlapping legal orders, in terms of "chains" or "pyramids" of legal validity. As Pauline Westerman argues in her contribution to this special issue, the "building metaphor" of law may not be the best theoretical representation of our legal practices.[199]

Her alternative proposal to conceive of legal order in terms of a web of deontic statuses which allocates power across society seems particularly appropriate to both the US antebellum federal legal order and the contemporary EU legal order. In the early American republic, reconstructions of legal normativity resulting in competing monisms were, indeed, *reconstructions* with particular justificatory aims. In reality, the political and legal developments of the US early American republic reveal a struggle for political and legal power rather than a hierarchically organised normative structure. A crucial role in the proliferation of power was played by Section 25 of the Judiciary Act 1789, which connected the State legal systems to the federal judiciary.[200] John Marshall and his brethren brilliantly interpreted this structural provision as providing for a clear judicial hierarchy with the US Supreme Court at its apex. But the fragility of the US Supreme Court's legitimacy and power in the first decades of the American republic reveals that this judicial hierarchy was anything but inevitable. The allocation and proliferation of power through deontic statuses[201] only developed into a hierarchical normative structure as federal legal *and political* power consolidated, initially in the 1830s and more consequentially after the Civil War.

The role of Section 25 of the Judiciary Act 1789 in the early American republic may remind EU constitutional lawyers of the essential role of art. 267 TFEU in the development of EU law and the possibility for the EU legal order to operate as an "autonomous" legal order.[202] Despite essential differences,[203] Section 25 of the Judiciary Act 1789 and art. 267 TFEU share an important function: they contribute to the centralisation of judicial power by providing for "normative bridges" between the State and supra-State levels of legal governance. In the (antebellum) US federal legal order and the EU legal order, the efficacy of supra-State law depends considerably on the degree to which the supra-State legal order connects – in real (legal) life – to the State legal orders.

[199] See P Westerman, 'Weaving the Threads of a European Legal Order' cit.

[200] On the role of legal rules as tools to proliferate power within a particular community, see *ibid*. 1309-1312.

[201] *Ibid*.

[202] See *e.g*. JHH Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press 1999) 32–35, 192–195.

[203] Most notably, Section 25 of the Judiciary Act of 1789 granted the US Supreme Court the power to *review* State court judgments, while art. 267 TFEU only grants the ECJ the power to answer preliminary questions on the interpretation of EU law by the Member State courts.

However, although the manner in which structural provisions such as Section 25 Judiciary Act 1789 and art. 267 TFEU may have been a necessary condition to create an autonomous federal legal order, such provisions were by no means a sufficient condition for, nor a justification of, federal autonomy. The constitutional history of the early American republic shows that there was nothing inevitable about the course of US history, the structure and autonomy of the federal legal order, and the role that the US Supreme Court eventually acquired. The same is undoubtedly true for the role of art. 267 TFEU in the process of European integration.

V. Conclusion

This *Article* analysed the constitutional history of the early American republic through the lens of contemporary European constitutionalism. It focused in particular on the role of the US Supreme Court in the development of an independent federal legal order, and the question who possessed the "final say" in constitutional matters. This history reveals salient similarities to ongoing constitutional debates about the autonomy of the EU legal order and the ECJ's final say on the interpretation of EU law.

As mentioned in the introduction of this *Article*, the constitutional similarities between the early American republic and contemporary Europe have not gone unnoticed to other scholars. Friedman Goldstein observed in her 2001 book that

> "[i]t turns out that virtually every institutional reform advocated by rebellious voices during those antebellum decades of state protest against U.S. Supreme Court authority was implemented in one or another version on the European side. The only exceptions to this were the suggestions for state powers to nullify federal law (a power claimed but not acted upon by the Constitutional Court in Italy and Germany, and not institutionalized in the EU) and state power to secede from the union".[204]

Some two decades later – after defiance of the Court of Justice by a number of national courts[205] as well as Brexit – arguably even these are exceptions no more.[206]

These constitutional similarities extend in particular to the reasons given by proponents and opponents of an autonomous federal legal order to justify their understanding of the "real" normative structure of legal order. The asymmetry between nationalists'

[204] L Friedman Goldstein, *Constituting Federal Sovereignty* cit. 43.

[205] Czech Constitutional Court Judgment of 31 January 2021 Pl. ÚS 5/12 *Slovak pensions*; Danish Supreme Court judgment of 6 December 2016 case 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A*; German Constitutional Court judgment of 5 May 2020 cit.; Polish Constitutional Tribunal Judgment of 7 October 2021 cit. While these constitutional courts did not strictly speaking "nullify" EU law – although the Polish Constitutional Tribunal's K3/21 decision comes close to it in regard to arts 1, 4(3) and 19(1) TEU – these judgments are very similar to the judgments of some State courts in the US antebellum period to which Friedman Goldstein refers.

[206] It should of course be noted that the United Kingdom's withdrawal from the EU was not an exercise of raw state power, but a procedure governed by Treaty law.

mostly functional arguments and compact theorists' mostly formal, identity-based arguments – which caused them to largely talk past each other – mirrors contemporary debates about the autonomy of EU law. In those debates, the ECJ mostly uses functional arguments concerning the effectiveness of EU law, while national constitutional and supreme courts mostly use formal arguments emphasising the ultimate sovereignty of the Member States and the constitutional authorisation at the foundation of the EU legal order.

While the structure of legal arguments about the autonomy of the federal order is similar in US antebellum constitutionalism and in EU law, the absence of a monism–dualism dichotomy in US antebellum constitutionalism is an important conceptual difference. The monism–dualism dichotomy, which is central to our contemporary thinking about the relationship between national and international law, frames questions about the "nature" of the EU legal order from an international law viewpoint. Constitutional debates in the early American republic show that this perspective is not inescapable.

Moving beyond an international law perspective on the relationship between the EU legal order and the national legal orders does not mean that the EU is a "federal State", nor does this departure deny that the EU is a creation of public international law. Indeed, it is unproductive, in my view, to conflate the day-to-day functioning of a particular legal structure with its origin.

Moving beyond an international law framing of EU constitutionalism also does not mean that the legality or effectiveness of the EU legal order may ultimately be contingent either for any particular Member State or for the Member States collectively. However, as long as the EU legal order exists and functions according to its own logic, its autonomy cannot be fully understood in traditional international law terms.[207] In this regard, the example of the early American republic reinforces a distinctly federal perspective on the EU and its legal structure.[208]

[207] See also K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' cit., and J Rendl, 'The Sphere of Intervention: EU Law Supranationalism and the Concept of International Treaty' cit. Cf *e.g.* P Eleftheriadis, *A Union of Peoples* cit.; T Moorhead, 'European Union Law as International Law' (2012) European Journal of Legal Studies 126; D Wyatt, 'New Legal Order, Or Old?' (1982) ELR 147.

[208] See also R Schütze, 'On "Federal" Ground' cit.; S Larsen, *The Constitutional Theory of the Federation* cit.

ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

Edited by Justin Lindeboom *and* Ramses A. Wessel

AUTONOMY: THE CENTRAL IDEA OF THE REASONING OF THE COURT OF JUSTICE

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TABLE OF CONTENTS: I. Introduction. – II. The concept of autonomy beyond a jurisdictional claim. – III. Autonomy as a source of coherence. – IV. Autonomy's omnipresence in the case law of the Court. – IV.1. Autonomy operating visibly. – IV.2. Autonomy not explicitly mentioned but operating actively. – IV.3. Autonomy as a silent undercurrent. – V. Conclusion.

ABSTRACT: This *Article* aims to demonstrate that if there is a single vision of the jurisprudence of the Court of Justice of the European Union, it is the idea of autonomy. It portrays how autonomy, defined as an idea of a new legal order with its distinct ontological and axiological character, serves as an organizing principle ensuring the coherence of the case law. It first examines the concept of autonomy, and then investigates the presence of autonomy in the case law of the Court, arguing that it is either explicitly or implicitly always present as the undercurrent in the Court's legal reasoning. It goes on to show the inextricable link between autonomy and the fundamental principles of the EU legal system, among them the rule of law, the protection of human rights and the effectiveness of the EU legal order. By drawing upon case law of the Court in varied areas of EU law, the *Article* establishes that autonomy, with its distinct character, is the most important guideline in understanding the Court's jurisprudence, ensuring its predictability and coherence. Autonomy vitally ensures pluralism of the European Union by contributing to the integrity of the judicial process and enabling the Court to speak with one voice. Through Aristotle's' approach for the search of knowledge, the *Article* portrays that autonomy is not the end in itself, but is rather vital for realizing the goals and values of the European Union.

KEYWORDS: European Court of Justice – autonomy – coherence – rule of law – human rights – legal reasoning.

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The fox knows many things, but the hedgehog knows one big thing.
The fox, for all his cunning, is defeated by the hedgehog's one defence.[**]

I. Introduction

The Court of Justice of the European Union (hereafter "the Court") has been a principal actor of the development of the European Union legal system.[1] Its achievements have been extraordinary, and the Court enjoys considerable interpretive authority. Despite occasional friction with courts in individual Member States and relentless academic criticism, the Court remains an influential actor in the European and global judicial landscape.

Sustaining coherence of the case law has been understood as a vital constitutional responsibility of the Court.[2] Ronald Dworkin would argue that courts need to have a unified vision of the legal system in which they operate in order to reach coherent decisions. Interpretation of the law as speaking with one voice, as Dworkin's idea of law as integrity requires, is a value with special relevance in the legal realm.[3] Dworkin's idea of law speaking with one voice relates to Isaiah Berlin's argument that hedgehogs "relate everything to a single central vision".[4] The fox knows many things, Berlin argues, "but the hedgehog knows one big thing. The fox, for all his cunning, is defeated by the hedgehog's one defence".[5] The jurisprudence of the Court has been approached from several perspectives including ideology,[6] neoliberalism,[7] *effet utile* and teleology,[8] internal

[**] I Berlin, 'The Hedgehog and the Fox: An Essay on Tolstoy's View of History' in *The Proper Study of Mankind: An Anthology of Essays* (Farrar, Straus and Giroux 2000).

[1] G de Búrca and JHH Weiler (eds), The European Court of Justice (Oxford University Press 2001); E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) AJIL 1; KJ Alter, *The European Court's Political Power: Selected Essays* (Oxford University Press 2009); JHH Weiler, 'The Transformation of Europe' (1991) YaleLJ 2403.

[2] N Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2013). This book examines the Court's constitutional responsibility to articulate a coherent vision of the EU internal market in the jurisprudence of free movement.

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

[4] I Berlin, 'The Hedgehog and the Fox: An Essay on Tolstoy's View of History' cit. 1: "For there exists a great chasm between those, on one side, who relate everything to a single central vision, one system, less or more coherent or articulate, in terms of which they understand, think and feel – a single, universal, organising principle in terms of which alone all that they are and say has significance – and, on the other side, those who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some de facto way, for some psychological or physiological cause, related to no moral or aesthetic principle".

[5] *Ibid*.

[6] T Ćapeta, 'Ideology and Legal Reasoning at the European Court of Justice' in T Peršin and S Rodin (eds), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (Hart Publishing 2018) 89; D Kukovec, 'Law and the Periphery' (2015) ELJ 406.

[7] A Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) ELJ 711, 721.

[8] N Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20 FordhamIntlLJ 656, 672 ff.

market logic,[9] or globalization logic,[10] deeper integration,[11] positivism[12] and constitutionalism.[13] Practitioners, fellow judges, politicians and academics alike critique, comment and attempt to predict the case law of the Court from numerous perspectives, which could be understood as perspectives of the fox.

What, if anything, however, could be understood as the hedgehog's perspective – as a single central vision and force that makes the jurisprudence of the Court follow its specific path? How can the unity and coherence of the European legal system sitting above a diverse mix of national legal systems, with several different languages, be ensured?[14] What is the organising principle of coherence of the Court, given its role in the European Union? [15]

[9] D Kochenov, 'EU Citizenship: Some Systemic Constitutional Implications' in N Cambien, D Kochenov and E Muir (eds), *European Citizenship under Stress* (Brill Nijhoff 2020) 11, 14 ff: "EU citizenship is not yet unquestionably endowed with fundamental rights. While numerous EU citizenship rights are obviously there, [...] from free movement and family reunification to social assistance, citizens' initiative and fundamental rights in times of economic crisis, to freedom to move investments around the Union and voting rights – the dependence of any EU citizenship rights claims on the division of competences between the EU and the Member States unquestionably demonstrates the far-reaching limits of EU citizenship. This is because the division of competences between the EU and the Member States generally follows what one can term as a cross-border or internal market logic." J Mulder, 'Unity and Diversity in the European Union's Internal Market Case Law: Towards Unity in "Good Governance"?' (2018) Utrecht Journal of International and European Law 4, argues that the challenge is finding unity in social diversity and many commentators consider that the Court has interpreted the constitutional foundation of the European Union as having turned market access rights into fundamental rights and social policy into an obstructive power that has to be limited. He contends that the Court has developed a proportionality assessment that is able to accommodate a plethora of Member State policy choices.

[10] J Meeusen, 'The "Logic of Globalization" Versus the "Logic of the Internal Market": A New Challenge for the European Union' (2020) AUC – Iuridica 19, 19: "In its recent judgment in Google/CNIL (C-507/17), on the territorial reach of the EU data protection rules and the "right to be forgotten", the CJEU introduces a new "logic of globalization" which must be distinguished from the traditional "logic of the internal market". While the latter justifies extraterritoriality in case internal market interests are affected, restraint characterizes the former".

[11] C Lebeck, 'National Constitutionalism, Openness to International Law and the Pragmatic Limits of European Integration European Law in the German Constitutional Court from EEC to the PJCC' (2006) German Law Journal 907, 936: "The integrationist approach relies thus to some extent on the assumption that democratic procedures are less effective than other institutional designs to resolve gridlocks, which also requires courts to step into to solve the problems".

[12] A Somek, 'Liberalism and the Reason of Law' (2020) ModLRev 394.

[13] HW Micklitz and N Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive' (2014) CMLRev 771.

[14] S Prechal and B van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008).

[15] There is a recurrent question of the source of coherence of the decision-making of the Court of Justice of the European Union, in comparison to national constitutional courts. See for example: U Šadl and J Bengoetxea, 'Theorising General Principles of EU Law in Perspective: High Expectations, Modest Means and the Court of Justice' in S Vogenauer and S Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 41. For the exploration of the notion of coherence in European Union

This *Article* explores whether autonomy, defined as an idea of a new legal order with its distinct ontological and axiological character, can be understood as such a single, universal, organizing meta vision in terms of which all that the Court does has significance.

It is submitted that autonomy serves as an organizing principle, it makes the case-law of the Court comprehensible and offers both a better ex ante insight of what is to be expected from the Court in terms of its decision-making as well ex post explanation of the Court's judgments. A reconstruction of the case law of the Court in light of such a vision offers a starting-point for legal investigation of the jurisprudence of the Court.

A clear caveat may best be put forward in the beginning. We may never discover all the causal chains that operate in any legal system. The number of such causes is infinitely great, the causes themselves infinitely small.[16] Yet, as this article argues, autonomy can be understood as representing the single synoptic vision of coherence and integrity of the Court. Autonomy reverberates throughout the case law and lawyers engaging with the Court miss it at their peril. Given the Court's unique position in the European and global judicial fabric, autonomy would justifiably be its central force.

Section II explains the development and understanding of autonomy in EU law in light of the case-law of the Court that explicitly mentions it. It proposes that autonomy should not be understood merely as a shield against other legal systems, as a jurisdictional claim, but as an ideal principle that guides the argument of the Court.

Section III first explains the role of coherence in legal argument in general. It then argues that autonomy is justifiably the source of coherence of the Court's case law given its specific ontological and axiological character that is constantly evolving and reshaping in the process of ordering pluralism.

Section IV argues that autonomy is omnipresent in the reasoning of the Court and that it is the centripetal force of EU case law, even when invisible and not explicitly mentioned in decisions of the Court. This section identifies some of the "deep currents" of autonomy running through the case law, specifically by showing that human rights protection and the rule of law are not an irritant to autonomy, but rather inseparable from it and that they are mutually reinforcing. It also explains why equation of autonomy with sovereignty does not accurately grasp its character, and how the autonomy of the EU legal order is intrinsically connected to its effectiveness. It is further argued that no other principle can plausibly compete with autonomy in enabling the new legal order's coherence. Finally, it argues that the autonomy as coherence reflects the Aristotelian analysis of seeking knowledge and that autonomy, as the coherence-enabling cause, is not the end-goal in and of itself. It rather ensures that all the goals and values of the Treaty are realized.

The *Article* concludes that autonomy is the most foundational element of the Court's reasoning, ensuring the coherence of its decision-making, its predictability and consistent

law, see also for example D Duic, 'The Concept of Coherence in EU Law' (2015) Zbornik Pravnog Fakulteta u Zagrebu 537.

[16] Berlin, 'The Hedgehog and the Fox: An Essay on Tolstoy's View of History' cit. 459.

development of legal principles. It is the hedgehog's synoptic vision, the Court's "one big thing", which has made the EU legal system what it is today.

II. The concept of autonomy beyond a jurisdictional claim

Autonomy is one of the most contested concepts of EU law. This section will first explain the historical development of autonomy in the case law of the Court and some of the best-known cases on autonomy, which have led to its understanding as a shield against other legal systems, protecting autonomy from external control and influence. Yet, this understanding does not fully appreciate autonomy's central role in the case law of the Court.

Autonomy has been understood as self-rule and ability to choose the path for itself.[17] It has been also understood as a relationship of an autonomous order with others and an ability to shape this relationship.[18] It has been further described as an instantiation of independence, of freedom from external control or influence.[19] The concept of autonomy exists in public international law, however, it has developed into a self-standing idea with precise legal meaning in EU law.[20]

Autonomy, or a claim to a legal order autonomous from national law of Member States, as well as from international law, has been called the single most far-reaching, and probably most disputed, principle of the European Union.[21] It has been said to be one out of several elements that, combined, make up "the essentials of European constitutional law".[22] The idea of "an independent source of law" has been central to its development. [23]

[17] J Odermatt, 'When a Fence becomes a Cage: The Principle of Autonomy in EU External Relations Law' (EUI Working Papers 07-2016).

[18] JW van Rossem, 'The Autonomy of EU Law: More is Less?' in RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence The EU Legal Order under the Influence of International Organisations* (Springer 2013) 13.

[19] *Shorter Oxford English Dictionary* (Oxford University Press 2007); C Vajda, 'Achmea and the Autonomy of the EU Legal Order' (LAwTTIP Working Papers 1-2019) 9 ff.

[20] J Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' cit. 3 ff. On various ways of understanding autonomy see also KS Ziegler, 'Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law' in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017) 267; 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.

[21] T Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) HarvIntLJ 389.

[22] N Lavranos, 'Protecting European Law from International Law' (2010) European Foreign Affairs Review 265. Lavranos lists autonomy alongside other notions such as the allocation of powers fixed by the EU Treaties and the Court's exclusive jurisdiction.

[23] Case 6/64 *Costa v E.N.E.L.* ECLI:EU:C:1964:66. According to the Court in *Costa*, "the law stemming from the Treaty, an independent source of law, could not [...] be overridden by domestic legal provisions [...] without the legal basis of the Community itself being called into question".

Autonomy started its development internally, against the legal orders of the Member States in the 1960s. It was primarily discussed within the framework of supremacy and direct effect. Much as it is apparent today, the Union with powers which could be exercised independently of the Member States was not self-evident from the inception of the Community.[24] The seeds of autonomy in European Union law were sown in the *Van Gend en Loos* judgment in which the premise of direct effect and the new legal order was established, including the premise that the question of direct effect was a question of EU law.[25] In other words, it is EU law, an autonomous legal system, itself that determines the effect and nature of European Union law within the national legal orders.[26]

Costa Enel set out that the premise of the new legal order having direct effect could succeed only when "an independent source of law" or in French "une source autonome"[27] had been established.[28] Without such a basis, the Court had thought, the direct effect and primacy could fall prey to considerations of a national constitutional nature. This was even more clearly set out in *Stauder* and *Internationale Handelsgesselschaft*. The motive of unity is enveloped in the principle of supremacy's aim to prevent significant distortions as regards the application of EU law in the Member States.[29]

These origins of autonomy were given concrete expression in the Opinion 2/13[30] in which the Court of Justice concluded that the draft agreement on the EU's accession to the European Convention on Human Rights (ECHR) was not in line with the Treaties and Protocol 8. The Court was concerned that the draft Accession Agreement did not take into consideration the special character of the autonomous legal order of the EU, including the judicial dialogue and mutual trust, some of the best-known features of autonomy. The effect of the EU's proposed accession on the unity and effectiveness of the autonomous EU legal order with its own particular ontological character stood out as its central concern.[31]

[24] Case 26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1, especially referring to the Member States' submissions.

[25] B de Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press 2012) 323.

[26] R Schütze, 'EC Law and International Agreements of the Member States: An Ambivalent Relationship?' (2007) CYELS 387; Case 12/86 *Demirel v Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400. The Court recognised the direct effect of certain agreements in accordance with the same criteria identified in the *Van Gend en Loos v Administratie der Belastingen* cit.

[27] JW van Rossem, 'The Autonomy of EU Law: More is Less?' cit.

[28] The English version of Costa speaks of "independent" instead of "autonomous". Other language versions, however, including the French original, consistently speak of "autonome" – French and Dutch – or "autonomen" – German.

[29] JW van Rossem, 'The Autonomy of EU Law: More is Less?' cit.

[30] Opinion 2/13 *Adhésion de l'Union à la CEDH* ECLI:EU:C:2014:2454.

[31] *Ibid*. Likewise, the Court was concerned that the principle of mutual trust could be harmed by the scrutiny of national courts' decisions within the framework of European Arrest Warrant, Dublin II and

Furthermore, autonomy is explicitly mentioned in external relations case law when the Court seeks to remain in control and preserve its exclusive jurisdiction to interpret and apply European Union law.[32] It became clear in the Opinion 2/13, in the *Mox Plant*,[33] and in *Achmea*[34] that the goal of protection of autonomy in these situations is set in art. 344 of the Treaty, which safeguards against Member States submitting disputes which concern EU law to tribunals other than the Court of Justice.[35] According to this article, "the interpretation or application of the Treaties" should be reserved to the Court.

Another example of the Court's concern for its own autonomous decision-making is the Opinion 1/91. The Court rejected the newly-created EEA tribunal, because it would be competent to guarantee the homogeneous application of rules of the EEA agreement, itself identically-worded to the Union rules. This would create a parallel and binding interpretation to that of the Court, effectively handing over the keys as regards the

Brussels II Regulation, which could significantly limit the effectiveness of the autonomous EU legal order. The Court was wary of the threat to the judicial dialogue between the Court of Justice and national courts. The Court had several other reservations, including concerning the jurisdiction of the ECtHR in the sphere of common foreign and security policy, which it itself does not have or concerning the co-respondent mechanism, whereby the ECtHR would be assessing the requests by the EU and the Member States to join proceedings, which would require interpretation of EU law by the ECtHR, a role that is reserved by the Treaties to the court of Justice of the European Union.

[32] J Odermatt, 'When a Fence becomes a Cage: The Principle of Autonomy in EU External Relations Law' cit. 5; JW van Rossem, 'The Autonomy of EU Law: More is Less?' cit.19.

[33] Case C-459/03 *Commission v Ireland* ECLI:EU:C:2006:345, para 154. In the *Mox Plant* case, the treaty at issue was the United Nations Convention on the Law of the Sea (UNCLOS), which constitutes a global multilateral agreement on the law of the sea. The case arose from a dispute between the United Kingdom and Ireland regarding a nuclear facility situated on the coast of the Irish sea. Ireland started the arbitral procedure against the UK at the level of international law pursuant to the dispute settlement provisions in UNCLOS. However, as the dispute also touched upon EU law, the Court could not accept the manifest risk to the jurisdictional order laid down in the Treaties by another tribunal deciding on questions of European Union law.

[34] Case C-284/16 *Achmea* ECLI:EU:C:2018:158. Achmea has clearly set the end of the intra-Union investment treaties criticized from several perspectives, particularly from the perspective of lowering investor protection in the European Union. See L Ankersmit, 'Achmea: le début de la fin du RDIE en et avec l'Europe?' (24 April 2018) International Institute for Sustainable Development www.iisd.org. The comments went as far as to argue that the CJEU has gone as far as *ultra vires* and that the judgment should thus not be respected by national legal systems: JP Gaffney, 'Slovak Republic v. Achmea: A Disproportionate Judgment?' (14 September 2018) Kluwer Arbitration Blog arbitrationblog.kluwerarbitration.com. 'Declaration of the Member States of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection' (17 January 2019) finance.ec.europa.eu. The joint statement of several Member States that *Achmea* will be respected gave a clear message.

[35] There have been numerous critiques of the *Achmea* judgment. Kochenov has argued that the *Achmea* judgment and post-*Achmea* developments such as the recently signed Termination Agreement to terminate the intra-EU BITs have been leading to significant – possibly irreparable in the short- to medium-term – lowering of the procedural and substantive protection standards for European investors in times when they are in need of more rather than less protection. D Kochenov and N Lavranos, '*Achmea* versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union' (2022) Hague Journal on the Rule of Law 195.

interpretation of EU law to another tribunal and seriously infringing the EU law's autonomy.[36] International treaties concluded by the Union thus cannot alter the competences of its organs, including of the Court, as set out in the Treaties.[37]

The motivation behind the Court's assertion of jurisdiction is a desire to ensure uniform and consistent interpretation of European Union law.[38] Autonomous decision-making of the Court was confirmed to be ensured in the Opinion 1/17 regarding the investment chapter in the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA).[39] CETA's investor-state dispute settlement system withstood the test of protection of the autonomous legal order[40] because its decision-making was deemed to be constructed in a way that did not infringe upon the Court's autonomous decision-making, similar to the WTO resolution system, whose panel resolutions are not directly effective and are entirely separate from the decision-making of the Court.

Unity and effectiveness of the autonomous EU legal order were also the Court's concern in several other cases regarding its relationship to international law.[41] Importantly, in *Kadi* the Court referred to "the autonomy of the Community legal system" and explained that the exclusive jurisdiction conferred on it by the Treaty forms "part of the very foundations of the Community".[42] The Court also clearly set out that

[36] Opinion 1/91 *Accord EEE - I* ECLI:EU:C:1991:490 para. 35.

[37] Opinion 1/09 *Accord sur la creation d'un système unifiè de règlement des litiges en matière de brevets* ECLI:EU:C:2011:123 paras 76–89; see also Opinion 1/00 *Accord sur la creation d'un espace aérien européen commun* ECLI:EU:C:2002:231 paras 12ff; Opinion 1/76 *Accord relative à l'institution d'un Fonds européen d'immobilisation de la naivigation intérieure* ECLI:EU:C:1977:63. Court of Justice's autonomous decision-making prerogatives was a concern in Opinion 1/76, in which it rejected the formation of a judicial body which would be composed of six Judges of the Court and one from Switzerland, as the former Judges would face a conflict of allegiance.

[38] Opinion 1/91 cit. para. 40: "An international agreement providing for such a system of courts is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions".

[39] See C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review 1. The separation provision of art. 8.31.2 CETA stated, first, the ISDS mechanism "shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of CETA"; second, it "may consider, as appropriate, the domestic law of a Party as a matter of fact"; third, it "shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party"; and, fourth, "any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party".

[40] *Ibid*.

[41] There is rich literature on the subject of the relationship between international law and EU law. See e.g. JHH Weiler and UR Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass' (1996) HarvIntLJ 411; T Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' cit.; R Barents, *The Autonomy of Community Law* (Kluwer Law International 2004); B de Witte, 'European Union Law: How Autonomous is its Legal Order?' (2010) Zeitschrift für öffentliches Recht 141.

[42] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461, para 282.

international norms should not be allowed to bypass the rule of law which underpins the Treaties and particularly the central aspect of the Court's mission – judicial review and protection of rights.[43]

The ensuing discussion and criticism of that case law on autonomy have focused on its jurisdictional character, shielding the European Union from external control and influence. Autonomy has been, with rare exceptions,[44] a repeated target of academic criticism, particularly coming at the expense of the EU's effective participation in the international legal order,[45] including joining the European Convention on Human Rights.[46]

In this context, it has been often asserted that autonomy is akin to the claim of sovereignty.[47] Following such understanding the argument was that the EU needs more protection than that of a well-established sovereign state because of the nature of the EU legal order.[48] Autonomy has been understood as an absolute or relative, primarily jurisdictional, institutional or normative *claim of the Court*.[49]

Autonomy indeed seems to speak loudest when the constitutional core of the European Union is at risk. The defensive character and shield[50] of autonomy are an emanation of its development. Yet, autonomy plays a wider role than an exclusive *claim*

[43] *Ibid*.

[44] D Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of *Opinion 2/13* on EU Accession to the ECHR, and the Way Forward' (2015) German Law Journal 105.

[45] G de Búrca, 'The EU, the European Court of Justice and the International Legal Order after Kadi' (2009) HarvIntlLJ 1; J Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' cit. 5; B de Witte, 'European Union Law: How Autonomous is its Legal Order?' cit. 150. For the critique of the *Mox Plant* case see: M Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) European Journal of Legal Studies 1; J Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press 2009) 148.

[46] See B de Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart 2014) 33; D Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of *Opinion 2/13* on EU Accession to the ECHR, and the Way Forward' cit.; P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' (2015) FordhamIntlLJ 955; J Malenovský, 'Comment tirer parti de l'avis 2/13 de la Cour de l'Union européenne sur l'adhésion à la Convention européenne des droits de l'homme' (2015) RGDIP 705; F Picod, 'La Cour de justice a dit non à l'adhésion de l'Union européenne à la Convention EDH – Le mieux est l'ennemi du bien, selon les sages du plateau du Kirchberg' (2015) Semaine Juridique Edition Générale 230; E Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) Maastricht Journal of European and Comparative Law 35; D Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) Yearbook of European Law 74.

[47] C Eckes, 'The Autonomy of the EU Legal Order' cit.; JW van Rossem, 'The Autonomy of EU Law: More is Less?' cit.

[48] C Eckes, 'The Autonomy of the EU Legal Order' cit.

[49] J Odermatt, 'When a Fence becomes a Cage: The Principle of Autonomy in EU External Relations Law' cit. 1.

[50] C Eckes, 'The Autonomy of the EU Legal Order' cit.

by the Court.[51] To Van Rossem, autonomy denotes the quality, rather than quantity of the legal order. He has also argued that autonomy is not exactly in the same league as primacy, fundamental rights protection or judicial review, but rather forms a premise upon which such fundamental principles are built.[52]

Autonomy is the Court's synoptic vision, which has made the EU legal system what it is today. Autonomy is not a principle to be balanced, not a right, not a telos, but rather the Court's central ideal element in the background of supremacy, direct effect, judicial review, fundamental rights, rule of law and other doctrines and principles of EU law. The Court keeps remaking it in this vision - it is the Court's "one big thing". To fully grasp the notion of autonomy and its role in the decision-making of the Court, its role in legal reasoning needs to be addressed, also in cases when autonomy is not explicitly mentioned. Autonomy is sometimes visible, explicitly mentioned by the Court, and at other times it is not, yet it is omnipresent in the judgments of the Court.

If this proposition is true, the "bad man", in the sense of Oliver Wendell Holmes[53] – who can be clearly also a well-intentioned citizen or anyone who would like to get to know the system before investing precious time and resources into a legal dispute –, who would like to understand or predict the decision-making of the Court, would have to first, on the most essential systemic level, turn to autonomy to understand the Court's overall past and future decision-making.

In order to explore autonomy's character as an ideal principle that guides the argument of the Court, it is necessary to turn to the broader role of autonomy in legal reasoning and, specifically, to the argument of coherence.

III. Autonomy as a source of coherence

A legal system, properly so called, establishes criteria of good and sufficient legal argument.[54] According to Dworkin, judges in the courts make legal assertions in line with established "ground rules".[55] The ground rules of legal enterprise state the truth conditions for the propositions of law.[56]

[51] Judge Vajda helpfully distinguishes between the normative, jurisdictional and institutional. See C Vajda, 'Achmea and the Autonomy of the EU Legal Order' cit.

[52] JW van Rossem, 'The Autonomy of EU Law: More is Less?' cit. 18: "In any event, the bottom line of this argument is that autonomy is not exactly in the same league as, say, primacy, fundamental rights protection or judicial review, but forms the premise upon which such fundamental principles of EU law are built".

[53] OW Holmes, 'The Path of Law' (1897) 10 HarvLRev 457. Such an exploration of the process of decision-making also fits into the Oliver Wendel Holmes' understanding of the legal system. According to Holmes, law in action is what courts are likely to do in fact. This is what the "bad man" is interested in in fact when trying to predict the Court's decision-making. The prophecies of what the courts will do in fact, and nothing more pretentious, are what he means by the law.

[54] L Sargentich, *Liberal Legality: A Unified Theory of Our Law* (Cambridge University Press 2018) 22.

[55] *Ibid*. 23.

[56] *Ibid*.

Coherence is a ground rule with special relevance in the legal realm in terms of the role which it should play in guiding judges seeking to interpret the law correctly. It plays an important role in Dworkin's understanding of law as integrity, which means that law is a coherent phenomenon, rather than a set of discrete decisions. Features of the law such as the doctrine of precedent, arguments from analogy, and the requirement that like cases be treated alike seem particularly apt to be illuminated via some kind of coherence explanation.[57] Coherence is certainly not the sole desideratum which guides the Court in interpreting the law. The Court's interpretative reasoning has been argued to be best understood in terms of a tripartite approach whereby the Court justifies its decisions in terms of the cumulative weight of purposive, systemic and literal arguments.[58] Coherence is merely one, albeit important, feature of a successful interpretation.[59]

When a judge decides a "hard case", her decision must fit the existing legal landscape. The decision must be coherent with the cases, statutes, constitutional provisions, and so forth. This requirement of fit is holistic. That is, the decision must fit all of the law and not just the law that is directly relevant to the case at hand.[60] As the European Union forms a united, self-referential legal order, with its own internal claim to validity,[61] the Court's essential concern is its unity and the uniform application of its rules.[62] Citizens are entitled to a coherent and principled extension of past decisions. Therefore, coherent decision-making of the Court plays an important role.

In order to properly seek out the source of coherence of the Court's decision-making, it has to be considered that coherence needs to be in touch with the concrete reality of

[57] J Dickson, 'Interpretation and Coherence in Legal Reasoning' (10 February 2010) Stanford Encyclopaedia of Philosophy plato.stanford.edu.

[58] G Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2013).

[59] R Dworkin, *Law's Empire* cit.

[60] L Solum, 'Legal Theory Lexicon: The Law Is A Seamless Web' (31 July 2011) Legal Theory Blog lsolum.typepad.com. A coherence account of adjudication, according to Raz, hold that courts ought to adopt that outcome to a case which is favoured by the most coherent set of propositions which, would justify them.

[61] JW van Rossem, 'The Autonomy of EU Law: More is Less?' cit. 19. Exploration of autonomy in its jurisprudential sense leads to Hart's understanding of autonomy. Lindeboom has forcefully explained from the Hartian perspective that legal systems are autonomous when they have their own rule of recognition, rules constituting its foundation. He argues that the Court's case law on autonomy, supremacy and direct effect can be conceptualized as internal statements referencing this rule of recognition, which leads him to conclude that we should be comfortable in recognising the EU legal system's autonomy even if we do not normatively endorse it. See J Lindeboom, 'The Autonomy of EU Law: A Hartian View' (2021) European Journal of Legal Studies. A strong Hartian jurisprudential backing is reassuring for the notion of autonomy in EU law. Hart's theory, however, has significant limitations in explaining the role of autonomy in the legal reasoning of the Court. There is a general obstacle in using Hart's theory in addressing legal reasoning of courts. Hart largely ignores the regimen that controls ideal argument in liberal legality. L Sargentich, *Liberal Legality: A Unified Theory of Our Law* cit. 108.

[62] JW van Rossem, 'The Autonomy of EU Law: More is Less?' cit.19; R Barents, *The Autonomy of Community Law* cit.

law in the jurisdiction under consideration.[63] The judicial context and the role of courts in a democratic polity vitally affect courts' interpretative methods.[64] Only judicial philosophy reflecting the court's systemic understanding of the normative preferences and institutional constraints of the legal order in which those courts operate is capable of securing the coherence and integrity of that legal order and judicial accountability, constraining the power of those courts to the normative preferences of that legal order.[65]

The institutional and normative context of the Court in the European Union is increased internal and external pluralism.[66] Internal pluralism encompasses plurality of constitutional sources (both European and national) and conditional acceptance of supremacy of European Union law over national constitutional law, which confers upon European Union law a kind of contested or negotiated normative authority, as well as political pluralism that can assume a radical form, particularly as conflicting political claims are often supported by claims of national authority.[67] External pluralism, on the other hand, derives from the increased interaction and interdependence of the European Union legal order with international legal order.[68] This context requires the Court to adopt particular methods of interpretation[69] and is also specifically, important for securing coherence.

The European Union is characterized by deep disagreement.[70] This deep disagreement was the reason for its creation[71] and is also one of the factors that keeps justifying its existence. In other words, overcoming deep division on issues concerning virtually every area of social life is the Union's historic raison d'être.[72] The European Union's mandate lies in this particular constant development. The Court is set in an organization committed to healing the deep and perpetual divisions of Europe in practically every field of social life.[73]

[63] J Raz, 'The Relevance of Coherence' in J Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) 277.

[64] M Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) European Journal of Legal Studies 137, 138 ff.

[65] *Ibid*. 139. Maduro argues that the Court of Justice reasons in light of the broader context provided by the EU legal order, specifically pluralism and in light of its systemic context, "the constitutional telos". So there is not only the telos of the rules, but also a telos of the legal context in which those rules exist. Maduro thus discusses the teleological and metatelological reasoning which is important for autonomy of the EU legal order as it assumes an independent normative claim and a claim of completeness, as these claims face national legal challenges.

[66] *Ibid*. 137–138.

[67] *Ibid*.

[68] *Ibid*. 138.

[69] *Ibid*. 138 ff.

[70] J-C Milner, *Considérations sur l'Europe* (Éditions du Cerf 2019).

[71] The Schuman Declaration (9 May 1950) www.consilium.europa.eu.

[72] G de Búrca, 'Europe's Raison d'Être' in D Kochenov and F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge University Press 2013).

[73] Much as is at the same time committed to human rights protection. The claim that the European Court of Justice is not a human rights court should be understood in this sense. A Rosas and L Armati, *EU*

What is the source of coherence in such a diverse and specific entity such as the European Union, characterized by internal and external pluralism? Some have argued that the Court decides cases based on the creation of the common market or the market logic,[74] others have argued that deeper integration guides the Court's reasoning.[75] Yet, the thinking of the Court cannot be reduced to such propositions,[76] as will be further explained in the next section.

If a coherent voice of a Court set in such pluralism cannot be based on "the internal market" nor on "further integration", what can it be based on? Clarification is offered by Dworkin's idea of law as a fraternal attitude, an expression of how we are united in community though divided in project, interest and conviction.[77] Judges are instructed to identify legal rights and duties, so far as possible, on the assumption that they were created by a single author—the community personified.[78] Legal interpretation is a function of this larger community upon which the Court and the European Union depend and which evaluates the legitimacy of the Court. What larger community is the Court set in?

The Court of Justice finds itself in a particular structure of constitutional pluralism and needs to deliver justice and coherence within this ontological[79] premise. The constitutional pluralism of the European Union entails a distinct form of political pluralism and normative

Constitutional Law: An Introduction (Hart 2018) 51. The European Court of Human Rights (ECtHR) is set in a different ontological, normative and judicial institutional environment (ibid) and to some extent also in a different axiological structure than the Court of Justice. The normative divergence of the parties to the European Convention of Human Rights should not be undermined and the axiology of the ECtHR is clearly not permanently fixed either. However, the ECtHR is a court set in an organisation whose aim is common commitment to human rights protection by contracting parties extending far beyond the Member States of the European Union. It is characterized by ex post, subsidiary control of human rights protection.

[74] J Mulder, 'Unity and Diversity in the European Union's Internal Market Case Law: Towards Unity in "Good Governance"?' cit.: Mulder argues that the challenge is finding unity in social diversity and many commentators consider that the Court has interpreted the constitutional foundation of the European Union as having turned market access rights into fundamental rights and social policy into an obstructive power that has to be limited. He contends that the Court has developed a proportionality assessment that is able to accommodate a plethora of Member State policy choices. J Meeusen, 'The "Logic of Globalization" Versus the "Logic of the Internal Market": A New Challenge for the European Union' cit.: "In its recent judgment in Google/CNIL (C-507/17), on the territorial reach of the EU data protection rules and the "right to be forgotten", the CJEU introduces a new "logic of globalization" which must be distinguished from the traditional "logic of the internal market". While the latter justifies extraterritoriality in case internal market interests are affected, restraint characterizes the former". Case C-507/17 *Google (Territorial scope of de-referencing)* ECLI:EU:C:2019:772.

[75] P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' cit.

[76] D Kukovec, 'Law and the Periphery' cit.

[77] R Dworkin, *Law's Empire* cit.

[78] J Dickson, 'Interpretation and Coherence in Legal Reasoning' cit.

[79] S Rodin, 'A Metacritique of the Court of Justice of the EU' (2 November 2015) Bingham Centre talk www.biicl.org. Siniša Rodin has argued that interpretation of European Union law takes place within the specific framework of basic ontological identities. Those ontological identities are the Legal Basis, the Act, the Agent and the Legitimacy of the social arrangement under which European Union law operates.

ambiguity[80] in which its axiology, while having a clear common core, is not entirely a priori set or pre-determined. As Rosas points out, at the very top of the hierarchy of EU norms stand the value foundations of the EU legal order (art. 2 Treaty of the European Union (TEU)) as well as national constitutional principles.[81] These principles and their interpretations may diverge. Thus, the axiology of the European Union, while based on fundamental values of art. 2 TEU and national constitutional foundations, is not a priori set, but is rather developed constantly within the premise of autonomy of EU law in a dialogue with national legal systems and the international legal sphere.

The Union can indeed be described as a *Verfassungverbund*, a constitutional compound,[82] which rests on general constitutional principles that all actors have in common as well as on pluralist normative awareness[83] in which national courts and legal systems constantly interact with the European Union courts and EU law. It is in this relationship of constant dependency that the axiology is developed according to the vision of the founding fathers as embodied in the Treaties.[84] In other words, while the European Union is based on the fundamental common (and possibly conflicting) axiological commitments, a priori axiological coherence would not allow for the kind of pluralism that the Union is constantly ordering, specifically through dialogical engagement in the preliminary reference procedure, but also otherwise, in a constant judicial relationship with national legal orders and the international legal sphere.

How can the community of the EU, characterized by profound pluralism, speak with one voice? In the described ordering of pluralism, it is autonomy of EU law that can provide the unity that is necessary in the pursuit of the many goals of the Union and which justifiably acts as an essential source of coherence of the Court's decision-making. In the context of the European Union, the notion of autonomy receives a unique ontological and axiological character that also defines its sui generis nature. Autonomy, an idea of a new legal order with its distinct ontological and axiological character, is a predisposition for a dialogue with other, national and international, legal systems. Pluralism, as ordered in the European Union, needs an ideal element of autonomy of EU law to fulfil its promise of simultaneous unity and diversity, an autonomous system that is also in dialogue and open to the wider world, satisfying both the demands of internal and external pluralism. Autonomy of EU legal order defines and legitimates the proper role of the Court in the European Union and in the world and provides the source of its legitimacy.

Thus, the Court's most fundamental argument of coherence needs to be pursued within the premises of this pluralist mandate. Autonomy is a predisposition of pluralism. It

[80] M Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' cit. 145.

[81] A Rosas and L Armati, *EU Constitutional Law: An Introduction* cit.

[82] JW van Rossem, 'The Autonomy of EU Law: More is Less?' cit.

[83] M Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' cit.

[84] See The Schuman Declaration cit.

keeps ensuring pluralism whilst enabling the Court to speak with one voice. The notion of the autonomous EU legal order articulates a coherent system in which the Court can provide the best fit that would otherwise be lacking in a context of constitutional pluralism.

IV. Autonomy's omnipresence in the case law of the Court

After establishing that autonomy is justifiably the Court's essential source of coherence, this section explores how autonomy provides the omnipresent normative fabric of the Court's decision-making and guides its legal argument, even if not explicitly mentioned in the case law. It identifies some of the "deep currents" of autonomy, which run through the case law, clearly without the aim of being exhaustive. The section explains how autonomy assists, in numerous ways, in leading the Court to the conclusion that one interpretation provides a better justification of existing constitutional practice than another.

The cases addressing the jurisdictional aspect of autonomy, set out in the previous section, have drawn attention to autonomy as a claim of the Court. Understanding autonomy as an occasional claim of the Court leads to the perception that after *Costa Enel* the concept of autonomy disappeared from the radar for a long time and eventually re-emerged at the beginning of the 1990s, in Opinion 1/91.[85] This would indeed be the conclusion if presence of autonomy in the case law was limited to those cases in which autonomy is explicitly mentioned. However, despite the lack of explicit mention, autonomy never disappeared after *Costa Enel.*

The discussion emphasizing the jurisdictional aspect of autonomy assumed that it operates at the outer border of the EU legal order, shielding it from external influence.[86] Autonomy, however, is the centripetal force of EU case law that is just most visible at EU law's outer border, but in fact permeates the legal system as a whole. Autonomy is sometimes visible, explicitly mentioned by the Court, and at other times it is not, yet it is omnipresent in the judgments of the Court.

[85] JW van Rossem, 'The Autonomy of EU Law: More is Less?' cit. As a denominator for the relationship between the Union and the Member States, the notion only resurfaced in Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114, in which the ECJ clarified that the primacy rule makes no exception for norms of a constitutional nature. Cf. further Case 327/82 *Ekro* ECLI:EU:C:1984:11 para. 11; Case C-287/98 *Linster* ECLI:EU:C:2000:468 para. 43, in which the Court stressed the importance of "an autonomous and uniform interpretation" of Community measures. Opinion 1/91 cit. As we have seen, the Court does not explicitly mention the concept of autonomy very often (JW van Rossem, 'The Autonomy of EU Law: More is Less?' cit.). To his knowledge, apart from the four cases discussed in the previous section, there are only three other cases in which the ECJ explicitly mentions the concept of autonomy. These cases are: *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* cit.; Opinion 1/00 cit.; Opinion 1/09 cit.

[86] JW van Rossem, 'The Autonomy of EU Law: More is Less?' cit., 27 ff; J Odermatt, 'When a Fence becomes a Cage: The Principle of Autonomy in EU External Relations Law' cit.

The Court of Justice confirmed the omnipresence of autonomy in the EU legal system in the Opinion 2/13.[87] It explained that autonomy relates to the constitutional structure of the European Union, the nature of EU law, the principle of mutual trust between the Member States, the system of fundamental rights protection provided for by the Charter, the substantive provisions of EU law "that directly contribute to the implementation of European integration",[88] including the Treaty provisions providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy.[89] Furthermore, autonomy relates to the principle of sincere cooperation and to the EU system of judicial protection, the keystone of which is the preliminary reference laid down in art. 267 TFEU.[90]

The Opinion 2/13 thus confirms that judgments that explicitly mention autonomy are an emanation of a much larger undercurrent. The following analysis of its ever-presence reveals the structure of autonomy and its normative influence. A reconstruction of the case law of the Court shows that autonomy operates constantly as a mode of legal reasoning, either visibly or invisibly.

IV.1. Autonomy operating visibly

As noted in the previous section, the autonomy is most visible at the EU law's outer border shielding the European Union from external control and influence. These jurisdictional cases, such as Opinion 2/13, *Kadi*, *Mox Plant*, and *Achmea*, indeed sparked most discussion and criticism. A focus on this type of cases, however, does not fully appreciate the character of autonomy. First, we turn to other instances where autonomy operates visibly in the case law of the Court.

Autonomy is certainly most visibly present any time the Court invokes an "autonomous interpretation". As frequently emphasized by the Court, autonomous concepts must be interpreted independently from national law. The need for uniform application of European Union law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union.[91]

[87] Opinion 2/13 cit.

[88] K Lenaerts, 'The Autonomy of European Union Law' (2019) AISDUE www.aisdue.eu 1.

[89] Case C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936.

[90] Opinion 2/13 cit. paras 174–176.

[91] Case C-610/18 *AFMB and Others* ECLI:EU:C:2020:565. Since the concepts referred to in para 48 of the present judgment play a crucial role in the identification of the applicable national social security legislation in accordance with the conflict of law rules laid down, respectively, in Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security scheme to employed persons and their families moving within the Community, art. 14, and in Regulation (EC) 883/2004 of the European Parliamente and of the Council of 29 April 2004 on the coordination of social security systems, art.13, an autonomous interpretation of those

Autonomy is important particularly when concepts of EU law, if dependent on the specific features of the relevant legislation of the Member States, could create discrepancies in their application within the European Union.[92] There are numerous examples of such interpretation. Autonomous interpretation is required with regard to the notion of the "court" or "tribunal" which may or must make a reference in the preliminary reference procedure. A number of factors are taken into account including whether the court in question is established by law, permanent, with compulsory jurisdiction, deciding *inter partes* and independent.[93] Further examples include the concept of 'misappropriation of State funds', within the meaning of art. 1(1) of Decision 2011/172 and art. 2(1) of Regulation No 270/2011.[94] The concept of an "individual contract of employment" referred to in art. 20 of Regulation No 1215/2012,[95] or the concepts of 'branch, "agency" and "other establishment", referred to in art. 7 of Regulation No 1215/2012 as implying a centre of operations which has the appearance of permanency, such as the extension of a parent body, also require autonomous interpretation.[96]

Furthermore, for the purposes of the issue and execution of a European arrest warrant, the concept of "same acts" in art. 3(2) of Council Framework Decision 2002/584 constitutes an autonomous concept of EU law.[97] Further, in *Mantello*, the Court stated that the *ne bis in idem* principle should be given an autonomous interpretation in EU law.[98]

In public procurement, "a body governed by public law" is an effective concept of EU law which must receive an autonomous and uniform interpretation throughout the EU[99]

concepts becomes all the more essential, as the Advocate General stated, in essence, in point 39 of his Opinion (*AFMB and Others*, opinion of AG Pikamäe, cit.ECLI:EU:C:2019:1010), given the single legislation rule mentioned in para. 41 of the present judgment, which means that the legislation of one single Member State must be designated as being applicable. That interpretation must take into account the context of the provision and the purpose of the legislation in question (*Ekro* cit. para 11). *Linster* cit. para. 43.

[92] Case C-335/14 *Les Jardins de Jouvence* ECLI:EU:C:2016:36 para. 47.

[93] "La qualité de juridiction est interprétée par la Cour comme une notion autonome du droit de l'Union. La Cour tient compte, à cet égard, d'un ensemble de facteurs tels que l'origine légale de l'organe qui l'a saisie, sa permanence, le caractère obligatoire de sa juridiction, la nature contradictoire de la procédure, l'application, par cet organe, des règles de droit ainsi que son indépendance" (Court of Justice of the European Union, Recommendation to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 2).

[94] Case T-358/17 *Mubarak v Council* ECLI:EU:T:2018:905.

[95] Case C-804/19 *Markt24* ECLI:EU:C:2021:134.

[96] *Ibid*.

[97] Case C-261/09 *Mantello* ECLI:EU:C:2010:683. And whether a person has been "finally" judged is determined by the law of the Member State in which the judgment was delivered.

[98] *Ibid*.

[99] Case C-44/96 *Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck* ECLI:EU:C:1998:4 paras 20-21; Case C-470/99 *Universale-Bau and Others*: ECLI:EU:C:2002:746 paras 51–53; Case C-214/00 *Commission v Spain* ECLI:EU:C:2003:276 paras 52–53; Case C-283/00 *Commission v Spain* ECLI:EU:C:2003:544 para 69. HCH Hofmann and C Micheau, *State Aid Law of the European Union* (Oxford University Press 2016).

and refers to the ability of contracting authorities to pursue market-oriented activities without losing their classification as contracting authorities for the purposes of public procurement law.[100] Furthermore, EU public procurement law has exclusive authority to determine the meaning of "a public contract".[101]

In addition, the Court sometimes observes that the autonomous concept of EU law must be interpreted in accordance with its usual meaning in everyday language, when it is not defined in the Treaties, such as the concept of 'votes cast', contained in the fourth paragraph of art. 354 TFEU.[102] Very often, as this also generally characterizes the court's decision-making, autonomy is supported by the teleological or "*effet utile*"[103] reasoning, when interpretation must take into account not only the wording of that provision but also its context and the objective pursued by the legislation in question. This follows from numerous examples such as that concepts of "working time" and of "rest period" are concepts of EU law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of Directive 2003/88. According to the Court, only an autonomous interpretation of that nature is capable of ensuring the full effectiveness of that directive and the uniform application of those concepts in all the Member States.[104] Hence, despite the reference to "national laws and/or practice" in art.2 of Directive 2003/88, Member States may not unilaterally determine the scope of the concepts of "working time" and "rest period" by making the right, which is granted directly to workers by that directive, to have working periods and corresponding rest periods duly taken into account, subject to any condition or any restriction whatsoever. Any other interpretation would frustrate the effectiveness of Directive 2003/88 and undermine its objective.[105]

This is clearly just a small sample of cases in which the Court considers autonomous interpretation. These questions arise in various fields of EU law and very often, the Court does not even discuss interpretation in terms of it being "autonomous" – some terms so clearly require autonomous interpretation that the Court uses it without its mention. Definition of "per object" or "per effect" violation of art. 101 TFEU, the notion of "selectivity of state aid" as per art. 107 TFEU or the notion of "individual and direct concern" for the purposes of standing under art. 263 TFEU are just some examples where autonomy does

[100] *Ibid*.

[101] *Ibid*. 167: "The determining factor of its nature is not what and how is described as public contract in national laws, nor is the legal regime (public or private) that governs its terms and conditions, nor are the intentions of the parties. The crucial characteristics of a public contract, apart from the obvious written format requirement, are: (i) a pecuniary interest consideration given by a contracting authority; and (ii) in return of a work, product, or service which is of direct economic benefit to the contracting authority". See also Case C-536/07 *Commission Germany* ECLI:EU:C:2009:664.

[102] See e.g. Case C-650/18 *Hungary v Parliament* ECLI:EU:C:2021:426.

[103] See eg. U Šadl, 'The Role of *Effet Utile* in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU' (2015) European Journal of Legal Studies 18.

[104] Case C-580/19 *Stadt Offenbach am Main (Période d'astreinte d'un pompier)* ECLI:EU:C:2021:183.

[105] *Ibid*.

not need to be mentioned. This does not mean, however, that autonomous interpretation is not actively operating, it is just not explicitly set out.

IV.2. Autonomy not explicitly mentioned but operating actively

In order to support the argument of omnipresence of autonomy in the EU legal system and its central role in the reasoning of the Court, I will turn to cases in which autonomy is not explicitly mentioned but nonetheless invisibly plays an active and decisive role, providing a direction (and ex-post explanation) of the decision-making of the Court as well as its ultimate coherence.

There are many cases where autonomy clearly plays the centripetal role of the reasoning of the Court even if it is not explicitly mentioned. This section reconstructs several judgments to support this argument, most notably the ERTA judgment.[106] This judgment was vital for establishing the so-called ERTA doctrine of implied external powers, whereby the presence of internal EU competence has primacy over that of Member States' external acts. The Court rejected the intergovernmental and ancillary role of the Council[107] and made a vital step toward an even more complete legal order – toward the autonomy of EU law. This so-called ERTA pre-emption significantly disempowered Member States in external relations, by developing the doctrine of parallelism of norms on the internal and external level, and enhanced jurisdictional autonomy of the Union without mentioning the concept of autonomy at all.[108]

The reason for the oversight of ERTA in the discussion of autonomy might be that this judgment, as with numerous others, is silent on autonomy of EU law. Yet, autonomy is its guiding force. The Court, while not invoking the "new legal order" nor "autonomy" explicitly, sets out that "regard must be had of the whole scheme of the Treaty no less than to its substantive provisions".[109] The central concern of uniformity of the autonomous legal system clearly lay behind the paragraph saying that "each time the [Union], with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form they may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations

[106] Case 22/70 *Commission v Council* ECLI:EU:C:1971:32.

[107] The case goes back to the negotiation of an international agreement concerning the work of crews of vehicles engaged in international road transport and Member States considered that the agreement was a product of the Member States, not of the Council. The Commission saw the agreement impinging on the internal competence in transport, given the existence of a prior Regulation regulating the field and brought the case before the Court. *Ibid*. paras 77–79.

[108] *Commission v Council* cit. para 22. The Court argued that based on the Union's competence in transport policy and the principle of loyal cooperation read in conjunction, "it follows that to the extent to which Union rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Union institutions, assume obligations which might affect those rules or alter their scope".

[109] *Ibid*. para 15.

with third countries which affect those rules or alter their scope".[110] Moreover, Advocate General Dutheillet de Lamothe laid the basis of the reasoning of the Court in ERTA arguing that the Member States negotiating the international agreement constituted a threat to the "new legal order", an autonomous legal order, as had recently been set out in *Van Gend en Loos*.[111]

Unlike the seminal judgments *Van Gend en Loos* and *Costa v E.N.E.L.*, the ERTA doctrine even found clear acceptance in the Treaty.[112] The judgment is important for the European Union to effectively exercise its autonomy in external relations law, and thus appears to be most important for external autonomy, in the sense that international action of the EU should not be undermined by the Member States.[113] However, the judgment is just as important for the Union's internal autonomy, as it settled some internal competence battles between the Member States and EU institutions in addition to solving the competence battles between EU institutions themselves.[114]

The Court in ERTA set out clearly "that with regard to the implementation of the provisions of the Treaty the system of internal [Union] measures may not therefore be separated from that of external relations".[115] The Court left no doubt that autonomy is indivisible. Only a Union that is able to have a coherent set of jurisdictional autonomy can exercise such an autonomy externally. ERTA thus bridges the relationship between external autonomy from international law and autonomy from Member States' legal systems and shows their unity,[116] without mentioning the idea of autonomy at all.

A further example of autonomy playing an active role without it being mentioned is a recent case of *Slovenia v Croatia.*[117] Slovenia brought an action on the basis of art. 259

[110] *Ibid*.

[111] *Ibid*.

[112] Art. 3(2) TFEU sets out that the Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope. Art. 216(1) TFEU sets out that the Union can conclude an international agreement also in such cases, not only when the Treaty expressly provides for it.

[113] J Odermatt, 'When a Fence becomes a Cage: The Principle of Autonomy in EU External Relations Law' cit. 1.

[114] For the progeny of ERTA see Case C-114/12 *Commission v Council* ECLI:EU:C:2014:2151; Opinion 1/13 *Adhésion d'États à la convention de La Haye* ECLI:EU:C:2014:2303; Case C-600/14 *Germany v Council* ECLI:EU:C:2017:935; Opinion 2/15 *Accord de libre-échange avec Singapour* ECLI:EU:C:2017:376.

[115] *Commission v Council* ECLI:EU:C:1971:32 para. 19.

[116] Former Judge Allan Rosas noted that any meaningful study of the constitutional order of the Union must include the external relations of the Union.

[117] Case C-457/18 *Slovenia v Croatia* ECLI:EU:C:2020:65. Annex III (List referred to in art. 15 of the Act of Accession: adaptations to acts adopted by the institutions) of the Treaty between the Member States of the EU and the Republic of Croatia concerning the accession of the Republic of Croatia to the EU, referring to section fisheries [2012] OJ L112/49–50. The treaty refers to the changes of, first, Regulation (EC) 2371/2002 of the Council of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy) that in annex 1 adds section "coastal waters of Croatia" with reference:

TFEU arguing that Croatia had failed to fulfil its obligations under EU law by not complying with obligations stemming from an arbitration agreement concluded with Slovenia that was intended to resolve their border dispute, and from an arbitration award defining the borders between the two Member States.[118]

The Court held that it lacked jurisdiction to give a ruling on the interpretation and obligations of an international agreement concluded by Member States whose subject matter falls outside the areas of EU competence. The Court noted that the arbitration award had been made by an international tribunal set up under a bilateral arbitration agreement governed by international law, the subject matter of which did not fall within the areas of EU competence and to which the European Union was not a party. The Court observed that neither the arbitration agreement nor the arbitration award formed an integral part of EU law.

The Court importantly stated that the reference to that arbitration award, made in neutral terms by a provision of the Act of Accession of Croatia to the European Union, could not be interpreted as incorporating into EU law the international commitments made by both Member States within the framework of the arbitration agreement.[119] Accordingly, the Court held that the infringements of EU law pleaded were, in the case in point, ancillary to the alleged failure by the Republic of Croatia to comply with the obligations arising from the bilateral agreement at issue.

"(*) The above mentioned regime shall apply from the full implementation of the arbitration award resulting from the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, signed in Stockholm on 4 November 2009." and, second, the same adds in the section coastal waters of Slovenia. Furthermore, it also changes Regulation (EC) 1198/2006 of the Council of 27 July 2006 on the European Fisheries Fund), where in art. 27 adds the following para: "5. The EFF may contribute to the financing of a scheme of individual premiums for fishers who will benefit from the access regime laid down in Part 11 of Annex I to Regulation (EC) No 2371/2002 as amended by the Act of Accession of Croatia. The scheme may only apply during the period 2014 to 2015 or, if this occurs earlier, up until the date of the full implementation of the arbitration award resulting from the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, signed in Stockholm on 4 November 2009".

[118] *Ibid*. Croatia and Slovenia concluded an arbitration agreement, undertaking to submit their dispute on the issue of establishment of their common border to the arbitral tribunal established by the agreement, whose award would be binding on them. Following the communications in the course of the arbitral tribunal's deliberations between the arbitrator appointed by the Republic of Slovenia and that State's Agent before the arbitral tribunal, Croatia took the view that the tribunal's ability to make an award independently and impartially was compromised and decided to terminate the arbitration agreement. The arbitral tribunal decided that the arbitration proceedings should continue and made an arbitration award defining the sea and land borders. Croatia did not execute that arbitration award and Slovenia brought an action for failure to fulfil obligations before the Court, arguing that Croatia had infringed a number of obligations under primary law by failing to comply with its obligations stemming from the arbitration agreement and the arbitration award and thereby also infringed a number of provisions of secondary law.

[119] *Slovenia v Croatia* cit.

Despite not being mentioned, autonomy, particularly external autonomy from international law, played an important role in the reasoning of the Court, as the case touched on the essential question of incorporation of norms of international law into the autonomous EU legal order.

International agreements entered into by the EU form an integral part of the autonomous EU legal order and bind it in accordance with art. 216(2) TEU. International rules are thus incorporated into EU law or "unionized". They are treated in the same fashion as internal norms. Moreover, they receive the status of a higher norm, above the secondary legislation. At the same time, they are below the value foundations of the EU legal order (art. 2 TEU) and national constitutional principles, below the general principles of Union law (including fundamental rights) and below written primary law, such as the TEU and TFEU with protocols.[120] An international norm needs to be formally binding upon the EU before it can create effects within the European legal order.

Integrating norms that are not binding upon the Union by Member States unilaterally would result in EU norms which would prevail over secondary norms. The integrity of the Union and its autonomy could be broken if norms were introduced into the EU legal order through international law rather than agreed on internally. The autonomous legal order would be put in peril if Member States were able to bring in their will to (de)regulate through the back door.[121] A threat of undermining EU law by international law was also effectively rejected by the Court with regard to the GATT[122] and WTO rules, which were found not to have direct effect in the EU legal system.[123] The direct effect would follow only when the EU intended to implement the obligation in question or when the EU measure expressly referred to it.[124]

Yet, the threat remained that other norms of international law could threaten the autonomy of EU law in terms of hierarchy of norms. The question was finally resolved in

[120] A Rosas and L Armati, *EU Constitutional Law: An Introduction* cit.

[121] JW van Rossem, 'The Autonomy of EU Law: More is Less?' cit. 22; E Stein and D Halberstam, 'The United Nations, The European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order' (2009) CMLRev 13.

[122] However, in the *International Fruit* cases (joined cases 41-44/70 *International Fruit Company and Others v Commission* ECLI:EU:C:1971:53), the Court decided to incorporate General Agreement onTariffs and Trade (GATT) [1947] into the EU legal order. The first reason was based on the argument that GATT has become binding on the Community because there had been a significant transfer of powers from the Member States to the Community in the field of trade policy. The second reason was that third parties allowed the Community to Act within the GATT framework, which means that GATT became a part of the community from the perspective of international law. Yet, given various aspects of the GATT, including the great flexibility of its provisions, possibilities of unilateral withdrawal and GATT was not given no direct effect. J Osterhoudt Berkey, 'The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting' (Jean Monnet Working Papers 3-1998).

[123] Case C-149/96 *Portugal v Council* ECLI:EU:C:1999:574.

[124] Case 70/87 *Fediol v Commission* ECLI:EU:C:1989:254; Case C-69/89 *Nakajima All Precision v Council* ECLI:EU:C:1991:186.

Kadi[125] where the Court refused the application of "external" international obligations in order to preserve fundamental norms of the European legal order, in particular the right of defence and the right to property. The incorporation of external norms into the autonomous EU legal system is conditional upon their compliance with the fundamental values and structures of the Union. The application of international legal norms can thus be denied if they conflict with the Treaties, including the Charter on Fundamental rights or general principles of law.[126]

To draw conclusions from an international norm, the latter thus needs to be first integrated, incorporated into the autonomous EU legal system. In the case *Slovenia v Croatia,* the obligation to execute the arbitral award was, however, never incorporated into the autonomous system of EU law.[127] Had the Accession Act of Croatia to the European Union contained a provision that Croatia and Slovenia assume the obligation to execute the arbitral decision, the situation would have been different. Autonomy of EU law, while again not explicitly mentioned, played the central role in the resolution of the case.

IV.3 Autonomy as a silent undercurrent

In order to fully understand the omnipresence of autonomy in the case law of the Court it is necessary to look into its character and relationship with certain fundamental principles of EU law, particularly the rule of law and human rights protection. Autonomy is present in every judgment of the Court, ensuring the development of a new legal order which needs to be constituted in order to preserve the process of pluralism and existence of the Union. Sometimes autonomy is just a silent undercurrent, yet plays a central role. This is the case in judgments concerning the respect of the rule of law and human rights protection where the Court generally does not discuss autonomy nonetheless autonomy still plays a fundamental role.

It is sometimes alleged that the rule of law and human rights protection are separate from autonomy and that autonomy is given preference vis-à-vis those and other values of the European Union as set out in art. 2 of TEU[128]. However, the idea of "autonomy *or* rule of law" and "autonomy *or* human rights" is not borne out by the analysis. The rule of

[125] *Kadi and Al Barakaat International Foundation v Council and Commission* cit.

[126] *Ibid*.

[127] The enforcement of the arbitral agreement only marked the starting date for the application of some specific legislation on fisheries and, given its minor importance, was mentioned in the footnotes of an annex. There was no condition for any party to uphold the arbitral agreement, as the Court also concluded, the reference was entirely "neutral".

[128] V Moreno Lax, 'The Axiological Emancipation of a (Non-) Principle: Autonomy, International Law and the EU Legal Order' in I Govaere and S Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Hart 2019) 45; S Peers, 'Negotiations for EU accession to the ECHR relaunched: overview and analysis' (30 January 2021) EU Law Analysis eulawanalysis.blogspot.com; P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' cit.; D Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' cit.

law and human rights protection form the fundamental part of autonomy's axiology. Moreover, their importance is further heightened by the autonomy's essential need for constant legitimacy. The enhanced need of legitimacy is due to the deeply dependent character of autonomy.

Autonomy, the new legal order, is unlike sovereignty characterized by profound dependence. Understanding autonomy as a disguised claim to sovereignty[129] would thus be a mischaracterization. Sovereignty is an expression of self, of a people, nation, territory. Much as both lawyers and international relations' scholars concluded that sovereignty cannot be understood as an absolute billiard ball,[130] but rather as relational and disaggregated, it still aims for absolute protection. Sovereignty is not ordering pluralism among different legal orders. Autonomy is rather necessarily developed in a relationship with "the other" – with national legal orders and international law. The European Union legal order is structurally dependent particularly on the former. A priori dependence on others is autonomy's central component. Authority and recognition are bestowed on the Union by the "high contracting parties". The Union has limited conferred competences,[131] derived legal personality[132] and is ultimately dependent on the high contracting parties who can amend the Treaties or even leave the Union.

The Union is highly dependent upon the Member States in order to carry out its functions and they remain a vital part of the EU constitutional structure, both in international relations,[133] as well as internally within the Union. The acceptance of the supremacy of EU rules over national constitutional rules has not been unconditional.[134] Furthermore, the application of EU law has always been decentralised. The dynamic of interpretation is at least partially a function of, or dependent upon, national courts and national litigants.

[129] JW van Rossem, 'The Autonomy of EU Law: More is Less?' cit. 5; C Eckes, 'The Autonomy of the EU Legal Order' cit.; JM Gillroy, *An Evolutionary Paradigm for International Law* (Palgrave Macmillan 2013) 257 ff.

[130] A Chayes and A Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1998); A-M Slaughter, *A New World Order* (Princeton University Press 2005).

[131] Art. 5 TEU.

[132] Art. 47 TEU.

[133] J Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' cit. 18. PJ Kuijper and E Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013) 35, 41 ff: "The EU [...] is the victim of a paradox in international relations. It seeks to act as a strong and unified actor towards the outside world in international relations and that is what it is supposed to do according to its latest charter, the Treaty of Lisbon. However, because of its basic structure, it is highly dependent on its Member States for carrying out its policies and implementing its laws, including in the field of international relations".

[134] Case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000; French Conseil d'Etat, *Syndicat Générale des Fabricants de Semoules* [1970] CMLR 395; Czech Constitutional Court, *Landtová* Pl ÚS 5/12 [2012]; Polish Constitutional Tribunal, Case P 1/05 and K 18/04, both in 2005.

The EU is thus said to have a negotiated or contested normative authority.[135] It is dependent on the national courts, national institutions, on Member States and citizens of the Union.[136] The Court is set in in a structure of profound pluralism in which it needs to constantly battle for its legitimacy. The pluralist system with autonomy at its centre breaks down when autonomy does not have the proper legitimacy. The autonomous legal order needs to earn its legitimacy, every day anew.

Legitimacy of the work of an unelected institution such as the Court should be sought in administrative analysis. This means that legitimacy should be sought primarily in legal, technocratic and functional claims.[137] EU law had to build an integral life of its own with its own coherence, precedents, its own formal and ideal elements. How these elements are mediated through national institutions and perceived by a plethora of actors is vital for the legitimacy and thus for the existence of the new autonomous legal order. The rule of law and human rights protection are important examples of the interplay of the axiological and ontological dimensions of autonomy that reinforce autonomy and give it further legitimacy.

a) Autonomy and the rule of law as inseparable and mutually reinforcing

One of the fundamental principles of the EU legal system in which autonomy operates silently but decisively in the decision-making of the Court is the rule of law. Rule of law has been argued to play a subservient role to autonomy.[138] Yet, the respect of rule of law is central to an autonomous *legal* order and its axiology.[139] The rule of law is simultaneously an axiological anchor of autonomy and vitally legitimizes it. The Court's central role, performing effective judicial review designed to ensure compliance with EU law is the essential element of the rule of law,[140] without which autonomy does not exist.[141] Judicial review legitimates the new legal order which was set up precisely to settle disputes legally.

Judicial independence, one of the preeminent features of the rule of law as set out in art. 19 of the TEU, is central to autonomy. Autonomy is ordering pluralism of legal systems in the European Union. If there is no rule of law underlying the entire system, the structure in which the autonomous legal order is set breaks apart. The EU operates by means of law, it is thus essential that there is a mutual trust between courts which enables national courts to rely upon the notion that law is correctly implemented throughout the Union and for the

[135] M Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' cit.

[136] *Ibid*.

[137] PL Lindseth, 'Reflections on the 'Administrative, Not Constitutional' Character of EU Law in Times of Crisis' (2017) *Perspectives on Federalism* 1.

[138] D Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' cit.

[139] Case 190/84 *Les Verts v Parliament* ECLI:EU:C:1988:94; Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:625 para 91: "union, based on the rule of law".

[140] Case C-72/15 *Rosneft* ECLI:EU:C:2017:236 para. 73 and the case-law cited.

[141] *Ibid*.

Court to engage with them in an effective dialogue. Autonomy and the rule of law are thus not mutually exclusive, but rather mutually reinforcing.

The European Union is based on the rule of law which had to establish a complete system of legal remedies and procedures designed to enable the Court to review the legality of acts of the EU institutions.[142] National courts and tribunals, in collaboration with the Court, jointly fulfil the duty[143] entrusted to them by art. 19 TEU[144] of ensuring that in the interpretation and application of the Treaties the law is observed.[145] This is a vital ontological feature of autonomy.

This ontology is reflected in *Associação Sindical dos Juízes Portugueses* (hereinafter *Portuguese judges*) case[146] where the Court decided that art. 19 TEU extends beyond the implementation of subjective rights of EU law and art. 47 of the Charter. Following this judgment, effective legal protection set out in art. 19 TEU applies also outside the application of EU law. Judicial independence[147] is thus a structural requirement, not linked only to the application of EU law by Member States when they are implementing EU law, as set out in art. 52(1) of the Charter. Art. 19 TEU affects the entire European Union legal system and[148] Member States have to comply with it in all respects.

The judgment in *Portuguese judges* case is also a reflection of the structural dependence of the autonomous new legal order on the whole judicial system of the Member States in the European Union. When judicial independence breaks down in Member States, the

[142] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 paras 34, 36.

[143] See, to that effect Opinion 1/09 cit. para. 66; Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:625 para. 90; Case C-456/13 P *T & L Sugars and Sidul Açúcares v Commission* ECLI:EU:C:2015:284 para. 45. The likelihood that the Court will find another international court to be compatible with EU law is quite low, if one is to consider the Court's long-standing case-law (Opinions 1/91, 1/92, 1/00, 1/09, 2/13 and *Achmea*). The accession to the European Court of Human Rights, investor-state tribunals under intra-EU BITs, the proposed European Patent Court and the proposed EEA Court have all fallen "victims" to this case-law.

[144] The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of art. 19 TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in arts 6 and 13 of the ECHR, signed in Rome on 4 November 1950, and which is now reaffirmed by art. 47 of the Charter (see, to that effect, Case C-432/05 *Unibet* ECLI:EU:C:2007:163 para. 37 and Case C-279/09 *DEB* ECLI:EU:C:2010:811 paras 29–33).

[145] Opinion 1/09 cit. para 69; *Inuit Tapiriit Kanatami and Others v Parliament and Council* cit. para 99.

[146] *Associação Sindical dos Juízes Portugueses* cit.

[147] *Ibid*. para 44: "The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (see, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51, and of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 37 and the case-law cited)".

[148] *Associação Sindical dos Juízes Portugueses* cit., confirmed in Case C-272/19 *Land Hessen* ECLI:EU:C:2020:535.

system of dialogue between independent courts breaks down. This further confirms that autonomy and the rule of law are not mutually exclusive, but rather inseparable and mutually reinforcing. This portrays how the ontology of the autonomous legal order played an important role in this case, reinforcing the axiology of the rule of law.

b) Autonomy and human rights protection as inseparable and mutually reinforcing

Human rights protection has been likewise called an "irritant to the policy-based coherence of the EU legal order".[149] However, human rights are not an irritant, but a fundamental part of autonomy's axiological character and vital for its legitimacy.

Human rights have been historically indispensable for the autonomy of the EU legal order and its legitimacy. In *Internationale Handelsgesellschaft*, the Court powerfully reaffirmed the supremacy of then Community law, holding that recourse to national constitutional principles and fundamental rights to judge the validity of Community measures would have an adverse effect on the uniformity and efficacy of Community law. This, however, was only effectively possible because the Court set out in the following paragraph of the judgment that fundamental rights formed an integral part of the general principles of law protected by the Court of Justice.[150] A genuine liberal legal system without adequate human rights protection in today's judicial landscape indeed appears impossible. The Court also stated clearly in *Kadi* that it viewed fundamental rights at the very heart of autonomy of EU law, as a precondition of the legality and legitimacy of the EU legal order,[151] rejecting automatic integration of international law into the system of EU law without a proper human rights review.

Thus, human rights form a fundamental part of autonomy's axiological character, and autonomy and human rights are inseparable and mutually reinforcing. Human rights protection is in the service of autonomy and vice versa.

This does not mean that there is no tension between the axiological and ontological character of autonomy. The principle of mutual trust[152] between Member States' authorities and particularly courts, one of the prominent features of the autonomous EU legal order, is often portrayed to be at variance with appropriate human rights protection. Following Opinion 2/13, it has been asserted that when implementing EU law, the Member States may be required to presume that fundamental rights have been observed by the other Member States, so that they may not check whether the other Member State has

[149] U Šadl and J Bengoetxea, 'Theorising General Principles of EU Law in Perspective: High Expectations, Modest Means and the Court of Justice' cit.

[150] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* cit. para 4. See P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Oxford University Press 2015) 333 ff.

[151] *Kadi and Al Barakaat International Foundation v Council and Commission* cit.

[152] C Ladenburger, 'The Principle of Mutual Trust between Member States in the Area of Freedom, Security and Justice' (2020) Zeitschrift für Europarechtliche Studien 373, 380.

actually, in a specific case, observed the fundamental rights guaranteed by the EU. [153] A Member State may thus only in exceptional cases, "check whether that other Member State has actually, in a specific case, observed [...] fundamental rights",[154] which led to criticism that this creates many violations of human rights.[155]

The Court has not been insensitive to these issues. In *Aranyosi and Caldararu*[156] the Court decided that the absolute prohibition on inhuman or degrading treatment or punishment is part of the fundamental rights protected by EU law. Accordingly, where the authority responsible for the execution of a European arrest warrant has in its possession evidence of a real risk of inhuman or degrading treatment of persons detained in the Member State where the warrant was issued, that authority must assess that risk before deciding on the surrender of the individual concerned and decide whether the surrender procedure should be brought to an end.[157]

The tension between mutual trust and human rights protection certainly exists. Another example is the case *Detiček* in the context of the mutual trust and application of the Brussels Regulation. In that case the Court of Justice assumed that human rights of the child were best protected by returning the child to their father, where the first instance court in the first Member state decided to give him custody.[158] The mother, by bringing the child to another Member state, thus "illegally abducting" them, foreclosed the right of appeal.[159] It will thus never be known if the return of the child to the father truly best protected the child's rights. The presumption of the correctness of the judgment of the first Member State's court applied, based on the principle of mutual trust.

Autonomy is, however, not above human rights, as those are not an external element to autonomy. As confirmed by the Court and explained above, human rights are integral to autonomy. Human rights are integrated in the legal analysis, including in the analysis of proportionality, which, when properly reasoned and giving maximum expression possible to the conflicting values, give the decision-making and the autonomous legal

[153] Opinion 2/13 cit. paras 191–192; V Moreno Lax, 'The Axiological Emancipation of a (Non-) Principle: Autonomy, International Law and the EU Legal Order' cit. 62.

[154] S Peers, 'Negotiations for EU accession to the ECHR relaunched: overview and analysis' cit.; Case C-403/09 PPU *Detiček* ECLI:EU:C:2009:810.

[155] S Peers, 'Negotiations for EU accession to the ECHR relaunched: overview and analysis' cit. Peers has argued that if it were possible to resist removal to another Member State on human rights grounds despite the Dublin rules on asylum responsibility or resist the execution of a European arrest warrant or enforcement of a judgment according to the Brussels regulation, then many violations of human rights in individual cases would be avoided.

[156] Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198.

[157] *Aranyosi* and *Caldararu* had a precedent in Joined cases C-411/10 and C-493/10 *N.S. and Others* ECLI:EU:C:2011:865, where the Court held that national courts, may not transfer an asylum seeker to that Member State where there are substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of art. 4 of the Charter of Fundamental Rights of the European Union.

[158] *Detiček* cit. para 43.

[159] *Ibid*. para 52.

order further legitimacy. The axiology of human rights importantly contributes to the centripetal force of autonomy and reinforces it.

This does not mean that critical evaluation of the case law of the Court is not vital. How tensions and conflicts within the system are resolved in any particular case is certainly subject to important discussion. There is no one single possible form of autonomy. Several variations of autonomy are certainly debated behind the closed doors in Luxembourg. Decisions of the Court should be carefully analysed and critically evaluated by academia, practitioners and the public. This is an essential part of the legal and general social development in a democratic society. However, the baby should not be thrown away with the bath water. Autonomy is a valid coherence-enabling principle of the Court's reasoning that is justifiably omnipresent in its decision making.

While the axiology of human rights reinforces autonomy, the axiological and ontological character of autonomy simultaneously plays a role in human rights case law. As Advocate General Villalón set out in *Samba Diouf*, the right of judicial protection under art. 47 of the Charter of fundamental rights has, as part of autonomous EU legal order, "acquired a separate identity and substance, which are not the mere sum of the provisions of arts 6 and 13 of the ECHR. In other words, once it is recognized and guaranteed by the European Union that fundamental right goes on to acquire a content of its own".[160]

Autonomy also played a decisive role in the interpretation of art. 51 of the Charter which provides that the provisions of the Charter are binding on the EU institutions and the Member states, without a mention of individuals. The Court, however, found that the Charter does have horizontal direct effect, when the necessary conditions are met.[161] Not giving the Charter direct effect, under those conditions,[162] would be against the ontology of autonomy, as set up by *Van Gend en Loos*, which places individuals at the heart of the autonomous new legal order.[163]

Indeed, the direct involvement of individuals in the daily functioning of the European Union and the Court is autonomy's defining ontological feature as per the *Van Gend en Loos* judgment. If autonomy was limited to EU law's relationship with national legal orders and international law, which the discussion of autonomy focusing on the jurisdictional aspect of autonomy assumes, without having a trace in relationships between public authorities and individuals (vertical direct effect) and between individuals (horizontal direct effect), the most fundamental aspect of autonomy of EU law would be negated in the sphere of application of fundamental rights.

[160] Case C-69/10 *Samba Diouf* ECLI:EU:C:2011:524 para. 39; and the Opinion of AG Cruz Villalón (ECLI:EU:C:2011:102).

[161] Case C-414/16 *Egenberger* ECLI:EU:C:2018:257; Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* ECLI:EU:C:2018:874; Joined Cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871.

[162] The criteria are very similar to the Van Gend en Loos criteria. *Van Gend en Loos v Administratie der Belastingen* cit.

[163] General principles of law have been given horizontal direct effect in some circumstances. Case C-144/04 *Mangold* ECLI:EU:C:2005:709; Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21.

The discussion on autonomy and human rights protection thus leads to several important conclusions. First, human rights are an integral axiological part of autonomy, not its "irritant". Furthermore, human rights are essential for the legitimacy of an inherently dependent autonomous legal order. At the same time, autonomy plays a decisive role in the interpretation of human rights, even when not explicitly mentioned. Autonomy and human rights are inseparable and mutually reinforcing. Moreover, the relationship between autonomy and human rights reveals that autonomy is not reserved for jurisdictional issues, which have marked the discussion of autonomy in EU law. It is not reserved for relationships between the Court and other courts and decision-makers, nor restricted to the relationship between EU law on the one hand and Member State law and international on the other. Autonomy, rather, shapes all vertical and horizontal legal relationships subject to the jurisdiction of the Court, being thus omnipresent in the case law of the Court.

c) Effectiveness of the autonomous legal order, state aid law and the search for autonomy's outer boundaries

For good measure and to further portray autonomy as the centripetal force of the reasoning of the Court, this discussion will turn to the principle of effectiveness. Furthermore, to confirm the argument about autonomy's ubiquitous presence in the EU case law, it will briefly look into a random field of exclusive EU competence. State aid law will be shortly presented as an example of the operation of autonomy in the decision-making of the Court, despite the fact that the Court either mentions it only occasionally or is entirely silent on it.

The autonomy of the EU legal order is intrinsically connected to its effectiveness. Norms of the new legal order have to be effective, there would be no autonomous EU legal system if no one applied it.[164] Effectiveness thus underscores autonomy and autonomy in turn plays a vital force in its interpretation. Emphasis on the general principle of the effectiveness of the autonomous EU legal system is seen in various forms throughout the system. *Effet utile* or effectiveness of norms has played an important role in Court's reasoning ensuring the autonomous new legal order is effective[165] and the Court has regularly relied in its argument on effective enjoyment of rights under the Treaty.[166]

In order to ensure the effectiveness of the autonomous legal order, the Court also foresaw that national law must provide specific remedies. In the *Francovich* case, which importantly drew on and contributed to effectiveness of the new EU legal order, the Court set up Member State liability for a breach of EU law referring to the fact that "the EEC Treaty

[164] J Lindeboom, 'The Autonomy of EU Law: A Hartian View' cit.

[165] See e.g. Case 9/70 *Grad v Finanzamt Traunstein* ECLI:EU:C:1970:78 para 5; Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Antonissen* ECLI:EU:C:1991:80; *Rosneft* cit.

[166] For effective enjoyment of citizenship rights under Art. 20 see Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124 para. 45.

has created its own legal system".[167] Just like supremacy and direct effect, the principle of state liability ensures autonomy of the new legal order. In *Courage*, in which the Court concluded that national law must provide an action for damages against a private party for breach of the Treaty competition rules, the Court explicitly referred to the *Van Gend en Loos* wording of the new autonomous legal order, which also has individuals as their subjects,[168] again affirming that autonomy with its specific axiological and ontological character is omnipresent in the case law of the Court, also in horizontal legal relationships.

The constant development of autonomy indeed guides the decision-making of the Court across the entire diverse field of EU law. European Union law is compartmentalized into distinctive areas of law, such as common foreign and security policy, competition law, trademark law, free movement of goods and citizenship, to mention just a few. These fields also have their own internal coherence driven by the sectoral demands, while always simultaneously guided by fundamental principles of law and overall autonomy of the EU legal order.

State aid control lies at the heart of the autonomous EU legal system that constantly guides it visibly and invisibly, as it guides any area of EU law. Thus, the General Court recently restated in the *Danish bottles* case[169] that art. 107(1) TEU, which sets out the conditions for the existence of state aid, should be given autonomous and uniform interpretation throughout the European Union. Thus, in examining whether the measure consisting of exemption from charging of the deposit was State aid, German law and Germany's obligations under the Directive 94/62/EC should not be considered.[170]

Furthermore, the pursuit of effectiveness of the EU system of state aid control, and thus of the autonomous system of EU law, can be seen in *Commission v Italy*,[171] in which the Court decided that the violation of the conditions of authorized state aid automatically converts it into a new illegal aid. In other words, such aid loses, in its entirety, the character of existing aid.[172] The Court of Justice emphasized the dissuasive effect of such a conclusion, which is necessary for the effectiveness of the state aid law regime.

The Court's careful exercise of judicial review reinforces the legitimacy of the autonomous system of EU law and its decision-making processes. Based on the required standard of burden of proof in an adversarial procedure set in a system ensuring effective judicial protection, the Court has thus recently annulled, either partially or entirely, a wide number of Commission's state aid decisions.[173] Moreover, state aid law

[167] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* ECLI:EU:C:1991:428.

[168] Case C-453/99 *Courage and Crehan* ECLI:EU:C:2001:465 para. 19.

[169] Case T-47/19 *Dansk Erhverv v Commission* ECLI:EU:T:2021:331.

[170] *Ibid*. para 74.

[171] Case C-467/15 P *Commission v Italy* ECLI:EU:C:2017:799.

[172] *Ibid*. para. 54.

[173] Joined Cases T-778/16 and T-892/16 *Ireland v Commission* ECLI:EU:T:2020:338; Joined Cases T-816/17 and T-318/18 *Luxembourg v Commission* ECLI:EU:T:2021:252; Case T-103/14 *Frucona Košice v Commission*

has followed the recent trend in competition law in which the emphasis is put on overcoming a formalistic approach set out in the law and enabling careful balancing and contradictory exchange between the parties regarding the effects of the activity on the market.[174] An autonomous EU legal system requires a carefully crafted contradictory procedure to satisfy the effective judicial protection requirement of art. 47 of the Charter.

Finally, to sharpen its legitimacy while upholding an autonomous EU legal order, also being aware of its docket, the Court has to carefully police the boundaries of EU and Member State competence and thus the limits of the autonomous legal system and its relationship with national and international legal orders with which it is in constant dialogue. While determining these limits in state aid law, for example, the Court has concluded that taking into account the fiscal autonomy, which the Member States are recognised as having outside the fields subject to harmonisation, EU state aid law does not preclude, in principle, Member States from deciding to opt for progressive tax rates, intended to take account of the ability to pay of taxable persons. Nor does it require Member States to reserve the application of progressive rates only to taxes based on profits, to the exclusion of those based on turnover.[175] This search for boundaries is an important feature of autonomy also reflected in several judgments in other fields of law such as *Keck* in the free movement of goods or in public procurement cases before the Court which fall below the thresholds of the Directives.[176] Deference to national legal systems is a function of autonomy and dialogue. Finding the fine line on such boundaries serves the legitimacy of the omnipresent autonomy.

d) Autonomy as the Court's synoptic vision and its role in the ultimate goals of the Union

The manifestations of autonomy are found in various forms and shapes throughout the decision-making of the Court, primarily without autonomy ever being mentioned. The cases reconstructed in this *Article* are an inevitably limited sample. Yet almost none of the mentioned cases could be explained by the oversimplification of "building the common market", or by the notions of "pro-integration" or "deeper integration".[177] Autonomy as a

ECLI:EU:T:2016:152; Case T-11/07 *Frucona Košice v Commission* ECLI:EU:T:2010:498; Case T-865/16 *Fútbol Club Barcelona v Commission* ECLI:EU:T:2019:113; Case T-791/16 *Real Madrid Club de Fútbol v Commission* ECLI:EU:T:2019:346; Case T-108/16 *Naviera Armas v Commission* ECLI:EU:T:2018:145; Case T-732/16 *Valencia Club de Fútbol v Commission* ECLI:EU:T:2020:98; Case T-901/16 *Elche Club de Fútbol v Commission* ECLI:EU:T:2020:97; Case T-398/16 *Starbucks v EUIPO – Nersesyan (COFFEE ROCKS)* ECLI:EU:T:2018:4.

[174] D Kukovec, 'The Realist Trend of the Court of Justice of the European Union' (EUI Working Papers Law 11/2021). For the description of this trend in competition law, see for example G Monti, 'Attention Intermediaries: Regulatory Options and their Institutional Implications' (TILEC Discussion Paper 018/2020).

[175] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland (Temporary mechanism for the relocation of applicants for International protection)* ECLI:EU:C:2020:257.

[176] Case C-187/16 *Commission v Austria* ECLI:EU:C:2018:194.

[177] U Šadl and J Bengoetxea, 'Theorising General Principles of EU Law in Perspective: High Expectations, Modest Means and the Court of Justice' cit. 47 ff. P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' cit.

coherence-enabling idea may contribute to further integration. "Pro-integration" is thus a potential description of social consequences of decision-making.[178] Yet, it does not adequately describe the process of decision-making and cannot be used as a tool to coherently reconstruct the Court's decision-making.

Effective judicial review and high standards of burden of proof are unrelated to "deeper integration". Annulment of numerous decisions of the Commission because it has not met those high standards in competition or state aid law cases, or annulling the Council's decisions when it has not properly reasoned its decisions on restrictive measures,[179] leads to results which could be described as opposing deeper integration. Nor can a quest for deeper integration explain a judgment such as *Slovenia v Croatia*, Opinion 2/13 or *Keck*. Autonomy, on the other hand, can explain these judgements and serve as a clear overall standard of coherence of the Court's decision-making and its case law.

When considering coherence, it should be noted that the number of causes that define a legal system is infinitely great, the causes themselves infinitely small.[180] Yet, the reconstruction of the case law in light of autonomy shows that autonomy can fit scattered or diffused elements of law into one all-embracing, by definition permanently incomplete, unitary inner vision.[181] A thick, complex web of events, objects, characteristics, connected and divided by literally innumerable visible and invisible links and gaps can be evaluated in symmetrical patterns of autonomy. In other words, autonomy provides a single embracing vision, whereby everything is interrelated directly, and all the doctrines and parts can be assessed by a single measuring-rod.

This single measuring rod of autonomy can also play a role in judicial efficiency. The moral development of society through deliberation provides the benefits if it is administered quickly.[182] Constraints are always there; the year has so many days, the day has so many hours, the Court has so many judges, the judges have so many cases.[183] Justice delayed is justice denied, as also confirmed by art. 47 of the Charter.[184]

[178] Panos Koutrakos speaks about such effects: "The perspective of the judgment is distinctly integrationist"; "Integrationist character of the judgment" in P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) *ICLQ* 1, 23.

[179] Case T-302/19 *Yanukovych v Council* ECLI:EU:T:2021:333.

[180] I Berlin, 'The Hedgehog and the Fox: An Essay on Tolstoy's View of History' cit. 459: "for we never shall discover all the causal chains that operate: the number of such causes is infinitely great, the causes themselves infinitely small; historians select an absurdly small portion of them and attribute everything to this arbitrarily chosen tiny section".

[181] I Berlin, 'The Hedgehog and the Fox: An Essay on Tolstoy's View of History' cit. 1.

[182] Case C-385/07 P *Der Grüne Punkt – Duales System Deutschland v Commission* ECLI:EU:C:2009:456; Case C-58/12 P *Groupe Gascogne v Commission* ECLI:EU:C:2013:770.

[183] JHH Weiler, 'Epilogue: The Judicial Après Nice' in G de Búrca and JHH Weiler (eds), *The European Court of Justice* (Oxford University Press 2001) 215, 219 ff.

[184] S Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in C Paulussen, T Takacs, V Lazić and B Van Rompuy (eds), *Fundamental Rights in International and European Law* (Springer 2016) 143.

Slow procedures undermine the autonomous legal system as well as putting individuals and companies in a position of legal uncertainty.[185] On the other hand, strong performance of the system is in the service of autonomy of the EU legal order and its legitimacy. In turn, autonomy assists the Court in administering justice. The Court is faced with countless legal rules, principles, policies and precedents. It adjudicates on issues as varied as air quality, free movement of persons, criminal law, common foreign and security policy and antidumping law. The general laws must speak in harmony, all elements must be made to cohere.[186]Autonomy helps enable coherence that would otherwise be difficult to obtain in a new legal order stemming from and relying on various legal systems. In a pluralist environment, autonomy can give the Court a clear vision of a direction and overall grounding. It enables it to deliver justice according to a coherent delineated system, enhancing its administrability.

The ultimate basis of the correlation of all the elements of EU law resides in a single synoptic vision of autonomy. To the extent that the overall legal order is identifiable through scientific research and observation, autonomy of EU legal order is its most important general characteristic. Autonomy of EU legal order is but a vague name for the totality that includes the categories and concepts of EU law, the ultimate framework, the basic presuppositions wherewith EU law functions.

Finally, in order to fully understand the role of autonomy in the case law of the Court, Aristotle's approach to the quest for knowledge provides a useful insight. Aristotle's quest for knowledge is defined by four causes: "the material cause", "the formal cause", "the efficient cause" and "the final cause".[187] These four explanatory factors explain how autonomy is not the final purpose of legal reasoning, as often asserted in the academic debate. Autonomy only ensures coherence of the Court's decision making to achieve the values and purposes as set out in the Treaties.

The Court does not create its own agenda and it is far from being the only agent in the process of seeking justice ("efficient cause", agent). National courts, parties, including individuals, European Union institutions and Member States bring the material – facts, legal problems, questions and their own visions of their resolution to the Court ("the material cause", material). The meaning of autonomy ("the formal cause", structure) arises in and out of this engagement with the realities in society.

[185] Report provided for under Article 3(1) of Regulation (EU, Euratom) 2015/2422 of the European parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union.

[186] L Sargentich, *Liberal Legality: A Unified Theory of Our Law* cit. 108.

[187] These are four explanatory factors, a grasp of all four is needed to have a proper knowledge of something. Material cause reflects what something is made of. The formal cause is the pattern, structure or form that the matter realizes in becoming a determinate thing. Efficient cause is the agent responsible for a matter to take a particular form. Final cause is that for the sake of which a thing is done. WD Aristotle, JA Ross and Smith, *The Works of Aristotle: Translated Into English under the Editorship of W.D. Ross* (Clarendon Press 1908), 634 ff, and 2293 ff.

The Court, guided by autonomy in its art of interpretation constantly (re)produces the formal cause – the autonomy- out of the provided material, further shaping autonomy in its ever-evolving form. In other words, autonomy governs the process along the way to its realization. It governs its own development from potentiality to actuality, based on the existing ontological and axiological understanding of autonomy. Yet, autonomous legal order – the coherence-enabling formal cause – is not the final cause of itself.[188] Autonomy is in service of the goals and values that the autonomous legal order serves ("final cause", final purpose).

The European Union is not a goal in itself, it is a functional entity, a means to reach the goals and values set out in the Treaties. Autonomy as an idea of coherent interpretation thus serves the existence and functioning of the autonomous legal order of the European Union in its multiple functions set out throughout the Treaties, which themselves are unable to provide coherence of the overall decision-making of the Court. Autonomy ensures that all the goals and values of the Treaty are realized, either individually or jointly. These goals or purposes of the European Union are necessary to bring the diverse Member states and their citizens together in a single Union, to fulfil the promises of the Founding fathers.[189]

What are European citizens submitted to by the authority of the Court? The Court, in ensuring that in the interpretation and application of the Treaties the law is observed, is seeking to attain the values and diverse functions of the European Union which are necessary to overcome the deep divisions of Europe through the constant reshaping of the axiological and ontological form of autonomy. Citizens submit to the universal texture of life in Europe, wherein truth and justice are to be found in a pluralist setting by a kind of Aristotelian knowledge.[190] Aristotelian knowledge-finding is reflected in the observations of the Judge Fernand Schockweiler. He explained that the Court had acted as an engine for the building of the autonomous Community legal order and that the Court had given preference to the interpretation best fitted to promote the achievement of the objectives pursued by the Treaty.[191]

[188] For a different opinion see V Moreno Lax, 'The Axiological Emancipation of a (Non-) Principle: Autonomy, International Law and the EU Legal Order' cit. 48: "[Autonomy] was first used to describe the distinctiveness of EU law, as the consequence of integration, to subsequently become the normative cause (or raison d'être) of the European project. Autonomy has gone from being a (privileged) means securing the (formal) emancipation of EU law from its international roots, to becoming a (rootless) end in itself, detached from any identifiable value base – whether in the Rule of Law or in fundamental rights – despite Article 2 of the Treaty on European Union"; *ibid*. 71: "The idea of autonomy the CJEU embraces is a remarkably reductionist notion, exclusively focused on negative protections from external (and externalised) restraint. It views it as pure self-determinism and unmolested self-action, suggesting the Union legal order should be considered autonomous for its own sake".

[189] The Schuman Declaration cit. paras 1-3.

[190] I Berlin, 'The Hedgehog and the Fox: An Essay on Tolstoy's View of History' cit.

[191] GC Rodriguez Iglesias, 'Address on the occasion of the publication of the work of Professor Jean Victor Louis on the European Union and the future of its institutions', Brussels, 16 January 1997. N Fennelly, 'Legal Interpretation at the European Court of Justice' cit.

This development is continuous. [192] Autonomy and the coherence it provides are not set in stone. Ever-changing autonomy is ordering pluralism in a constant process,[193] to attain the purposes of the Treaty. Autonomy is coherently and consistently bringing diverse legal systems together through its constant reshaping as well as through reshaping and articulating interests and values. Autonomy and coherence should thus be understood phenomenologically – in a particular moment in time. New questions are resolved on the basis of well-established concepts, giving the basis for further new legal and economic developments.

V. Conclusion

Autonomy can explain the reasoning of the Court and offer the most important guideline for following and understanding the Court's jurisprudence. The reconstruction of the axiological and ontological features of autonomy is inevitably partial. Yet, it portrays that autonomy is the most foundational factor ensuring the coherence of the EU case law, its predictability and consistent development of legal principles.

The European Union was established to overcome grand historic divisions in Europe by pursuing goals through an autonomous legal order. Autonomy contributes to integrity of the judicial process, while securing the pluralism of the European Union. Importantly, it enables the Court to speak with one voice. Given the Court's particular position in the European legal structure, no other foundational principle can plausibly compete in providing coherence to its overall decision-making. Autonomy is justifiably the Court's starting point of analysis, its Archimedian point and synoptic vision.

Autonomy should not be understood as a mere sword against other legal systems, though it also performs this function. Autonomy, while not explicitly mentioned or seen in a great majority of cases, is always present, guiding the decision-making of the Court and thus forms at least the background of the Court's every decision. Autonomy constantly provides overall coherence of the decision-making of the Court and is thus central to its normative fabric. Lawyers and citizens involved in the decision-making of the Court in any capacity would discount autonomy at their peril.

Reduction of the Court's reasoning to the construction of an internal market or to furthering integration mischaracterizes the Court's analysis and misses its sophistication. While the Court of Justice indeed was instrumental in the construction of the internal market, this is just one of the several partial goals of the Treaty that serve the larger final

[192] For the need to understand any legal development and justice as situated in time and place see D Kukovec, 'Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the Status Quo' in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit* (Hart 2015) 319; D Kukovec, 'Hierarchies as Law' (2014) ColumJEurL 131.

[193] M Delmas Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Hart 2009).

cause as pursued by the founding fathers.[194] Sectoral goals, such as free competition or internal market, are there only to provide deeper goals of Europe, such as war prevention and bringing together the deeply divided continent, but the Court's overall case law cannot be reconstructed in their partial visions.

All liberal courts can rely on coherence in their reasoning.[195] Yet, no other court can rely on autonomy established in its specific institutional and normative setting. The particular pluralist and Aristotelian search for a constant reshaping of autonomy to achieve the various goals as set out in the Treaty, which connect Europe in the unique ontological sense, confirms the European Union's sui generis character.

While there are certainly several vectors of the Court's decision-making, autonomy can be concluded to be its most essential. Autonomy is the Court's synoptic vision, which has made the EU legal system into what it is today. The Court keeps remaking it in this vision – in the words of Isaiah Berlin, it is the court's "one big thing". The mission statement of the Court of Justice of the European Union is set out in art. 19 of the TEU, stating that in the interpretation and application of the Treaties, the law is observed. This task is set in the setting of internal and external pluralism. In order to properly order this pluralism, however, the hedgehog has autonomy in mind. The fox, for all his cunning, is defeated by the hedgehog's one defence.

[194] The Schuman Declaration cit.
[195] L Sargentich, *Liberal Legality: A Unified Theory of Our Law* cit.

ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

Edited by Justin Lindeboom *and* Ramses A. Wessel

ON METAPHOR AND MEANING: THE AUTONOMY OF EU LEGAL ORDER THROUGH THE LENS OF PROJECT AND SYSTEM

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ABSTRACT: This *Article* examines the understanding of EU legal order that underpins the concept of the autonomy of EU legal order. Building on the work of the American constitutional scholar Paul Kahn, this *Article* argues that the EU legal order can be understood as either *project* or *system*. From the perspective of *project*, the autonomy of EU legal order is the necessary means to realise the values and objectives the EU pursues, but from the perspective of *system*, the autonomy of EU legal order is an end in itself. By making this tension explicit, this *Article* hopes to cast doubt on the claim that autonomy operates in complete harmony with the *telos* the EU pursues and the *ethos* on which it is founded. Autonomy will only express a *telos* or *ethos* if these align with the preservation of the systemic integrity of the EU legal order. There thus exist no *necessary* relationship between the autonomy of the EU legal order and the objectives and values it pursues, but only a *contingent* one.

KEYWORDS: autonomy – Court of Justice – cultural study of law – metaphor – monism – immanent principle.

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I. Introduction

The concept of the "autonomy of EU legal order" is somewhat of an enigma. Legal scholars have described the autonomy as "nebulous"[1], as being marked by "considerable ambiguity, if not vagueness"[2] and as a "systemic, ever-changing principle" whose further operation is likely to remain "hard to fathom".[3] Given the difficulties to pin down the meaning of autonomy, it has even been suggested to give up a doctrinal analysis of autonomy altogether and instead conceive of autonomy as a "shapeshifter" that either morphs into a shield protecting EU law from external interference or allows EU law to embrace international law depending on policy considerations.[4] On such a reading, autonomy is not really a legal concept at all.

Rather than relying on a doctrinal or realist analysis, this *Article* asks how the EU legal order is discursively framed and imagined through the concept of autonomy. Building on the recent work of the constitutional scholar Paul Kahn[5], this *Article* argues the EU legal order can be understood as either *project* or *system*. From the perspective of *project*, the autonomy of EU legal order is the necessary means to realise the values and objectives the EU pursues, but from the perspective of *system*, the autonomy of EU legal order is an end in itself. These perspectives are not complementary, but ultimately incommensurable. By making this tension explicit, this *Article* aims to cast doubt on the claim that autonomy operates in harmony with the objectives and the values of the EU. This *Article* instead suggests there is a tension between the institutional and substantive dimensions of EU legal order. The case law of the European Court of Justice (ECJ) shows that a commitment to the EU legal order as a system precedes and underpins an understanding of the EU legal order as a project. This means that the concept of autonomy of EU legal order will only express a more substantive value if such a value aligns with the preservation of the systemic integrity of the EU legal order.

The first part of this *Article* outlines the imageries of project and system – two terms developed by the scholar Paul Kahn (section II). Next, this *Article* shows how project and system offer competing understandings of EU legal order and how the concept of autonomy can be conceptualised as the immanent principle of EU legal order (section III). Finally, it is argued that attempts to conceptualise autonomy as a substantive, value-

[1] C Contartese, 'The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the "Essential" to the "Specific" Characteristics of the Union and Back Again' (2017) CMLRev 1627.

[2] P Koutrakos, 'The Anatomy of Autonomy: Themes and Perspectives on an Elusive Principle' (2019) ECB Legal conference, 92.

[3] M Klamert, 'The Autonomy of the EU (and of EU Law): Through the Kaleidoscope' (2017) ELR 815, 829.

[4] S Gáspár Szilágyi, 'Between Fiction and Reality. The External Autonomy of EU Law as a "Shapeshifter" after Opinion 1/17' (2021) European Papers www.europeanpapers.eu 675.

[5] P Kahn, *Origins of Order: Project and System in the American Legal Imagination* (Yale University Press 2019). For a general introduction to Kahn's methodological commitments, see P Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press 1999).

loaden concept are limited by the fact that in EU law *system* precedes *project*. Autonomy will only express a more substantive value if such a value aligns with the preservation of the systemic integrity of the EU legal order (section IV).

II. Cultural analysis, metaphor and the imageries of project and system

The American constitutional scholar Paul Kahn is famous for having articulated a distinctive methodology of studying law, which he calls the cultural study of law.[6] According to Kahn, law is not only an expression of culture, but offers itself a distinct way to imagine, understand and give meaning to the world. Understanding law as culture means to comprehend law "as an autonomous form of understanding the social".[7] In this sense, law offers a way of perceiving events and actors and creates a framework through which one can comprehend the world. As Kahn puts it, law offers "a way of organizing a society under a set of beliefs that are constitutive of the identity of the community and of its individual members".[8]

A cultural study of law thus approaches law *as if* it is a culture and in doing so understands law as "the imaginative construction of a complete worldview" with the aim to uncover "its founding myths, its necessary beliefs, and its reasons that are internal to its own norms".[9] Law is always embedded in a web of narratives and conceptual structures through which it is rendered intelligible and these conceptual webs can be made explicit. Throughout his work, Kahn has identified the ways in which American legal discourse is structured by different "conceptual worldviews" and different "conceptual models of order".[10] To render these models explicit, Kahn identifies grand structural metaphors which offer different explanations of law as a phenomenon and structure the way in which law is imagined and talked about. As Kahn himself has argued at the core of the meaning-making process of law "we find the uses of metaphor".[11]

Etymologically speaking the word metaphor stems from the Greek "*meta*" and "*phero*" and means "to carry over". Metaphor as a figure of speech is thus, to follow a well-established definition, a device of "understanding and experiencing one kind of thing in terms of another".[12] Among linguists and language philosophers it is widely accepted that metaphors are more than merely a style figure or a rhetorical flourishing, but rather play an active role in the structuring of human thoughts. In the seminal study *Metaphors we live by* Lakoff and Johnson have argued that human thought processes are largely metaphorical and that our conceptual system is "metaphorically structured and

[6] P Kahn, *The Cultural Study of Law* cit.
[7] D Bonilla Maldonado, 'The Cultural Analysis of Law: Questions and Answers with Paul Kahn' (2020) GJL 285.
[8] P Kahn, *The Cultural Study of Law* cit. 8.
[9] *Ibid*. 1.
[10] See for example in P Kahn, *Legitimacy and History* (Yale University Press 1993).
[11] P Kahn, *The Cultural Study of Law* cit. 66.
[12] G Lakoff and M Johnson, *Metaphors We Live By* (University of Chicago Press 2003) 5.

defined".[13] Metaphors help to understand one things in terms of another, thereby acting as "the principal vehicle of understanding".[14] Metaphors rely on the existence of similarities between things and concepts to create understanding between the conceptual structure of a source domain and another domain. Thereby they help to create analogies previously not recognised and in doing so are able to bring a different perspective to a concept or conceptual domain. Metaphors are thus principally a conduit to increase understanding and intelligibility.

Beyond being a tool to create meaning and understanding, however, a metaphor is also a way to exert power because "it colors and controls our subsequent thinking about its subject".[15] Metaphors structure the way we think about a certain concept in terms of other concepts, but it does so in a partial way. Metaphorical structuring allows on the one hand to highlight certain aspects of a concept, but inevitably this means metaphors "that allows us to comprehend one aspects of a concept of in terms of another [...] will necessarily hide other aspects of the concept".[16]

Metaphors thus simultaneously *highlight* and *hide* aspects of concepts and it is in this way that they structure the legal imagination by simultaneously highlighting and hiding specific aspects of law.

In his most recent work, *The Origins of Order*, Kahn has identified two grand metaphors that structure the American legal imagination: *project* and *system*. The difference between these imageries can be captured in a set of oppositions, such as law as made versus law as discovered, self-creation versus immanent order, narrative versus structural analysis and mechanic versus organic metaphors.[17] Together these grand metaphors form an expression of the "chicken-egg" problem regarding the creation of legal orders that Pauline Westerman identifies in her contribution to this special issue.[18]

Kahn's view, the imagery of project "moves in a pattern of ends, plans and ownership".[19] A project is always guided by an idea or a telos: there is an underlying principle, notion or thought which explains why the project is being undertaken and which the project tries to realise. Moreover, it is based on a plan and its success can be measured in terms of design and execution. Finally, a project is always attributable to an author: "[p]rojects don't exist absent commitments to the ideas that define those projects".[20] Kahn argues that at the time

[13] *Ibid*. 6.

[14] *Ibid*. 160.

[15] SL Winter, 'The Metaphor of Standing and the Problem of Self-Governance' (1988) Stanford Law Review 1383.

[16] G Lakoff and M Johnson, *Metaphors We Live By* cit. 10.

[17] P Kahn, *Origins of Order* cit.

[18] P Westerman, 'Weaving the Threads of a European Legal Order' (2023) European Papers www.europeanpapers.eu 1301.

[19] P Kahn, *Origins of Order* cit. 16.

[20] *Ibid*. 15.

of the American revolution, constitutional law was imagined as a revolutionary project authored by the citizens with the aim to realise the principle of self-government.

Kahn also shows how this understanding gradually gave way to a systemic understanding of constitutional law with the common law at its core. As a result, constitutional law was no longer thought to be authored by the people, but rather to be a system governed by a set of principles inherent to the law itself. The imagery of system is markedly different than that of project. Whereas a project "is an idea external to the acts constitutive of the project [...] a system is striving to maintain an immanent principle of order".[21] From a systemic perspective, law has no author and does not appeal to the realisation of a transcendental principle that is external to the system itself (self-government), but rather realises the principle in an immanent fashion, *i.e.* through its continued existence. The common law does exactly this: it operates according to its internal logic and judges try to "discover" legal rules derived from custom, precedence, and legal principles.

In the *Origins of Order*, Kahn spells out in detail the ramifications of this shift in the legal imagination for questions about standards of legitimacy and democracy, appropriate forms of legal reasoning and the understanding of the proper role of Courts within the American political system. It is important to emphasise that for Kahn neither of these imageries are better reflections of the "reality" of US constitutional law. Rather they are competing frames through which the law is understood, and legal interpretation takes place, structuring the way in which law is imagined and talked about. In Kahn's words, "project and system compete as ways of imagining the world and our place in it".[22]

III. Autonomy and project and system in EU law

The imageries of project and system help to understand how the ECJ imagines legal integration. From the perspective of project, EU law is an instrument that is used to realise the objectives the EU pursues and the values on which the EU is founded. From a systemic understanding, in contrast, the EU legal system is perceived on its own terms. The ECJ's projects has been to promote the EU legal order qua system (see section III.1). This commitment manifest itself in the language EU legal scholars and judges adopt, relying on either mechanic or organic metaphors (section III.2). The principle of autonomy, finally, can be understood as expressing the Court's project to create a legal system, in which autonomy operates as the immanent principle of EU legal order (section III.3).

III.1. The EU legal order as the ECJ's project to create a system

Whereas Kahn argues that the American legal imagination moved from the imagery of project (constitutionalism) to an understanding of law as system (common law) over the

[21] *Ibid*. 17-18.
[22] *Ibid*. 21.

course of more than a century, in the context of the EU it is more appropriate to say that this shift occurred almost immediately. From the beginning of the integration process, both the ECJ and EU legal scholars have framed the project of European integration in systemic term. Conceptualising EU law as constituting a single, whole, unified legal system that operates according to its own principles of order was seen as necessary to pursue the project of European integration. This systemic vision of EU law allowed the Court to decentre the original authors of the project – the Member States – and move the project forward with reference to the systemic requirements of EU legal order. By imagining the EU legal order as *system* the Court itself became the author of the project of European integration.

This is not how legal integration is commonly framed. Economic objectives and shared values, not systemic requirements, are seen as underpinning the EU legal order. In a fascinating article Azoulai has shown how the narrative of integration through law has traditionally been accompanied by a vision of EU law as pursuing a telos or expressing an ethos.[23] This is the story told in much of EU legal scholarship, where it is argued the Court initially relied on teleological reasoning to realise the objectives the EU pursues but now has a constitutional framework in which " the values on which the EU is founded are placed before its objectives".[24] The idea is thus that the EU started out as a functional entity but is known developing "towards what in German is known as an objektive *Wertordnung*, ie 'an objective order of values'" and hence becoming a constitutional polity in its own right.[25]

Of course, such a vision is challenged by those who continue to argue that the EU continues to primarily pursue functional purposes.[26] Chalmers, for example, has argued that EU law sets out a vision of human association based exclusively around shared or common activities" as a consequence of which there is "no EU legal vision of collective being as a social form, a notion of society".[27] Building on Oakeshott's distinction between *universitas* and *societas*, Walker similarly holds that the EU legal order can best be conceptualized as a *universitas*: an enterprise association based on the pursuit of a set of collective purposes, most notably economic prosperity through the establishment of a common market.[28] On this view, despite the rhetoric of constitutionalism, the EU thus continues to be a functional entity.

Beyond these competing understandings of the EU as functional entity or constitutional polity, there exists a different way to understand EU law, namely in systemic terms. From this perspective, the *project* of European integration is not measured in economic output or in terms of its commitments to values, but rather is

[23] L Azoulai, '"Integration through Law" and Us' (2016) ICON 499.

[24] J Larik, 'From Speciality to a Constitutional Sense of Purpose: on the Changing Role of the Objectives of the European Union' (2014) ICLQ 11.

[25] *Ibid.* 17.

[26] T Isiksel, *Europe's Functional Constitution* (OUP 2016).

[27] D Chalmers, 'The Unconfined Power of European Union Law' (2016) European Papers www.europeanpapers.eu 415–416.

[28] N Walker, 'The Theoretical Foundations of EU Law' in C Kilpatrick and J Scott (eds), *Contemporary Challenges to EU Legality* (Oxford University Press 2021) 27–28.

understood as the creation of a legal *system*. This systemic understanding is already present in the foundational case law of the Court. The ECJ has explicitly framed the project of European integration in terms of the creation of a legal order. In the *Van Gend en Loos* judgement, the ECJ declared that the European Economic Community (EEC) "constitutes a new legal order of international law".[29] In *Costa v ENEL* the Court slightly changed the wording, stating the "EEC Treaty has created its own legal system [in French: *l'ordre juridique*]".[30] Much of the debate about these judgements has focused, and continuous to focus, whether EU law is truly "new" or whether it should be seen as a form of international law. Perhaps, however, the true genius of the Court laid in the fact it framed EU law in systemic terms, namely as a "legal order".

In his contribution to this *Special Section*, Eleftheriadis draws attention to the systemic understanding of EU legal order, which he terms the "structural" conception of EU law and which he rejects in favour of an "interpretative" understanding.[31] However, in contrast to Eleftheriadis I do not think that we can say that "the translation of the term *ordre juridique* to legal system was an unfortunate error", for the simple reason that all juridical actors involved in the early decades of the integration processed operated through a systemic imagination of EU law.[32]

From the beginning of the integration process legal scholars framed the significance of the Court's case law in those terms. At the 1963 Conference in Cologne on the 10th anniversary of the ECJ, various participants praised the Court's contribution to the integration process precisely for its systemic conception of EU law. Among those commentators we find Pierre Pescatore, who as an ECJ Judge is known for his significant contribution to the "constitutionalization" of the EU legal order. In his presentation, he praised the Courts many achievements, which he summarised as follows:

> "is it not true that, as jurists, we are all imbued with the need for a system, that is to say the need to bring a rational unity to the multiplicity of phenomena? Animated by this spirit, the Court of Justice makes its contribution [...] to the effort of integration which we have seen in action, for once, not at the level of economic facts, but at the level of the institutional structure and the legal order".[33]

Within the field of international law, it is well documented how the conceptualisation of the international legal order in systemic terms allowed legal scholars, judges, and bureaucrats at international organisations to partly emancipate international law from

[29] Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1 para. 12.

[30] Case C-6/64 *Costa v E.N.E.L* ECLI:EU:C:1964:66, para. 593.

[31] P Eleftheriadis, 'The Primacy of EU Law: Interpretive, Not Structural' (2023) European Papers www.europeanpapers.eu 1255.

[32] *Ibid*.

[33] P Pescatore 'Der Gerichtshof als Verfassungsgericht/La Cour en tant que juridiction fédérale et constitutionnelle' in *Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* (Carl Heymanns Verlag 1965) 533 [own translation from French].

the states. As Benvenisti notes, the effect of framing international law as a system allowed courts "to develop international law beyond the intention of governments".[34] This is the case because, it judges were no longer limited to interpret the law with reference to the text of the treaties and the intention of the treaty signatories, but could also draw on "the basic principles of the system and its underlying norms".[35] It was precisely by copying this strategy that EU law distanced itself from the international legal project. Vice-versa, it is the continued commitment of international legal scholars to this project that underpins their resistance against the systemic understanding of the EU legal order.[36]

It could thus be said that the *project* pursued by the ECJ is the creation of a legal *system* of which the ECJ is the author. Consequently, European integration is envisaged not only as the realisation of the objectives of art. 3 TEU and the values of art. 2 TEU, but also as the creation and maintenance of the EU legal order qua legal system. This perspective is not so much concerned with EU law based on what it *does*, but on the basis of what it *is* (namely a system). In doing so, the Court has developed a set of legal principles which make up the architecture of the EU legal order. This process is now generally known as the "constitutionalization" of the EU legal order, but if we strip down the constitutional language, what remains is a process of legal system building. This is how the Court describes the development of EU law in Opinion 2/13 where it states the essential characteristics of EU law (the principles of primacy, direct effect, and autonomy) "have given rise to a *structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States*, and its Member States with each other which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'".[37]

The language the Court uses here is very revealing: the essential characteristics of EU law "*have given rise* to a structured network of principles". The Courts adopts a highly systemic view of EU law, in which these principles simply derive from what the necessities of the EU legal system dictate. An example of this systemic reasoning is, for example, found in the development of general principles of EU law by relying on a deductive method that focuses on what is "inherent in the system of the Treaty" or what can be discerned "in the light of the general system of the Treaty".[38] In developing this method the ECJ frames legal questions not from in light of the values on which the EU is founded

[34] E Benvenisti, 'The Conception of International Law as a Legal System' (2007) German Yearbook of International Law 396.

[35] *Ibid*.

[36] This is well illustrated by Koskenniemi's summary of the *Mox Plant* judgement: "The European project, the [ECJ] is saying, enjoys precedence over the international project." see M Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) EJLS 9.

[37] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 167.

[38] Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur* ECLI:EU:C:1996:79 para. 31 and joined cases C-6/90 and C-9/90 *Francovich* ECLI:EU:C:1991:428 para. 35.

or from the objectives of European integration to be achieved, but rather from the perspective of *the requirements of the legal system itself*.

This systemic orientation is also visible in what Lasser has identified as the meta-teleological reasoning of the Advocates General and the ECJ. In fact, the denominator "meta-teloi" is somewhat misplaced, because the *teloi* do not refer to the objectives pursued by the integration project, but instead develop and maintain the EU legal system qua legal system. This is evident from the objectives Lasser has identified in his analysis of the ECJ's case law: effectiveness, uniformity, legal certainty, and judicial protection. These teloi are distinct from the objectives pursued by European integration, but instead are "broadly systemic meta-purposes" which underpin the ECJ's judicial reasoning with reference "to the purposes, values, or policies that should motivate the EU *legal system* if it is to be a proper *legal order*".[39]

From a legal point of view, this systemic view of EU law is presented as necessary to pursue the objectives of European integration. It is for this reason that EU law has famously been described as both as an instrument and an end in itself. In the introduction to the Integration Through Law volumes (ITL), Cappelletti, Seccombe and Weiler described law as both the agent and object of integration, meaning they perceived law both as the instrument to achieve the objectives of integration, but also as the goal of integration, each of these elements supporting each other.[40] Walker has even argued that EU law can be said to be the *primary* agent and object of integration, because the "core technique of integration could not be to offer law as an instrument of political will backed by force, thereby treating law as a *secondary* and derivative *agent* of political accomplishment".[41] As the object of integration "law *itself* has often been projected as a prominent mark and symbol of [...] community at the EU level". Walker thus argues EU law creates *self-signifiers*: legal constructs such as the Single Market, the Area of Freedom Security and Justice (ASFJ), Economic and Monetary Union (EMU) are "pointing to the significance of their own achievement, rather than being merely or mainly of secondly and derivative import in signifying other and prior cultural features of the polity, as is often the case with polity-evocative legal symbols in the national context".[42]

The same could be said about the legal order as a whole, which from the perspective of the ECJ serves as the ultimate self-signifier; representing the success of European integration as such. Illustratively is that the Court in its recent judgement C-156/21 *Hungary v Parliament and Council* explicitly spoke about the identity of the European

[39] M Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2009) 358.

[40] M Cappelletti, J Weiler and M Seccombe, *Integration through Law: Europe and the American Federal Experience* (Walter de Gruyter 1986) 15.

[41] N Walker, 'The Theoretical Foundations of EU Law' cit. 38.

[42] *Ibid*. 40.

Union "as a common legal order".[43] The political project of European integration is thus framed as the creation and maintenance of a legal order and whenever the unity of that legal order is under threat, the integration project itself is deemed to be at stake.

III.2 The EU legal order as construction and body

The understanding of European integration as the project to create a legal system can be observed in the language judges and legal scholars use to talk about the EU legal order. From the perspective of project, the ECJ is presented as the author of the EU legal order and the language adopted revolves around the metaphor of "construction". Whenever a systemic perspective is adopted, the EU legal order is framed as a "body" through use of organic metaphors. The metaphor of construction emphasises that EU law has an author – namely the Court – whereas the metaphor of "body" indicates that EU law is a self-sufficient and complete system that is governed by its own internal principles of order and therefore has no author.

When conceiving of the EU legal order as a project, the role the ECJ is framed as one of "building the European Union", to quote the title of the *liber amicorum* published in honour of former Judge José Luís da Cruz Vilaça.[44] The Court is thus seen as the author of the EU legal system. This conception is deeply embedded in EU legal discourse, as noted by the political theorist Luuk van Middelaar, who has observed how since the beginnings of the integration project lawyers have invoked the concept of 'construction' to render intelligible the role of law in integration.[45] In legal discourse EU law is frequently cast as the "instrument"[46] and literally treated as a *tool* to bring about European integration. It is not a coincidence that Koen Lenaerts, the current president of the Court, describes the Court's *modus operandi* as the "stone-by-stone" approach, meaning the incremental approach through which the court is "building of a solid edifice".[47]

The EU legal order, generally, is described as the "judicial architecture", the "structure" or the "edifice" of the EU and the process of constitutionalisation is frequently described – to quote from French – as the edification (*l'édification*) of the EU legal order.[48] These construction-related metaphors reveal how judges and legal scholars see the ECJ as the principal author of the EU legal order and how they consciously engage in a project of order building. In stark contrast, to the US, within the context of the EU the

[43] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 para. 232.

[44] K Lenaerts, N Piçarro, F Rolin, C Farinhas and A Marciano (eds), *Building the European Union: The Jurist's View of the Union's Evolution* (Bloomsbury Publishing 2021).

[45] L Van Middelaar, *Passage to Europe* (Yale University Press 2013) 6.

[46] See for example M de Wilmars, 'La jurisprudence de la Cour de justice comme instrument de l'intégration communautaire' (1976) Cahiers de droit Européen 10.

[47] K Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy' (2013) Fordham Int'l LJ 1369.

[48] J Weiler, 'The Transformation of Europe' (1981) YaleLJ 2405; JL da Cruz Vilaça, 'Le Principe de l'effet Utile Du Droit de l'Union Dans La Jurisprudence de La Cour' in A Rosas, E Levits, and Y Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (T M C Asser Press 2013).

"constitution" is not seen as authored by the people, but a product of a process of "constitutionalisation" in which the Court constructed the foundational principles of EU law. Illustrative in this regard is the recent contention by Judge Lycourgos that the "constitutionalisation process [...] now seems complete, the Court expressly referring to the Union's 'constitutional framework'".[49]

Moreover, law is thought of not only to *bind* the Member States and citizens in a legal sense, but also to *bond* them together. As the title of the inaugural lecture the current Dutch Judge at the ECJ: *the judicial mortar of the Union.*[50] The message is clear: EU law is what holds the EU together and forms the very expression of integration.

When considering EU law as system, however, mechanical metaphors are replaced for organic ones and as a result EU laws are no longer *made* but simply *discovered*. Whereas construction metaphors highlight the role of the Court, natural metaphors hide all agency on behalf of judicial actors. This language could be described as a form of naturalization, which is the process that occurs when "contested arrangements may be made to appear obvious and self-evident, as if they were natural phenomena belonging to a world out there".[51]

This is the perspective adopted, for example, in the literature on general principles, which are described as derived from the general scheme of the Treaties. Bodily metaphors are deployed to emphasise how general principles are an inherent part of the whole of EU legal order - they are not "constructed" by judges, but simply an inherent part of the "body" of EU law. From this perspective, "the superstructure of the EU legal order is treaty-based and relatively *skeletal*".[52] As a consequence, "it was often up to the CJEU to fill in the general framework, provide protection where necessary, and generally *breathe life into the bare bones of the Treaties".*[53] Resultingly, the discovery of general principles has led to "inflation of the *size and shape* of the EU legal order".[54] This is not a form of judicial activism, however, since this development of general principles are "in line with the *animating logic* of *Van Gend en Loos* and *Costa v ENEL*. They are of the *same blood* as those foundational judgments".[55] General principles thus simply have the role to help "systematising *the vast body of norms* into a coherent whole".[56]

[49] C Lycourgos, 'The Intersection between the Uniform Application of EU Law and the Limitation of Sovereign Rights in the Jurisprudence of the CJEU' in K Lenaerts, N Piçarro, F Rolin, C Farinhas and A Marciano (eds), *Building the European Union: The Jurist's View of the Union's Evolution* (Hart Publishing 2017) 6.

[50] S Prechal, *Juridisch cement voor de Europese Unie* (Europa Law Publishing 2006).

[51] S Marks, 'Big Brother is Bleeping Us – with the Message that Ideology Doesn't Matter' (2001) EJIL 112.

[52] S Weatherill and S Vogenauer, 'Introduction' in S Weatherill and S Vogenauer *General Principles of Law: European and Comparative Perspectives* (Bloomsbury Publishing 2017) 1.

[53] A Cuyvers, 'General Principles of EU Law' in E Ugirashebuja, JE Ruhangisa, T Ottervanger and A Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff 2017) 219.

[54] S Weatherill and S Vogenauer, 'Introduction' cit. 2.

[55] S Weatherill, 'From Myth to Reality: The EU's "New Legal Order" and the Place of General Principles Within It' in S Weatherill and S Vogenauer (eds), *General Principles of Law* cit. 36.

[56] U Sadl and J Bengoetxea, 'Theorising General Principles of EU Law in Perspective: High Expectations, Modest Means and the Court of Justice' in *Ibid*. 41.

These organic metaphors thus convey the message how general principles are a natural and inherent part of the EU legal order and are thereby rendered immune from questioning or critique.

III.3. Autonomy as the immanent principle of EU legal order

The literature on the autonomy of EU law is replete with organic metaphors. From the perspective of the Court and its judges, autonomy is an expression of "the very *nature*" of EU law"[57] and part "of the very DNA" of the EU legal order".[58] The autonomy of EU legal order is thus not a constructed phenomenon, but an inherent part of EU law. Autonomy is thus *naturalised*, i.e. made part of the very description of EU legal order. This is well illustrated by the following quote from General Court Judge Da Silva Passos: "the concept of 'legal order' or 'law' already implies a certain degree of autonomy. Indeed 'law' can only exist if it results from an independent source and has independent normative character, and 'legal order' implies the existence of a system of law, having its own, exclusive source of law and, as a result, having its own principles, characteristics and rules".[59]

In similar fashion, Lenaerts et al. argue the autonomy of EU legal order separates EU law from both national and international law, meaning autonomy refers to "a legal order that has the capacity to operate as a self-referential system of norms that is both coherent and complete".[60] As such it offers a distinct systemic perspective of EU legal order, which is evident from the following four characteristics of the systemic imagination proposed by Kahn: *i)* autonomy portrays the EU legal order as an authorless system; *ii)* through autonomy the EU legal system tries to maintain itself; *iii)* autonomy emphasis the timeless origins of EU legal order and thus; *iv)* autonomy can be said to serve as the EU's immanent principle of order.

i) The concept of autonomy frames EU law as an authorless system. This means that autonomy cast the EU legal order as a system operating "independent of the motivating interests of those whose actions bring the system into being".[61] Since *Van Gend en Loos* and *Costa v E.N.E.L.,* the Court proclaimed the EU legal order as a "new legal order" on the basis of an analysis of "the spirit and *the general scheme*" of the Treaties and characterized the treaties as an "independent" (in French: *autonomé*) source of law.[62] In doing so, the Court downplayed the role of the Member States as Masters of the Treaty and implied

[57] See *e.g.*, case C-284/16 *Achmea* ECLI:EU:C:2018:158 para. 34 [my emphasis].

[58] K Lenaerts, J A Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' (2021) *Heidelberg Journal of International Law* 49.

[59] R Da Silva Passos, 'The Scope of the Principle of the Autonomy of the European Union Legal Order: Recent Developments' in K Lenaerts, N Piçarro, F Rolin, C Farinhas and A Marciano (eds), *Building the European Union* cit. 19.

[60] K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' cit. 48.

[61] P Kahn, *Origins of Order* cit. 7.

[62] *Van Gend en Loos* cit. and *Costa v E.N.E.L.*cit. para. 594.

that state consent is not the foundation of EU law's authority, but rather that this authority resides in the legal framework itself.

More generally, the intention of the Member States hardly plays a role in the interpretation of the Treaties and the concept of autonomy is frequently invoked to counter-act the will of the Member States. This is particularly evident in the context of Opinion 1/91 in which the ECJ for the first time invoked the "autonomy of the Community legal order" to prevent the Member States from concluding an agreement with the member of the European Free Trade Association (EFTA).[63] In the aftermath of Opinion 1/91, scholars suggested that the autonomy of EU legal order lays down limits to the material revision of the Treaties and that the ECJ could invoke the principle of autonomy to declare Protocols to the Treaty.[64] It was thus argued the legal architecture of the EU legal order *on its own terms* takes precedence over the will of the Member States.

Such arguments illustrate how the concept of autonomy expresses the self-standing quality of the EU legal order, framing EU legal order as an authorless system that operates according to its own rules and emancipates the foundation of EU law from the will of the Member States. It is therefore not surprising that Eckes argues autonomy is "rooted in Kelsenian thought", because this concept allows the Court to hide the weak enforcement capacities of EU law and instead "invoke respect and normative force beyond factual compliance".[65]

In the literature, one frequently encounters the metaphor of "maturation" to explain how the role of autonomy has increased with the development of the EU legal order. EU law is thus framed not as being authored, but rather as having an inherent developmental dynamic that simply occurs "naturally" and of which the principle of autonomy forms an expression. It has been claimed, for example, how "[t]he rise of autonomy can be seen as *a sign of maturity of EU law* and increasing confidence on part of the Court".[66] Similarly, it is seen as a means to protect "the distinct characteristics of the *mature EU legal order* from interventions that originate beyond the Union".[67] Van Rossum has made a similar claim, linking the concept of autonomy to the way in which the ECJ delineates EU law from international law: "one could argue, *the more constitutionally mature* the EU becomes, the more protective the shield of the concept of autonomy in the face of the international legal order".[68]

[63] Opinion 1/91 *Draft Agreement on the creation of the European Economic Area* ECLI:EU:C:1991:490.

[64] For example, see DM Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) CMLRev 17, 62-66.

[65] C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review 5.

[66] T Tridimas, 'The General Principles of Law: Who Needs Them?' (2015) Les Cahiers de Droit 421.

[67] P Koutrakos, 'The Anatomy of Autonomy' cit. 92.

[68] JW van Rossem, 'The Autonomy of EU Law: More Is Less?' in RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence* (TMC Asser Press 2013) 28.

ii) The concept of autonomy expresses the aim of the EU legal system to maintain itself *qua legal system* and protect it from interference from the Member States and other international regimes. Despite the controversies surrounding the meaning of the concept of autonomy, the general understanding is that the Court relies on this concept when it thinks the essential aspects of the EU legal system are at stake and need protection. As AG Maduro remarked in his Opinion in the famous *Kadi* ruling, the ECJ "seeks first and foremost, to preserve the constitutional framework created by the Treaty".[69] The ECJ has invoked autonomy, for example, to strike down international agreements that would exclude certain parts of EU law from the scope of national courts and hence locate these laws outside the reach of the preliminary reference procedure or to prevent Member States to use alternative methods of dispute settlement.[70]

iii) The concept of autonomy frames EU legal order as a timeless enterprise. Azoulai neatly captures this aspect of autonomy when stating "time does not matter in the construction of the EU legal order. It is autonomous; it has not and is not supposed to 'become autonomous'".[71] Autonomy thus stems directly from the presumption that EU law is different from both national and international law and that this has always been the case. Using a systemic imagery of law, it is thus not possible to explain *how* EU law has become autonomous, it simply must be to render EU legal system intelligible. When legal scholars talk about autonomy as an expression of the "maturation" of EU law, they also emphasize the timeless essence of autonomy, implying that the EU legal order is simply becoming what it already is. After all, as Arendt aptly observed, "the natural thing's existence is not separate but is somehow identical with the process through which it comes into being: the seed contains and, in a certain sense, already *is* the tree".[72]

iv) From the foregoing follows that the concept of autonomy can best be understood as the EU legal order's immanent principle of order. Autonomy is both "prior to the phenomena even though they have no existence prior to the events they inform" and describes "a reciprocal relationship [...] between parts and whole".[73] General Court Judge Kukovec claims exactly this when he argues autonomy should be understood as a "single, universal,

[69] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461, opinion of AG Maduro, para. 24.

[70] Opinion 1/09 *Creation of a unified patent litigation system* ECLI:EU:C:2011:123; case C-459/03 *Mox Plant* ECLI:EU:C:2006:345.

[71] L Azoulai, 'The Many Visions of Europe' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014) 153.

[72] H Arendt, *The Human Condition: Second Edition* (University of Chicago Press 2019) 58. Also see Pernice who remarked that when the Court "spoke in Van Gend about a 'new legal order of international law', the *seed for developments* of great impact was already set". I Pernice, 'The Autonomy of the EU Legal Order - Fifty Years After Van Gend' in *50th anniversary of the judgment in Van Gend en Loos, 1963-2013 conference proceedings, Luxembourg, 13 May 2013.* (European Court of Justice 2013) 56.

[73] P Kahn, *Origins of Order* cit. 18.

organizing meta vision in terms of all that the Court does has significance".[74] This simply means that autonomy bridges the relationship between the individual judgements and the overall legal order, because it is through autonomy that the EU legal order sustains itself.

The fact that autonomy operates as the immanent principle of order of EU law is also exemplified in the circular forms of reasoning which the ECJ deploys when invoking the concept of autonomy. From the case law of the ECJ, we learn that autonomy "stems from the essential characteristics of the European Union and its law", which include "the fact that it stems from an independent source of law [...] its primacy over the laws of the Member States, and [...] the direct effect of a whole series of provisions".[75] This is a tautological and circular description: the autonomy of the EU legal order is the result of the essential characteristics, the first one of which is the fact that the EU law forms an independent, meaning: autonomous, source of law.

This circularity is also present in the recent characterizations of autonomy as a principle of EU law in the case law of the Court and some of the legal literature.[76] Lenaerts et al. have argued that in order for the EU legal order to be autonomous there can exist no normative gaps and therefore "the very nature of EU law requires the Court of Justice to 'find' the law [...] by fashioning general principles of law where necessary".[77] If we are to believe the president of the ECJ, the principle of autonomy of EU law order is thus fashioned ... in the name of the autonomy of the EU legal order. This circularity in the form of reasoning is exemplary of a systemic understanding of law, because in a system "the whole operates as a principle of order at every moment".[78]

IV. The autonomy of EU legal order and the tension between project and system

So far this *Article* has focused on an analysis of the autonomy discourse, relying on Kahn's distinction between *project* and *system* to argue that the principle of autonomy of EU legal order expresses a *systemic* imagination of EU legal order by with the ECJ pursues its own project. But how does these contrasting images of order manifest themselves in the case law of the ECJ on the concept of Autonomy? Most literature starts from the premise that maintaining the EU legal order is instrumental to the project of European integration, meaning the autonomy of EU legal order is compatible with and complementary to the pursuit of the objectives (telos) and values (ethos) of European integration. This view is premised on the assumption that all objectives, values and the system of EU legal order

[74] D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' (2023) European Papers www.europeanpapers.eu 1403.

[75] Opinion 1/17 *CETA* ECLI:EU:C:2019:341 para. 109.

[76] Opinion 1/20 *Draft Modernised Energy Charter Treaty* ECLI:EU:C:2022:485 para. 47.

[77] K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' cit. 78.

[78] P Kahn, *Origins of Order* cit. 18.

can be realized simultaneously and in complete harmony. Drawing on the work of the political philosopher Isaiah Berlin, we can describe this view as *monism* (not to be confused with *legal* monism) (section IV.1).

However, even if the systemic understanding of EU legal order is instrumental to the project of European integration, conceptually speaking it also *precedes* the understanding of European integration as a project. As a result, the autonomy of EU legal order will only express a commitment to the objectives and values of EU integration if these align with the preservation of the systemic integrity of the EU legal order. There thus exist no *necessary* relationship between the autonomy of the EU legal order and substantive value notions, but only a *contingent* one (section IV.2).

IV.1. Autonomy and the presumed compatibility of *telos, ethos* and system

The presumed compatibility between the objectives, values and system of EU law is most clearly expressed by ECJ judges in their extra-judicial writings. Exemplary in this regard are the writings of General Court Judge Kukovec. He claims autonomy expresses the "single, universal, organizing meta vision" of the ECJ. Drawing on Isaiah Berlin's distinction between the ideal-types of the Fox and the Hedgehog – "the fox knows many things, but the hedgehogs knows one big thing" – he argues that like a hedgehog the ECJ has a central vision which renders intelligible and coherent every single one of its judgements.[79] In Kukovec's view autonomy is thus "omnipresent" in the case law of the ECJ, ensuring the coherence and integrity of EU legal order at all times, even when the Court does not refer to the principle as such.[80] Kukovec claims that autonomy is the means to ensure "all the goals and values of the Treaty are realized, either individually or jointly".[81]

We can describe this vision of autonomy as value *monism*. This is the term Isaiah Berlin used to describe the belief that (1) all genuine questions must have one true answer; (2) there is a method to discover the true answer to any question and (3) when found, all true answers will be compatible with one another, forming a single coherent whole.[82] This is thus an ontological belief in the ultimate harmony of the universe. In fact, this is precisely the belief that Isaiah Berlin attributed to the Judge Kukovec' Hedgehog, namely the need to "relate everything to a single central vision, one system, less or more coherent or articulate in terms of which they understand, think and feel – a single, universal, organizing principle in terms of which alone all that they are and say has significance".[83]

[79] I Berlin, 'The Hedgehog and the Fox: an Essay on Tolstoy's View of History' in *The Proper Study of Mankind* (Vintage 2013) 436.

[80] D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' cit. 1417 ff.

[81] *Ibid*.1437.

[82] I Berlin, 'The Decline of Utopian Ideas in the West' in H Hardy (eds), *The Crooked Timber of Humanity: Chapters in the History of Ideas* (Pimlico 2013) 25–26.

[83] I Berlin, *The Fox and Hedgehog* cit. 436.

This view is similarly found in the work of Judge Da Silva Passos, who suggest the principle of autonomy plays an active role in the recent cases on judicial independence and thus entails a commitment to the rule of law. In particular, he argued the development of the principle of judicial independence in *Associação Sindical dos Juízes Portugueses* [84] and *Commission v Poland*[85] forms "an extension of the scope and principle of autonomy of the EU legal order", which he described as "a rather logical and justified development of the ECJ case law".[86]

This understanding of autonomy is sometimes also articulated in the case law of the Court. In Opinion 1/91 the Court examined whether the system of courts proposed in the draft agreement between the EU member States and the EFTA states – which aimed to create an European Economic Area (EEA) including an EEA Court – would "undermine the autonomy of the Community legal order in pursuing *its own particular objectives*".[87] The Court observed that the objectives of the EEC go far beyond that of the EFTA agreement, referencing inter alia the objective to create an internal market and economic and monetary union, as well as art. 1 of the Single European Act which establishes that the Treaties are geared "to making concrete progress towards European unity".

In *Kadi*, the Court explicitly linked the autonomy of the Community legal system to fundamental rights protection, arguing that "measures incompatible with respect for human rights are not acceptable in the Community".[88] Subsequently, the Court found that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights".[89] This led the Court to conclude that it could review the implementation of UN Security Council resolutions.

In *Achmea*, as a final example, the Court linked the autonomy of EU legal order to mutual trust, arguing that Investor-State Dispute Settlement (ISDS) provisions in Treaties between EU Member States undermine the premise of mutual trust – the existence of and commitment to shared values codified in art. 2 TEU – and therefore also the autonomy of EU legal order. Seen in that light, it could be argued "that the principle of legal autonomy is ultimately derived and justified by the principle of mutual trust".[90]

In the legal literature, lastly, we find similar views. Legal scholars frequently claim that the autonomy of EU legal order not only has an institutional dimension, but also a substantive one. For example, it has been argued that the *Achmea* judgment enriches the

[84] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117.

[85] Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531.

[86] R Da Silva Passos, 'The Scope of the Principle of the Autonomy of the European Union Legal Order' cit. 30.

[87] Opinion 1/91 cit. para. 31.

[88] *Kadi and Al Bakaraat* cit. para. 284.

[89] *Ibid*. para. 285.

[90] J Hillebrand Pohl, 'Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?' (2018) EuConst 781.

concept of autonomy by forging a substantive link between the concept of autonomy and the value of the rule of law. Hindelang supports this claim by pointing to the frequent references to the *ASJP* judgement in which the ECJ for the first time articulated a definition of judicial independence and which since has been used as a benchmark to assess judicial reforms in Poland and Hungary. Accordingly, in *Achmea* the ECJ is "hinting towards a connection between the principle of autonomy of EU law and the rule of law", which could ensure that the "preliminary reference procedure and the daily administration of EU justice by Member States' courts is not corrupted".[91]

Likewise, it has been argued that in Opinion 1/17 autonomy protects a substantive core of democracy within the EU. In the judgement the Court refers several times to the need to protect the EU democratic process, which in the view of the Court cannot be undermined by the CETA dispute settlement bodies, as a result of which these cannot "call into question the level of protection of public interests determined by the Union".[92] For this reason it has been suggested that in this part of the judgement "the CJEU extends the application of the principle of autonomy from the structural/institutional dimension of the EU legal order to its substantive aspects".[93]

IV.2 The incompatibility of autonomy as project and system

These claims are premised on the idea that a commitment to the institutional dimension of EU legal order is inherently compatible with a commitment to the substantive objectives the EU pursues and the values on which the EU is founded. It thus expresses an ontological belief in the complete harmony of the EU's legal universe, corresponding to the vision of Isaiah Berlin's Hedgehog. Contrary to what Kukovec seems to imply, however, Berlin by no means favoured the perspective of Hedgehog over that of the Fox.[94] In fact, the opposite is true. Berlin claimed "the notion of the perfect whole, the ultimate solution, in which all good things coexist, seems to me to be not merely unattainable – that is a truism – but conceptually incoherent".[95] He explicitly warned that

[91] S Hindelang, 'Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU's Judgement in *Achmea* Put in Perspective' (2019) ELR 390.

[92] Opinion 1/17 cit. para. 156.

[93] C Contartese and M Andenas, 'Opinion 1/17 and Its Themes: An Overview' (2021) European Papers www.europeanpapers.eu 625.

[94] Revealingly Kukovec misquotes Berlin stating "The fox knows many things, Berlin argues, 'but the hedgehog knows one big thing. The fox, for all his cunning, is defeated by the hedgehog's one defence'". D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' cit. 1404. In fact, Berlin writes "'The Fox knows many things, but the hedgehog knows one big thing.' *Scholars have differed about the correct interpretation of these dark words, which may mean no more than that* the fox, for all his cunning, is defeated by the hedgehog's one defence". Berlin never endorses the perspective of the hedgehog. See I Berlin, *The Fox and Hedgehog* cit. 436.

[95] I Berlin, 'The Pursuit of the Ideal' in *The Proper Study of Mankind* cit. 11.

utopian ideals "as guides to conduct [...] can prove literally fatal" because he deemed the very possibility of realizing ultimate harmony a fallacy.[96]

We thus ought to take seriously the perspective of the Fox, and with it the possibility that the objectives and values pursued by European integration, on the one hand, and the systemic needs of EU legal order on the other, cannot always be reconciled. In fact, the case law of the ECJ shows that the need to maintain the functioning and existence of the EU legal system on its own terms can clash with the objectives and values pursued by the EU. This section will therefore illustrate how autonomy will only express a more substantive telos or ethos, if and when these align with the preservation of the systemic integrity of the EU legal order. In other words, when the ECJ must make a decision it chooses *system* over *project*, or put differently, it first and foremost pursues its own project of European integration, namely the maintenance of EU legal system.

To illustrate the tension between an understanding of EU law as project and the Court's understanding of EU law as system, this section will contrast the *Kadi* judgement with Opinion 2/13, as well as *Banco de Santander* with *Getin Noble Bank*.[97] The former cases concern the relationship between autonomy and fundamental rights protection, the latter two cases concern autonomy and the principle of judicial independence. These cases illustrate how through the concept of autonomy the Court adopts a systemic understanding of EU legal order.

Among the cases in which the ECJ has invoked the concept of autonomy, the *Kadi* ruling stands out as the all-time favourite among legal scholars, because the ECJ ruled that the implementation of UN Security measures should be subjected to EU human rights scrutiny. This judgement is widely understood as an instance where the Court declared that "the protection of fundamental rights forms part of the very foundations of the Union legal order".[98] In *Kadi*, so it has been claimed, the ECJ "takes fundamental rights out of the scope of Balancing" and in doing so the Court established a "constitutional core" of EU law that cannot be affected by Member States or international law more generally.[99] Even critical voices of the Court recognise how *Kadi* should be welcomed for the way it effected an "institutional prioritization of rights protection within the EU's array of functions".[100] Similarly, Moreno-Lax, who has written highly critical about the Court's case law on autonomy, recognizes how in Kadi the "autonomy of EU law was granted an *axiological*, or value-loaded, dimension, because the ECJ framed autonomy as "the

[96] *Ibid*. 13.

[97] *Kadi and Al Bakaraat* cit.; Opinion 2/13 cit.; case C-274/14 *Banco de Santander* ECLI:EU:C:2020:17; and case C-132/20 *Getin Noble Bank* ECLI:EU:C:2022:235.

[98] J Kokott and C Sobotta, 'The *Kadi* Case - Constitutional Core Values and International Law - Finding the Balance?' (2012) EJIL 1116.

[99] N Lavranos, 'Protecting European Law from International Law' (2010) European Foreign Affairs Review 269.

[100] T Isiksel, 'Fundamental Rights in the EU after Kadi and Al Barakaat' 15 ELJ (2010) 571.

consequence of the (substantive) hierarchy of norms within the EU legal order".[101] Rather than an end in itself, autonomy was thus presented as a means "for the preservation of the (substantive) integrity of the most basic values of the system".[102]

Opinion 2/13, on the other hand, is almost universally decried among legal commentators, because here the concept of autonomy was invoked to prevent the accession of the EU to the European Convention on Human Rights (ECHR). In the judgement, the ECJ forcefully emphasised the special nature of EU legal order, referring to the fact the "EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles" and reiterating the essential characteristics of EU law, primacy, direct effect and autonomy as the foundation of the legal structure of the EU.[103] Whilst the Court claimed that the rights laid down in the EU Charter of Fundamental Rights ('the Charter') are "at the heart of that legal structure", it also remarked how the autonomy of EU law "requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU".[104]

These parts of the judgements, in particular, have been interpreted as the Court saying that fundamental rights objectives are to be subordinated to the achievement of the objects of integration, which the in the *Opinion* were defined as "the raison d'être of the EU itself".[105] Moreno-Lax and Ziegler, for example, claim that in the Court is too concerned with the securing the realisation of the objectives of art. 3 TEU, at the expense of the values in art. 2 TEU. As a result, they claim, the Court "inverses the constitutional hierarchy of norms, placing the objectives of EU integration above (and beyond) the values that motivate it".[106] Elsewhere Moreno-lax has argued that in Opinion 2/13 the ECJ "emancipates" the EU legal order from its founding values, the Court "suggesting the Union legal order should be considered autonomous 'for its own sake'".[107]

However, if we look beyond the tension between the telos (objectives) and ethos (values) of EU integration, then we can see how in both *Kadi* and Opinion 2/13 the autonomy of EU law the Court expresses *a structural bias towards the very structure of EU legal order* (system). What these two judgements illustrate is that there exists no *necessary* relationship between the autonomy of the EU legal order and the objectives and values the EU pursues, but only a *contingent* one.

[101] V Moreno-Lax, 'The Axiological Emancipation of a (Non-)Principle: Autonomy, International Law and the EU Legal Order' in I Govaere and S Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Hart Publishing 2019) 55.

[102] V Moreno-Lax, 'The Axiological Emancipation of a (Non-)Principle' cit. 55.

[103] Opinion 2/13 cit. paras 158, 165–168.

[104] *Ibid*. paras 169–170.

[105] *Ibid*. para. 172.

[106] K Ziegler and V Moreno-Lax, 'Autonomy of the EU Legal Order – A General Principle? On the Risks of Normative Functionalism and Selective Constitutionalisation' in K Ziegler, P Neuvonen and V Moreno-Lax (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar 2022) 241.

[107] V Moreno-Lax, 'The Axiological Emancipation of a (Non-)Principle' cit. 71.

Even in *Kadi*, one might very well argue that autonomy is deployed not to establish an untouchable core of fundamental rights at the heart of the EU legal order, but to secure the position of the ECJ to safeguard its own position as the ultimate arbiter of fundamental rights review within the EU. This is particularly evident from the following passage in the judgment where the court notes how EU law "may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, *including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.* [108]

This reading is supported by the argument of Gráinne de Búrca, who claims that the ECJ deliberately used the *Kadi* judgement "to emphasise the autonomy, authority and separateness of the EC legal order over international law".[109] Contrasting the approach of the ECJ with the approach by AG Maduro and the Court of First Instance, she shows how the Court relied on an "internally-oriented approach and a form of legal reasoning which emphasized the particular requirements of the EU's general principles of law and the importance of the autonomous authority of the EC legal order".[110] The outcome that reinforced the autonomy of EU law just happened to be also most conducive to human rights protection.

A second example of the tension between the structural tenets of EU legal order conflict with a commitment to values is the case law on the meaning of a 'court or tribunal' under art. 267 TFEU. Lenaerts and al. argued that the autonomy of the EU legal order enables the ECJ to interpret the Treaties and the Charter as a "living instrument", allowing the Court to take into account ongoing changes in the societies of the Member States, "whilst remaining faithful to the immutable values on which the entire EU is founded".[111] The autonomy of EU law is here thus presented as the means that enables the realisation of the values of art. 2 TEU. As the authors note themselves, "since the EU legal order is a self-referential system of norms that is both coherent and complete, the Treaties and the Charter must be read with sufficient flexibility for the EU legal system 'to endure for ages to come, and consequently to be adapted to the various crises of human affairs'".[112]

To support this claim, they refer to the judgement in *Banco de Santander* in which the Court tightened its definition of what constitutes a 'court or tribunal' in the meaning of art. 267 TFEU. This concept is treated as an "autonomous concept" under EU law, meaning that the ECJ has developed its own set of criteria to assess whether a national body should

[108] *Kadi and Al Bakaraat* cit. para. 128.

[109] G de Búrca, 'The European Court of Justice and the International Legal Order After *Kadi*' (2009) Harv Int'l LJ 7.

[110] *Ibid*. 44.

[111] K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' cit. 84–85.

[112] *Ibid*. 84.

be able to enter in a dialogue with the ECJ through the preliminary reference procedure. As various authors have pointed out, however, traditionally the Court has taken a very functionalist approach to this question, with the Court's main concern being to broaden access to the preliminary reference procedure to guarantee the uniform application of Union law and providing effective legal protection.[113] In one of these previous cases, the ECJ had, in fact, determined that the Spanish Central Tax Tribunal constituted a "court or tribunal" in the sense of art. 267 TFEU and therefore could send preliminary reference questions to the ECJ.[114] In *Banco de Santander*, by contrast, the Court ruled that this body does not meet the requirement of independence, because the irremovability of its member was not sufficiently guaranteed.

This change of direction was set in motion by the *Associação Sindical dos Juízes Portugueses*[115] judgement in which the Court read the principle of judicial independence into art. 19 TEU. The Court explicitly mentioned that the criterion of independence "must be re-examined notably in the light of the most recent case-law of the Court concerning, in particular, the criterion of independence which any national body must meet in order to be categorized as a "court or tribunal" for the purposes of art. 267 TFEU".[116] The implicit message is thus that in light of the democratic backsliding in several of the Member States of the EU the Court has formulated a stricter norm of judicial independence to ensure that only independent courts and tribunals can send a preliminary reference to the Court. In this way, Lenaerts et al. claim, *Banco De Santander* "not only reinforces the judicial dialogue between the Court of Justice and national courts, which is the 'keystone of the EU judicial system', but also the rule of law within the EU".[117]

However, in the more recent *Getin Noble Bank*[118] judgement, which also concerned the requirement of independence to qualify as a 'court or tribunal' in the meaning of art. 267 TFEU, the ECJ has quietly abandoned the more stringent test developed in *Banco de Santander.* In this case the ECJ accepted a preliminary reference from an irregularly appointed judge in the Polish Supreme Court. Before the ECJ handed down its judgement (but after the oral part of the proceedings) the ECHR found that the formation of the Civil Chamber in which this judge was sitting could not be considered a "tribunal established by law" in the meaning of art. 6 ECHR, because of several irregularities in the appointment process of the judge in question, which amounted to a manifest breach of the domestic law on the appointment of judges.[119]

[113] M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) EUConst 638.

[114] Joined cases C-110/98 to C-147/98 *Gabalfrisa and Others* ECLI:EU:C:2000:145.

[115] *Associação Sindical dos Juízes Portugueses* cit.

[116] *Banco de Santander* cit. para. 55.

[117] K Lenaerts, J A Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' cit. 87.

[118] *Getin Noble Bank* cit.

[119] EctHR *Advance Pharama SP. Z.O.O v. Poland* 1469/20 [3 February 2022] paras 359–350.

The ECJ, however, considered that it was not disputed that the Polish Supreme Court as an institution qualifies as a "court or tribunal" in the meaning of art. 267 TFEU, because the Commission and the Ombudsman only challenged whether the sitting judge which made the request for a preliminary reference satisfies the requirements of independence.[120] Moreover, it stated that when a request for a preliminary reference "emanates from a national court or tribunal, it must be presumed that it satisfies those requirements [...] irrespective of its actual composition".[121] This presumption is not only tautological (in order to be considered a "court or tribunal" the requirements of art. 267 must have already been met, after all), but also leads the ECJ to abdicate almost all responsibilities in upholding the value of judicial independence. The Court noted that it was not for the ECJ itself to determine whether the preliminary reference was made in accordance with the rules of national law, instead positing the general presumption could only be rebutted when a final judgement handed down by a national or international court finds that the actual composition of the referring court is not an independent and impartial tribunal by law.[122]

As a result, *Getin Noble Bank* exemplifies the tension between the *systemic* view of EU legal order expressed in the concept of autonomy and the *project* of upholding the values on which the EU is founded. The Court explicitly considered that as the "keystone of the judicial system", the preliminary reference procedure "has the object of securing uniformity in the interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties".[123] At the same time, it considered how the presumption of compliance "applies solely for the purposes of assessing the admissibility of references for a preliminary ruling under art. 267 TFEU" and thus does not imply that the judge "necessarily satisfy the guarantees of access to an independent and impartial tribunal previously established by law, for the purposes of the second subparagraph of art. 19(1) TEU or art. 47 of the Charter".[124] This means the Court is thus willing to receive questions from bodies that from the perspective of EU law are not able to apply the answers received from the ECJ, because they do not qualify as a 'court or tribunal' established by law. In the end, the Court is most concerned to maintain the systemic requirements of the preliminary reference procedure as a result of which "[t]he value of the rule of law is [...] giving way to the value of ('judicial') dialogue".[125] The latter, of course, being a systemic requirement for the functioning of EU legal order more than anything else.

[120] *Getin Noble Bank* cit. para 68.

[121] *Ibid*. para. 69.

[122] *Ibid*. para. 72.

[123] *Ibid*. para. 71.

[124] *Ibid*. para. 74.

[125] F Paweł 'Drifting Case-law on Judicial Independence: a Double Standard as to What Is a 'Court' Under EU Law?' (13 May 2022) Verfassungsblog verfassungsblog.de.

IV. Conclusion

The concept of autonomy of EU legal order is not simply a legal rule but offers a window on a distinct way of imagining the EU legal order, namely as an authorless system that operates according to its own internal and immanent principle of order. Identifying the Court's imagination of the EU legal order as system, allows one to better understand some of the tensions in the case law of the Court where it invokes the concept of autonomy of EU legal order. This *Article* has shown there exist no *necessary* relationship between the autonomy of the EU legal order and the objectives and values it pursues, but only a *contingent* one. In distinction to the objectives and values of European integration, a commitment to EU legal order as system forms an independent motivating force in the case law of the Court which expresses its commitment to maintaining the EU legal system as an end in itself. This means that to speak about the 'substantive' dimension of the autonomy of EU legal order is somewhat of a category error, which conflates means and ends, project and system. Despite the attempt to frame EU legal order as one of harmonic unity, we can thus conclude that the Fox with all its cunnings defeats the Hedgehog's one defence.

ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

Edited by Justin Lindeboom *and* Ramses A. Wessel

THE AUTONOMY OF THE EU LEGAL ORDER: THE CASE OF THE ENERGY CHARTER TREATY

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ABSTRACT: The autonomy of EU law is what makes the EU legal order what the Court of Justice of the European Union (CJEU) claims it to be, namely a domestic legal order that allows the EU to be an international actor in its own right. Investor-State-Dispute-Resolution (ISDS) mechanisms have recently been examined by the CJEU as to their compatibility with the jurisdictional normative autonomy of EU law and the regulatory autonomy of the EU institutions (*Achmea*, Opinion 1/17, *Komstroy*). The EU is only party to one international agreement in force that contains an ISDS mechanism. It is also the most litigated investment treaty in the world: the Energy Charter Treaty (ECT). In 2022, the negotiations between the Contracting Parties to the ECT have led to an 'agreement in principle' on a reformed treaty text. This *Article* examines the compatibility of the current ECT and of its reformed text with the normative and regulatory autonomy of the EU. It also argues that the Commission's actions in the period between the agreement in principle on the revised text of 24 June 2022 and the adoption of a resolution of the European Parliament calling on the EU to withdraw from the ECT on 23 November 2022 demonstrate the dark, undemocratic side of vesting the EU with external regulatory autonomy *vis-à-vis* the Member States. It highlights in particular that greater external regulatory autonomy of the EU may lead to an usurpation of executive powers and comes at the price of parliamentary control.

KEYWORDS: jurisdictional normative autonomy – regulatory autonomy – Energy Charter Treaty – Opinion 1/17 – International State Dispute Settlement – Commission as negotiator of international agreements.

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I. Introduction

The autonomy of EU law is what makes the EU legal order what the Court of Justice of the European Union (CJEU) claims it to be and what, in any event ordinary, national courts accept it to be: a new legal order in its own right that can take a dualist position towards international law, and, according to some, towards national law.[1] It is the very foundation of the effectiveness of EU law via national law.[2] The relevance of this autonomy claim can therefore be hardly overstated.

Currently, not only the autonomy of the EU legal order but also the regulatory autonomy of the EU institutions is put under pressure by the only EU agreement in force that foresees the possibilities of individuals (investors) to bring claims against the EU and that is also the most litigated investment treaty in the world: the Energy Charter Treaty (ECT).

This *Article* conceptually introduces the different forms of EU autonomy and examines the current ECT but also the renegotiated text of the ECT in light of these different forms of autonomy. It argues that not only the ECT as it is binding on the EU and 26 of its Member States but also the renegotiated text, as confirmed by the parties to be the outcome of the negotiations on 24 June 2022, breach the autonomy of the EU. Intra-EU arbitration under the ECT in its current form breaches EU law. This was confirmed by the CJEU in 2021.[3] This *Article* argues that also the reformed text as it was agreed in June 2022 undermines the EU's right to regulate.

This *Article* further concludes that reading the ongoing reform process of the ECT through a lens of separation of powers demonstrates that vesting the EU with greater external regulatory autonomy may result in a concerning power grasp of the Commission and deteriorates control by national parliaments and the European Parliament.

Normative or jurisdictional autonomy, on the one hand, and regulatory or political autonomy, on the other, are the very foundation of the EU legal order, its ability to pursue its own policy objectives, and its ambition as an international actor in its own right. The Court of Justice is very protective of the normative or jurisdictional autonomy of the EU legal order.[4] In the past 10 years, this has become particularly apparent in relation to international agreements that set up international courts and tribunals.

The EU's regulatory or political authority refers to the EU institutions' ability to determine their own course of action. This has an internal dimension; this is the right to regulate within the EU and under EU law. It also has an external dimension; this is the capacity of the EU to be an autonomous international actor in its own right, not depending on the will and approval of individual Member States.

[1] C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review 1; See in relation to national law *e.g.*, P Eleftheriadis, *A Union of Peoples* (Oxford University Press 2020), and J Lindeboom, 'The Autonomy of EU Law: A Hartian View' (2021) European Journal of Legal Studies 271.

[2] C Eckes, *EU Powers under External Pressure* (Oxford University Press 2019) chapter 1.

[3] Case C-741/19 *République de Moldavie v Komstroy* ECLI:EU:C:2021:655 (hereinafter *Komstroy*).

[4] C Eckes, 'The Autonomy of the EU Legal Order' cit.

Futhermore, the reform process as we have seen it up to 31 December 2022 painfully demonstrates the dark, undemocratic side of allowing the EU to become an international actor autonomous not only from external influences (right to regulate) but also from national will-formation and control mechanisms. While the constraints imposed by closed-door arbitration tribunals on the EU's ability to regulate are highly problematic, autonomy of the EU institutions from national will-formation and control mechanisms also raise democratic concerns. The EU lacks a deeply integrated political community and is structurally reliant on national sources for its legitimacy. The reform process of the ECT illustrates exceptionally well how weak the link between "the EU position" and any public debate, debate in national parliaments, or national media can become. The Commission appears so invested in the reform process and afraid of public pushback that it tries to keep the substantive points of change and how reform compares to withdrawal, which is supported by an increasing number of civil society actors and Member States, out of the public debate. The EU's external regulatory autonomy, *i.e.*, capacity to act autonomously from the Member States also means that it is largely acting under the radar of public scrutiny. This gives the Commission, as the EU's 'technocratic' and politically independent, *i.e.*, not directly politically controlled, executive institution, great power.[5]

In 2021, the CJEU held that intra-EU arbitration under the ECT, *i.e.*, arbitration between and investor of one Member State against another Member State, infringes the autonomy of the EU legal order.[6] However, convincing reasons also speak in favour of extra-EU arbitration equally infringing the autonomy of the EU legal order. The ongoing process of amending the ECT may potentially lead to a re-evaluation of this problematic treaty, including by the CJEU, as it reopens the possibility of asking for an opinion under art. 218(11) TFEU.

This *Article* explains, first, the meaning and relevance of the normative autonomy of the EU legal order (section II) and, second, its relationship to and the meaning of the regulatory autonomy of the EU (section III). Section IV then examines how the current ECT affects the normative and regulatory autonomy of the EU. Section V assesses whether and to what extent the conclusions of section IV are also applicable to the amended text of the ECT as agreed by the negotiators on 24 June 2022 that was meant to be approved by the Contracting Parties on 22 November 2022 before the Commission asked to remove the item from the agenda.[7] Section VI reflects on the process of reform so far (until 31 December 2022) and argues that, irrespective of whether the reformed ECT will ever see the light of day, the way the reform debate is suppressed should be a warning to those in favour of democratic control of external relations. The conclusions set out that the ECT both in its current form and in form of the amended text subject to approval by

[5] See on the Commission's expertise and independence: art. 17 TFEU.

[6] *Komstroy* cit.

[7] F Simon, 'Brussels calls for pause in ECT reform talks after losing key EU vote' (21 November 2022) Euractiv www.euractiv.com.

the Contracting Parties is incompatible with both, normative and regulatory autonomy and outlines possible ways in which the CJEU could be asked to rule on this issue.

II. Normative autonomy as the very foundation of the EU legal order

The normative or jurisdictional autonomy of EU law is what makes EU law a legal order.[8] It means that EU law does not legally depend for its validity on norms originating from outside of its own legal order, be it national or international. In practice, this means that the CJEU has exclusive jurisdiction to determine the definitive meaning, scope, and validity of EU law. This claim to normative autonomy is defensive in the sense that it aims to protect EU law from external interference but makes no claim that the EU institutions, including the Court, should be in the position to create or even interpret international or national law external to the EU legal order.

The CJEU *justifies* the normative autonomy of EU law "by the essential characteristics of the EU and its law, relating to the constitutional structure of the European Union and the very nature of that law".[9] It refers to the "independent source of law", the "primacy over the laws of the Member States", and the "direct effect" within the national legal order.[10] In other words, the Court justifies its conception of the normative autonomy of the EU legal order in a circular reasoning: the essential characteristics of EU law justify its autonomy and autonomy makes its essential characteristics as a domestic legal order possible. The CJEU takes in its reasoning a meta-teleological approach to interpretation referring on a very high level of abstraction to systemic values.

All legal orders, including national ones, establish their necessary self-contained nature in a circular reasoning.[11] To establish the self-contained and self-sufficient nature of national legal orders, national courts and constitutions routinely refer to the pre-existing sovereign, the people, that created the legal order by a constituent act, which itself could not yet be governed by the constitution that it created.[12] The CJEU construes EU law to stem from a separate independent source that originally derived from sovereign rights transferred from and by the Member States. However, the transfer is seen as having cut the link to the national legal order in a way that the validity and interpretation of EU law is now autonomous and no longer depending on the sovereignty of the Member States. Autonomy in this normative sense ensures the Court's jurisdictional authority as the final authority within this complete epistemic system. It allows the Court to protect the EU legal order from normative interference that could be "liable to adversely affect the specific characteristics of EU law and

[8] This section draws on C Eckes, *EU Powers Under External Pressure* cit. See section III of chapter 1 for a detailed conceptualization of the autonomy of EU law.

[9] *Komstroy* cit. para. 43; see also case C-284/16 *Achmea* ECLI:EU:C:2018:158 para. 33.

[10] *Ibid.*

[11] *E.g.*, T Flynn, *The Triangular Constitution* (Hart Publishing 2019).

[12] Comprehensively, J Colón-Ríos, *Constituent Power and the Law* (Oxford University Press 2020).

its autonomy".[13] This internal autonomy, that is autonomy from national law and the authority of national courts, gives the CJEU the necessary distance from national law that allows it to call on national courts to ensure the effectiveness and uniform application of EU law.

This conception of an autonomous legal order and the logical consequences that ensue from this conception are precisely what allows construing EU law as a domestic legal order and what lies at the very core of what makes the Union different from international organisations. At the same time, this conception of autonomy remains essentially contested by other international actors, as well as the highest national courts of the EU Member States.[14] Both the centrality of the claim of EU law to autonomy and the fact that it is contested may explain why the CJEU has attached so much value to this principle and has given strong rulings aiming to exclude even the possibility of undermining the autonomy of EU law.[15]

In short, the EU law's very claim to being a domestic legal order depends on its autonomous character, that is, its self-referential nature of not depending on national and international law for its validity and interpretation. This claim to normative autonomy allows the CJEU to uphold the claim that the effects of EU law within the national legal orders are a matter of EU law, rather than national or international law.

In turn, normative autonomy ensures the effectiveness of EU law on the ground, which is its most distinctive characteristic. The preliminary ruling procedure (art. 267 TFEU) was termed by the Court to be the "keystone" of the EU's judicial system.[16] It also is the institutional backbone of this effectiveness. It is the mechanism that ensures the "consistency and uniformity of the interpretation of EU law"[17] and allows regular confirmation of the CJEU's autonomy claim by national courts.[18] The EU's history of integration and ability to achieve a unique level of effectiveness of EU law within the national legal order has largely been triggered by and hinges on the decentralized enforcement of EU law by individuals in national courts and with the possibility of involving the CJEU via a preliminary ruling request. Under EU law, direct actions of individuals before the CJEU were much less relevant in the transformation of EU law than the ability and willingness of national courts to give effect to EU law and to refer questions to the CJEU under the preliminary ruling procedure.

With the EU becoming a powerful international actor, the CJEU's focus shifted towards external autonomy and the relationship between EU law and international law. The tensions

[13] Opinion 2/13 *Accession of the European Union to the EC* ECLI:EU:C2014:2454, para. 178.

[14] Recent illustrative examples: German Federal Constiuttional Court, judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 (PSPP judgment); Polish Constitutional Court's ruling of 7 October 2021 (case K 3/21).

[15] See in particular Opinion 2/13 cit.; C Eckes*, EU Powers Under External Pressure* cit.

[16] Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* ECLI:EU:C:2017:376.

[17] *Komstroy* cit. para. 45.

[18] See C Eckes, *EU Powers Under External Pressure* cit.

in this respect arise when (quasi-) judicial bodies established under international agreements to which the EU is a party are vested with the authority to give binding decisions that may interpret EU law (other than the international agreement itself). The fundamental nature of the Court's normative autonomy concern and its position that even potential interference with the self-referential nature of EU law is sufficient to render the external (quasi-) judicial mechanism contrary to EU law become apparent in a long list of rulings.[19]

More specifically, the CJEU held both in *Achmea* and in *Komstroy* that the protection of the normative autonomy of the EU legal order requires that no field of EU law be removed from the substantive reach of the preliminary reference procedure.[20] This is also fully in line with Opinion 1/09 on the European Patent Court.[21] In *Komstroy* the ECJ emphasised in particular that "by concluding the ECT the European Union and the Member States which are parties to it established a mechanism for settling such a dispute that could exclude the possibility that that dispute, notwithstanding the fact that it concerns the interpretation or application of EU law, would be resolved in a manner that guarantees the full effectiveness of that law".[22] This point is also confirmed by the Court's rulings in *Commission v. Poland*[23] and in *Associação Sindical dos Juízes Portugueses,*[24] which confirm the constitutional role of the Member States' courts under art. 19(1) TEU as the prime guardian of the rule of law and the entry point for the institutionalised judicial dialogue under the preliminary ruling procedure.

In Opinion 1/17, the Court further engaged with *procedural safeguards* of the EU's normative autonomy. CETA contained an elaborate provision (art. 8.31.2), ensuring that the Investment Court System (ICS) does not give binding interpretations of EU law but treats EU law as facts and follows the CJEU's interpretation.[25]

III. Regulatory autonomy

Construing the EU legal order as a domestic legal order that is normatively autonomous in the fashion explained in the previous section also form the necessary basis for the EU's regulatory autonomy. The term "regulatory autonomy" refers to the EU institutions' ability to determine their own course of action. It enables the EU to take the role of an actor, who is not remote controlled either by the Member States or international bodies but can take its own position and exercise power in its own right. Normative autonomy from

[19] Joined Cases C-402/05 P and C-415/5 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461; Opinion 2/13 cit.; *Achmea* cit.; *Komstroy* cit.

[20] *Komstroy* cit. para. 62.

[21] Opinion 1/09 *Istanbul Convention* ECLI:EU:C:2011:123.

[22] *Komstroy* cit. para. 60.

[23] Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531 paras 47-50 and case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586.

[24] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 paras 29-37.

[25] See for more detail section IV.2. below.

national and international law ensures that neiter national courts nor international (quasi-) judicial bodies can determine what is legal or illegal under EU law. This creates and protects a legal space for regulatory decision-making of the EU institutions.

The Court explicates Opinion 1/17:

> "if the Union were to enter into an international agreement capable of having the consequence that the Union – or a Member State in the course of implementing EU law – has to amend or withdraw legislation because of an assessment made by a tribunal standing outside the EU judicial system of the level of protection of a public interest established, in accordance with the EU constitutional framework, by the EU institutions, it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework." [26]

The Court's starting point was that, in the context of the ISDS-mechanism of CETA, arbitrators would be weighing "the interest constituted by the freedom to conduct business" against "public interests".[27] They would be able to render decisions binding on the EU on questions of whether EU acts violated the standards of 'fair and equitable treatment' or "indirect expropriation".[28] The Court added that such situations "are likely to occur often".[29] However, in terms of outcome, these considerations did not lead the Court to conclude CETA adversely affect the EU's regulatory autonomy. By contrast, the Court confirmed that CETA offered the *necessary legal safeguards* to prevent arbitrators from calling into question the policy choices of the EU institutions. It concluded that CETA was therefore compatible with the jurisdictional autonomy of EU law and the regulatory autonomy of the EU.

In its reasoning, the Court followed a two-step assessment of whether the EU's regulatory autonomy was affected.[30] First, it examined whether the international agreement contained *problematic features*, i.e. features that potentially interfere with the EU's regulatory autonomy. Problematic features are in particular (1) a broad definition of 'investment';[31] (2) compulsory jurisdiction for the EU and EU Member States as a respondent to claims by investors;[32] (3) that measures of general application can be challenged;[33] and (4) that a tribunal may award damages and this award is final.[34]

[26] Opinion 1/17 *CETA* ECLI:EU:C:2019:341 para. 150; see for more detail: L Ankersmit. 'Regulatory Autonomy and Regulatory Chill in Opinion 1/17' (2020) Europe and the World: A Law Review 1.

[27] *Ibid*. para. 137.

[28] *Ibid*. para. 138.

[29] *Ibid.*

[30] The summary of the Court's reasoning draws on: C Eckes and L Ankersmit, 'The compatibility of the Energy Charter Treaty with EU law' (22 April 2022) Client Earth www.clientearth.org.

[31] Opinion 1/17 cit. para. 139.

[32] *Ibid*. para. 140.

[33] *Ibid*. paras 141-143.

[34] *Ibid*. paras 144-146.

Second, and after confirming the presence of problematic features, the Court examined whether the agreement contained the *necessary legal safeguards* to ensure that the regulatory autonomy of the EU remained protected. These safeguards are in particular (1) a general exceptions clause for public interest measures;[35] (2) provisions guaranteeing the "right to regulate";[36] (3) a commit of the contracting parties to not lowering levels of protection of public interests;[37] and (4) the agreement circumscribes the scope of investment protection.[38]

The Court does not explicate whether *all safeguards* need to be present for an agreement that contains problematic features to be compatible with the EU Treaties. From the way the Court presented its considerations, the Court appeared to have assessed the various provisions together and drawn the overall conclusion that the contracting parties had sufficiently protected their regulatory autonomy.[39]

Regulatory autonomy has taken in Opinion 1/17 a more prominent place than in the earlier case law of the CJEU. Regulatory autonomy is key for the EU to be able to realize its ambitions as a global leader in climate change policies. The EU's Green Deal in general and commitment to an energy transition, in particular, require deep socio-economic changes in carbon-depending societies that can only be realized if the EU is in the position to determine its own course of action, with a certain distance to vested interests of other international actors but also private investors. However, it has convincingly be argued that it is almost impossible to violate regulatory autonomy.[40] While *prima facie* it might require repeated damages awards that would force the EU to retract legislation to pinpoint a specific violation the opinion procedure under art. 218(11) TFEU puts the Court in the exceptional but important position to assess future clashes between the envisaged agreement and EU law. This, by its very logic, opens the door for an assessment of *probability*.

IV. The Energy Charter Treaty (ECT) in its current form

This section examines the ECT as it is *at present binding* on the EU and 26 of its Member States. The amendments to the ECT, as they were negotiated between 2019 and June 2022 but have not so far (31 December 2022) been formally agreed by the Contracting Parties, are examined in the next section.

The ECT was signed in 1994 and entered into force in 1998. It aimed to incentivise and protect Foreign Direct Investments (FDIs) in the energy sector, in particular from Western European countries into fossil rich countries in the East. In many respects, the

[35] *Ibid.* paras 152-153.
[36] *Ibid*. para. 154.
[37] *Ibid*. para. 155.
[38] *Ibid*. paras 157-159.
[39] See also: L Ankersmit, 'Regulatory Autonomy and Regulatory Chill in Opinion 1/17' cit.
[40] *Ibid*.

ECT is an unusual and anachronistic investment treaty that would not meet current standards of protecting the right to regulate, in particular in order to meet other legal obligations, including obligations to reduce emissions.[41]

Since 2019, the Contracting Parties have been negotiating to modernise the ECT. On 24 June 2022, the *ad hoc* meeting of the Energy Charter Conference endorsed the outcome of the modernization negotiations and gave an "agreement in principle".[42] At the regularly scheduled meeting of the Energy Charter Conference on November 2022, the formal agreement and approval of the amended text was taken off the agenda because at that that point there was insufficient support for the revised ECT amongst the Contracting Parties.

On the side of the EU, the Commission has conducted the negotiations pursuant to art. 218 TFEU based on a negotiating directives adopted by the Council.[43] Besides a public communication of a summary of the changes made to the text, the reformed text endorsed by the Energy Charter Conference has remained secret. It was however leaked by POLITICO pro on 12 September 2022.[44] It is this leaked version that I have used for my analysis below.

IV.1. Substantive tensions

a) Sustainability

Substantively, EU law and the ECT may *prima facie* appear pursuing similar or at least compatible objectives. Both EU law and the ECT promote international economic integration in a way that appears based on a paradigm that further integration is inherently positive and capable of promoting other values, such as economic growth and energy efficiency but also environmental protection, with the ECT even making specific reference to the United Nations Framework Convention on Climate Change (UNFCCC).[45]

However, the ECT structurally subordinates environmental protection to investment protection and trade liberalisation provisions and includes weaker language for its environmental provisions than its investment provisions. It is no surprise therefore that arbitration awards have not given much significance to the ECT's references to the UNFCCC or environmental protection.[46]

The inherent substantive tensions are growing between the ECT, which protects the *status quo*, by protecting expected future profits for past and present investments, in-

[41] See C Eckes and L Ankersmit, 'The compatibility of the Energy Charter Treaty with EU law' cit.

[42] International Energy Charter, *Public Communication of the Ad Hoc Meeting of the Energy Charter Conference of 24 June 2022 Explaining the Main Changes Contained in the Agreement in Principle* www.energychartertreaty.org.

[43] Council of the European Union, *Negotiating Directives for the Modernisation of the Energy Charter Treaty – Adoption*, 2 July 2019, 10745/19 ADD 1 LIMITE.

[44] Politico, *Energy Charter Mod 24 Secretariat* www.iisd.org.

[45] See Energy Charter Treaty [1994], preamble paras 5, 13-15 and art. 19 and 24(2).

[46] A Ipp, A Magnusson and A Kjellgren, *The Energy Charter Treaty, Climate Change and Clean Energy Transition - A Study of the Jurisprudence* (Climate Change Council 2022).

cluding of the fossil fuel industries, and both the urgent need and far-reaching commitments of the EU and its Member States to reduce CO2 emissions in the present and immediate future.[47] The increase of sustainability policies and sharply growing numbers of (strategic) climate cases intended to speed up the transition towards renewable energy may be reasonably expected to result in a growing number of "phase-out cases" under the ECT. The cases of RWE and Uniper against the Netherlands are in this respect likely to be but the first signs of a new wave.[48]

b) Relevance of EU law

One way how EU law has been considered by arbitral tribunals and may be considered even more forcefully in the future is "as a fact" in the assessment of whether the claimant can argue that at the time of the investment it could reasonably expect legal stability.[49] With increasing EU law obligations to reduce emissions, it will be more difficult for future investments to establish such expectations. However, for past investments, depending on the time they were made, this line of argument will only apply to a more limited extent. Similar points can be made with regard to climate litigation.[50]

The EU has adopted a range of instruments with the objective to create a legal framework for achieving the objectives of its political plans under the so-called European Green Deal and meeting its international commitments of reducing emissions. These instruments include for example the EU climate law,[51] the EU Emissions Trading System (EU ETS),[52] Effort Sharing,[53] and emission performance standards for cars.[54] These legislative

[47] Intergovernmental Panel on Climate Change (IPCC) Assessment Report 6 (AR6) (2021); Communication COM(2021) 550 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 14 July 2021 on 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality.

[48] A Ipp, A Magnusson and A Kjellgren, *The Energy Charter Treaty, Climate Change and Clean Energy Transition* cit.

[49] See *e.g.*, ICSID case of 21 January 2020 n. ARB/15/44 *Watkins Holdings S.à.r.l and Others v Kingdom of Spain* para. 527; PSA case of 15 May 2019 n. 2014-21 *Photovoltaik Knopf Betriebs-GmbH v The Czech Republic* para. 522.

[50] C Eckes, 'The Courts Strike Back – The Shell Case in Light of Separation of Powers' Verfassungsblog (15 June 2021), verfassungsblog.de.

[51] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law").

[52] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

[53] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) n. 525/2013.

[54] Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) n. 510/2011.

measures only further increase the substantive tensions with the ECT, aimed at protecting existing investments in the energy sector, including by fossil fuel industries.

c) Level of investor protection

The ECT offers higher protection to international investors than to other rights-holders. Scholarly literature on ISDS in general and the ECT in particular has widely criticized that ISDS/the ECT treat international investors inequitably favourably as compared to ordinary persons or national investors. Art.16 ECT illustrates this point. It stipulates that "[w]here two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern [...] this Treaty, [...] nothing in such terms of the other agreement shall be construed to derogate from [...] this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is *more favourable to the Investor or Investment*".[55]

In line with this provision, the European Communities made a declaration under art. 25 ECT. This declaration establishes a carve-out from the ECT in that it allows the extension of EU law benefits between the Member States to the extent that these rules are more favourable for investors. It does not shield respondent states from obligations under the ECT if the rules under the ECT are more favourable for investors.

This leads to a situation that the ECT logically is set up in a way that gives investors, including the fossil fuel industries, greater protection for their investments. It is correct that the ECT may also give greater protection to investments into renewables where Member States withdraw originally offered preferential schemes or subsidies for investment into renewables. However, the growing climate emergency will only require more fundamental socioeconomic changes[56] and the tremendous gap between states' international commitments and their actual reduction policies at present[57] lead to the reasonable expectation that the greatest future beneficiary of the enhanced investment protection under the ECT will be the fossil fuel industries. They will necessarily be subject to the most far-reaching restrictions as a result of the necessary sustainability policies at national and EU level.

In addition, and more importantly, the case law of the CJEU on investment arbitration in general and the ECT in particular, highlights numerous institutional and constitutional conflicts between the ECT and EU primary law. These institutional and constitutional conflicts have led the CJEU to conclude that intra-EU arbitration on the basis of the ECT as it is currently binding on the EU and 26 of its Member States breaches EU law.

IV.2. A CLASH WITH NORMATIVE AUTONOMY?

Investor-State-Dispute-Settlement (ISDS) mechanisms established under international agreements to which the EU is a party have in recent years been the context in which the

[55] Emphasis added.

[56] IPCC Assessment Report 6 cit.

[57] Climate Action Tracker, *Climate Action Tracker* climateactiontracker.org.

CJEU has engaged with the EU's normative and regulatory autonomy. Offering an *alternative* route for dispute settlement and, as a consequence, removing disputes from the ordinary judiciary is the *very purpose* of ISDS mechanisms, including the ISDS provision of the Energy Charter Treaty (ECT). This is the core reason why ISDS mechanisms may interfere with the normative autonomy of the EU. *Ad hoc* arbitral tribunals are not courts or tribunals in the sense of art. 267 TFEU. They cannot refer questions to the CJEU. This was specifically confirmed for *ad hoc* arbitral tribunals such as those referred to in art. 26(6) ECT.[58]

As a result, *potential questions about EU law* are removed from the preliminary ruling procedure. Potential questions about EU law can also arise from *prima facie* purely national legal issues, because they fall within the widely defined scope of EU law or because they touch upon the Union's interest.[59] In 2014, the Court rejected the EU's planned accession to the European Convention on Human Rights (ECHR) in a controversial opinion that focused on all eventualities and excludes even the remote possibility of a challenge to the autonomy of EU law.[60] Also, in *Achmea* and in *Komstroy,* the ECJ did not focus on the specific arbitration at hand but considered how the international agreement set up arbitration and whether any (hypothetical future) arbitration could have negative effects for the (autonomy of the) EU legal order.[61]

Not only the cases' outcomes but also the Court's reasoning make *Achmea* and *Komstroy* bad news for extra-EU arbitration on the basis of the ECT. The Court introduced the *Achmea* ruling with eight paragraphs of principled considerations on the *autonomy of the EU legal order* before turning to the central question about the compatibility of the ISDS mechanism with EU law. It found the ISDS mechanism in *Achmea* to be in conflict with the *autonomy of the EU legal order* because it *removes disputes from the jurisdiction of the courts of the Member States*. [62] This is not a new criticism. In fact, the ECJ had highlighted this point also in Opinion 2/15 as the decisive feature of the investment chapter in the Free Trade Agreement between the EU and Singapore (EUSFTA) that requires Member States to give their formal consent the investment arbitration mechanism in that agreement.[63] In *Achmea* and *Komstroy*, the Court added more specifically that the autonomy of the EU legal order can only be preserved by an internal EU judicial system that remains able "to ensure the consistency and uniformity in interpretation of EU law".[64]

Opinion 1/17 confirms the legality of the ICS envisaged under CETA. One core contextual difference between the Court's rulings in *Achmea* and *Komstroy,* on the one hand, and Opinion 1/17, on the other, is the fact that the former concerned *intra*-EU arbitration

[58] *Komstroy* cit. para. 52.

[59] See for the ECJ's interpretation of the scope of EU law, case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 para. 22 and case C-206/13 *Siragusa* ECLI:EU:C:2014:126.

[60] Opinion 2/13 cit.; C Eckes, *EU Powers Under External Pressure* cit. chapter 6.

[61] *Achmea* cit. paras 50–52; Komstroy cit.para. 60.

[62] See also: *Achmea* cit. paras 50–52.

[63] Opinion 2/15 cit. ECLI:EU:C:2017:376 para. 292.

[64] *Achmea* cit. para. 35 (see also above).

while the latter concerns *extra*-EU arbitration under CETA. However, this is not the only difference. Even in light of Opinion 1/17, good reasons support that extra-EU arbitration on the basis of the ECT is incompatible with the normative autonomy of EU law.

First, EU agreements containing ISDS mechanisms are rare exceptions. Besides the ISDS mechanism under the ECT, in fact, the EU is not currently subject to the jurisdiction of any binding international court of tribunal that allows *individuals* to act as parties or directly receives complaints from individuals. While provisionally applied, CETA has not yet entered into force.

Second, the CJEU was more protective of the EU's normative autonomy in Opinion 2/13 than in Opinion 1/17. The stringent approach in Opinion 2/13 may be explained in light of the exceptional authority of the ECtHR, the broad scope of the ECHR having the potential to affect all areas of life, and the fact that it concerns a multilateral agreement with 47 Contracting Parties. By comparison, the arbitral tribunals established under the ECT do not have the exceptional authority of the ECtHR and the ECT is limited to the economic sector of energy. At the same time, the ECT is a multilateral treaty with 53 Contracting Parties. In addition, in relation to the issue of how protective the ECJ may be of the jurisdictional autonomy of the EU in relation to the ECT, it should not be disregarded that the ECT has, as we have seen above, the structural potential to trigger a large number of arbitrations in relation to an already ongoing and irreversible deep socioeconomic transition.

Third, the ECT is different in nature from CETA in that it is a legal framework that permits both intra- and extra-EU arbitration. This is conceptually very different from a separate agreement between the EU and the Member States as one party to an agreement with one or several third states. As explained above, the dividing line between intra- and extra-EU arbitration under the ECT is not static. Whether a particular arbitration is intra-EU (between an investor from one Member State against another Member State) or extra-EU (between an investor from a third state against a Member State or the EU) depends on the seat of the investor and company seats can be moved.[65] The presence of both intra- and extra-EU arbitration under the same agreement is the core conceptual difference that distinguishes the ECT from CETA. In light of the fact that extra-EU arbitration may have effects on intra-EU arbitration, this is a relevant difference to consider in the evaluation of whether the ECT can adversely affect the normative autonomy of EU law.

While ISDS in general and the ECT in particular do not rely on precedents, arbitral tribunals regularly reason their awards in light of the position of earlier arbitration.[66] Hence, interpretations of the ECT but also potentially of EU law in extra-EU arbitration have an indirect effect on the interpretation of the ECT and potentially EU law beyond the ECT, including in intra-EU arbitration, to the extent that it still takes place. This becomes

[65] See for more detail: C Eckes and L Ankersmit, *The Compatibility of the Energy Charter Treaty with EU law* cit.

[66] For ECT in particular, see: A Ipp, A Magnusson and A Kjellgren, *The Energy Charter Treaty, Climate Change and Clean Energy Transition* cit.

particularly apparent in areas of EU law that have extraterritorial effects, such as EU competition law, the CFR, or EU financial regulations related to derivatives trading.[67]

Fourth, an important difference between the ECT and CETA is that the ECT does not offer comparable *procedural safeguards* of the EU's normative autonomy as CETA. CETA contains a procedural separation provision (art. 8.31.2), which takes a four-pronged approach. It states, first, that the ISDS mechanism "shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of [CETA]"; second, it "may consider, as appropriate, the domestic law of a Party as a matter of fact"; third, it "shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party"; and, fourth, "any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party". The ECT does not offer any of these procedural safeguards, aiming to separate the activities of the arbitral tribunals from the EU legal order.

As a result of the missing separation provision, the status of EU law in arbitral tribunals established on the basis of the ECT is entirely uncertain. From the perspective of the ECT and hence the tribunals established on the basis of the ECT, EU law could either be seen as a distinct legal order constituting domestic law or as international law. However, even if accepted to be domestic law, this does not allow the EU (or its Member States) to rely on domestic law as a defence for avoiding responsibility under an international agreement, *i.e.,* the ECT. Pursuant to art. 27 of the VCLT/VCLTIO 1986 (the latter is not in force but widely accepted to constitute customary international law) a State cannot rely on domestic law as an excuse for failing to comply with treaty obligations.[68]

If, by contrast, EU law was seen as international law and hence as at least potentially "applicable rules and principles of international law" under art. 26(6) ECT,[69] its applicability would still depend on whether the substantive protections that it provides are more favourable to investors than are the investment protection of the ECT.[70] The latter is the condition for applicability in the conflict clause of art. 16 ECT. In other words, EU law could not easily justify a restriction of the investor's rights under the ECT. It should be added that a different

[67] M Cremona and J Scott (eds), *EU Law Beyond EU Borders: the Extraterritorial Reach of EU Law* (Oxford University Press 2019).

[68] ICSID case of 31 July 2019 n. ARB/15/38 *SolEs Badajoz v Spain* para. 150.

[69] See also: Vienna Convention on the Law of Treaties (1969) art. 31(3)(c), stipulating that courts and tribunals should interpret a treaty taking into account "any relevant rules of international law applicable in the relations between the parties".

[70] *SolEs Badajoz v Spain* cit. para. 164; ICSID case of 6 June 2016 n. ARB/13/30 *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v Kingdom of Spain* (Decision on Jurisdiction) para. 75; ICSID case of 31 August 2018 n. ARB/13/30 *Vattenfall v Germany II* (Decision on the Achmea Issue) para. 229; SCC case of 8 March 2021 n. 2017/060 *FREIF Eurowind Holdings Ltd v Kingdom of Spain* (Final Award) para. 325.

position was taken in *Electrabel v. Hungary*,[71] which, however, appears not to have been followed by subsequent tribunals as far as information is publicly available.

Finally, the ECT does not contain a clause stipulating the limited legal bindingness of the arbitral tribunals' findings for the national courts of the Member States or the CJEU. However, while claims on the basis of the ECT primarily aim for financial compensation, the primary remedy sought in some claims based on the ECT appears to request specific performances. An example is the by NordStream2 case against the European Union[72] and the first Vattenfall case against Germany.[73] The former requests the 'disapplication' of the Gas Directive from the project. The latter concerned the amount of Elbe water that could be used by the investor without harming the ecosystem of the river.

Pursuant to Opinion 1/17, arbitration systems must (1) guarantee that arbitration panels do not interpret EU law "other than the provisions of the [international investment agreement]" and (2) not have "*effect on the operation of the EU institutions* in accordance with the EU constitutional framework".[74] An assessment of the ECT in light of these two conditions demonstrates, first, that the ECT tribunals interpret EU law, including as (international) law; second, that they are likely to carry out balancing tests that entail the interpretation of EU policies and their assessment in light of the ECT; and, third, and most importantly, that the fundamental concerns of the CJEU regarding the removal of disputes from the preliminary ruling procedure as the backbone of the autonomy and effectiveness of EU law also apply to extra-EU arbitration on the basis of the ECT. Matters that at least potentially affect EU law and hence fall within the widely interpreted scope of EU law are decided by judicial bodies that cannot refer preliminary rulings to the CJEU.

In other words, good legal arguments support that the ECT in its current from adversely affects the EU's normative autonomy. The third subsection below offers an assessment as to whether the reformed text of the ECT gives reason for a different conclusion.

IV.3. Limiting regulatory autonomy?

The CJEU was more protective of the EU's regulatory autonomy in Opinion 2/13 than in Opinion 1/17. This becomes particularly apparent in the comparison of the discussions of the effects on the operation of the EU institutions. Opinion 2/13 aims to exclude the

[71] ICSID case of 30 November 2021 n. ARB/07/19 *Electrabel SA v Republic of Hungary* (Decision on Jurisdiction, Applicable Law and Liability) paras 4.187-4.191. See also: A Ipp, A Magnusson and A Kjellgren, *The Energy Charter Treaty, Climate Change and Clean Energy Transition* cit. 39.

[72] PCA case of 3 July 2020 n.2020-07 *Nord Stream 2 AG v EU*.

[73] ICSID case of 11 March 2011 n. ARB/09/6 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany (I)*, see also ISDS Platform *Vattenfall vs. Germany I: Coal-fired electric plant* www.isds.bilaterals.org.

[74] Stated in Opinion 1/17 cit. para. 119 and elaborated in paras 120 ff. and 137 ff.,respectively.

possibility of effects on the institutional interaction ('stress test').[75] Opinion 1/17 by contrast examines the *probability* of effects.[76] What would be the assessment of the effects of the ECT on the EU's regulatory autonomy?

The ECT contains all problematic features identified in the section on regulatory autonomy above. First, the ECT contains a broad definition of investment, although it is – in line with the subject matter of the ECT – limited to investments "associated with an economic activity in the *energy sector*".[77] "Investment" under the current ECT is defined as "every kind of asset, owned or controlled directly or indirectly by an investor". Second, art. 26(3)(a) ECT establishes that the EU and the EU Member States that are party to the ECT give "unconditional consent to the submission of a dispute to international arbitration". Third, the ECT does not preclude that a dispute can concern a measure of general application or an act implementing a measure of general application. Any dispute may be brought "relating to an investment" of an investor of one party in the area of the other party.[78] Recently, the EU itself has found itself in a dispute with a Swiss company Nord Stream 2 AG over its amendment of the Gas Directive 2009/73/EC as an example of a claim challenging a measure of general application.[79] Fourth, art. 26 (8) ECT provides that the "awards of arbitration [...] shall be final and binding upon the parties to the dispute. [...] Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its area of such awards". Accordingly, this element has also been satisfied in relation to the ISDS-mechanism in the ECT.

While containing all the features that are problematic for internal regulatory autonomy, the ECT does not offer all the required safeguards considered by the Court in Opinion 1/17. First, the ECT contains an exceptions clause. However, the clause is more limited than that of CETA. In addition, the more limited exceptions clause is only partially applicable to the relevant part III of the ECT on investment protection. Significantly, parties cannot rely in the context of ISDS disputes on the exception that allows parties to adopt or enforce any measure "necessary to protect human, animal or plant life or health".[80] These grounds of public interest protection are explicitly listed by the Court in Opinion 1/17.[81]

Second, the ECT has a "right to regulate" clause (art. 18 ECT on resource sovereignty) that is somewhat comparable to art 8.9.1 CETA although it only applies to resource sovereignty. However, art. 18 ECT is located in Part IV of the ECT, not part III of the ECT. Art. 26 ECT limits the jurisdiction of the tribunals to disputes concerning "an alleged breach of an obligation of the former under Part III". Hence, the right to regulate is not protected

[75] C Eckes, 'Autonomy of EU Law' cit. 8.
[76] Opinion 1/17 cit. para. 138.
[77] Energy Charter Treaty cit. art. 1(6) ECT, emphasis added.
[78] *Ibid*. art. 26(1).
[79] *Nord Stream 2 AG v European Union* cit.
[80] Energy Charter Treaty cit. art. 24(2)(b).
[81] Opinion 1/17 cit. para. 152.

in ISDS disputes. In addition, the ECT does not feature a clause similar to 8.9.2 CETA. Therefore, the current ECT does not meet this particular safeguard.

Third, no Annexes or Decisions under the ECT offer interpretative safeguards as to the levels of protection established by the Parties in their respective territories. Fourth, the ECT does not circumscribe the scope of the "fair and equitable treatment" and indirect expropriation standard as referred to by the Court in Opinion 1/17. The text of the ECT does not state that non-discriminatory public interest measures can only constitute "indirect expropriation" where such measures "are so severe in light of its purpose that it appears manifestly excessive". Oddly, though, this provision in CETA seems to specifically allow tribunals to call into question the level of protection sought by a party. The limitations (excessive measures) nonetheless appear to satisfy the Court. In relation to the "fair and equitable treatment" standard in the ECT, art. 10 ECT does not contain an exhaustive list, nor have the parties to the ECT explicitly "concentrated on [...] situations where there is abusive treatment, manifest arbitrariness and targeted discrimination". Rather, "fair and equitable treatment" is neither defined nor does art. 10(1) ECT provide an exhaustive list when a violation of this standard has occurred.

Furthermore, the ECT and CETA differ in other respects. While both agreements predominantly seek to liberalise trade and protect foreign investment, the parties to the CETA have been more explicit in underlining the importance of protecting the ability for parties to regulate in the public interest and to have the freedom to set the levels of protection of those public interests. The Joint Interpretative Instrument of CETA refers to the CETA as a "modern and progressive trade agreement" with various provisions that seek to protect the ability of the Parties to protect public interests such as environmental protection and to choose the appropriate level of protection.

What is more, the ECT contains two provisions that negatively affect the regulatory autonomy of the EU institutions that are not present in CETA. First, the ECT contains the above sketched non-derogation clause in art. 16 ECT. Even if the ECT is the only agreement to which the EU is party, Opinion 1/17 makes clear that regulatory autonomy can also be adversely affected were Member States are implementing EU law and Member States are party to a significant number of investment agreements with states that are party to the ECT. Second, the ECT is explicit in structurally subordinating environmental protection to investment protection in the text. For instance, art. 13(1) of the Energy Efficiency Protocol contains a hierarchy clause that subordinates the provisions of the protocol to the ECT and both the Energy Efficiency Protocol and art. 19 of the ECT are not covered by the dispute settlement procedures of art. 26 (ISDS) and art. 27.[82]

By way of conclusion, the ECT in its current form is incompatible with the EU's internal regulatory autonomy, because the ECT gives ISDS tribunals relevant powers to interfere with internal policies without offering sufficient legal safeguards.

[82] Energy Charter Treaty cit. art. 19(2), 26(1) and 27(2)

V. The reformed text of the ECT

This section examines whether the reformed text as it was agreed by the negotiating parties on 24 June 2022 gives reasons for a different assessment. It engages in turn with the substantive difference, normative autonomy, and regulatory autonomy.

V.1. Substantive incompatibilities are a ticking bomb

Substantively, the amended ECT text aims to reduce the tension between the ECT and EU law, in particular by bringing the former in line with the Paris Agreement and restricting the scope for claims by the fossil fuel industries; yet, it does not resolve the inherent tension between the "fuel-neutral" protection of the *status quo* and the need to quickly realize deep socio-economic changes. Fuel-neutral is used to refer to the fact that it protects both fossil fuel and renewable energy.[83] Protecting the *status quo* at this point in time means protecting 340 billion US dollars of investments into fossil fuel.[84] Hence, the term "fuel-neutral" https://borderlex.net/2022/11/14/energy-charter-treaty-preserving-a-forum-for-energy-transition-diplomacy/ while legally correct, both fossil fuels and renewable are protected under the reformed text, is questionable in light of the factual situation of much higher investments in fossil fuel than renewable energy. In any event, continuing to protect fossil fuels is contrary to the EU's and national climate policies and the Paris agreement. For *existing* investments on the territory of the EU protection continues for ten years beyond entering into force. *New* investments into fossil fuel remain protected until 15 August 2023. The protection of fossil fuel investments in non-EU states remains unlimited in time.[85] The extensive sunset clause in current art. 47(3) ECT protects the effects of the ECT for 20 years after a contracting party withdraws will remain in place in the reformed ECT.[86]

While *prima facie* the protection of existing fossil fuel investments to a period of 10 years may seem significantly shorter than the twenty years of the so-called sunset clause that is in principle triggered by withdrawal, the devil is in the detail. The protection extends ten years beyond entering into force. This took three, four years for the current text.[87] However, the reform is must more controversial and several parliaments have

[83] U Rusnák, 'Energy Charter Treaty: Preserving a Forum for Energy Transition Diplomacy', Borderlex 14 November 2022 borderlex.net; see the understanding added by the contracting parties to the definition of "economic activity" in art. 1(5), clarifying that economic activity refers to "(i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium; (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources".

[84] K Tienhaara, R Thrasher, A Simmons, and K Gallagher, 'Investor-State Disputes Threaten the Golbal Green Energy Transition' (2022) 376 Science 701.

[85] The only non-EU states that have committed to limiting the protection of certain fuels are the UK and Switzerland, see Annex NI.

[86] Art. 47 ECT remains unchanged.

[87] The current text of the ECT was signed in December 1994 and entered into force in April 1998.

voiced strong criticism.[88] The reformed text states in anticipation of looming ratification difficulties that protection will end at the latest on 31 December 2040.[89] The greatest problem, also from a justice perspective, *i.e.*, that the Commission speaks of a just transition, is that fossil fuel investments of EU investors in non-EU states remain protected without any time limit.[90] In other words, while the EU (limitations of fossil fuel protection) and the Member States (by withdrawing) aim to escape investor claims for billions of euros, the Commission/DG Trade and at present several Member States that do not want to stand in the way of reforming and extending the ECT[91] actively pursue or at least allow for roping in developing and usually financially struggling countries into an investment treaty that exposes them to excessive claims for compensation in the future. If the reformed ECT is financially risky and climate policy incompatible for EU states, why would one want to extend it to African countries?

Another important aspect of current and above all future substantive incompatibility of the reformed text of the ECT with EU climate policies is the newly introduced protection of renewables, *i.e.*, hydrogen, ammonia, biomass, biogas, and synthetic fuels.[92] First, by protecting the interests of investors above and beyond other rights and principles protected under domestic constitutional law (by exceptionally protecting uncertain future earnings) the balance is tilted towards economic interests of private persons and the common interest in maintaining a habitable climate. Second, while we do not understand all the implications of the unprecedented socio-economic changes necessary in the energy transition, we do know that our understanding and technological possibilities will increase. Locking public policy in regulatory frameworks and subsidy schemes that appeared sensible to reduce emissions in the past (*e.g.*, biomass) have proven and are likely

[88] European Parliament resolution P9_TA(2022)0268 of 23 June 2022 on the future of EU international investment policy. The EP has scheduled a debate about the reformed text for 21 November 2022, the day before the meeting of the Energy Charter Conference.

[89] Tweede Kamer (Dutch Parliament, 2nd chamber), Appreciatie van de moderniseringsvoorstellen voor het Verdrag inzake het Energiehandvest (Energy Charter Treaty), 10 November 2022, available at: www.tweedekamer.nl See Annex NI Section C 1 of the leaked text of the reformed Energy Charter Treaty.

[90] See however Japan as the only country in the Annex IA-NI, which contains a "[l]ist of Contracting Parties not allowing to submit to international arbitration a dispute related to an Investment in their Area by an Investor of another Contracting Party regarding Energy Materials and Products *excluded* by the latter" (emphasis added); in other words, Japan excludes the protection of fossil fuel investments by investors from a contracting party that itself does not protect fossil fuel investments. All other contracting parties to not introduce any limitation of the protection of fossil fuel investments by EU investors.

[91] See the ambition of the ECT Secretary-General Guy Lentz to extend to forty African countries: K Mathiesen and SA Aarup, 'The world's biggest dirty energy club is cracking up' (24 October 2022) Politico www.politico.eu.

[92] See Annex EM I of the leaked text of reformed Energy Charter Treaty (Energy Materials and Products in accordance with art. 1(4) ECT); low carbon hydrogen, also called blue hydrogen, is highly problematic: Environmental Defense Fund, *For hydrogen to be a climate solution, leaks must be tackled* www.edf.org.

to continue to prove outdated and insufficient in the future. Any such straightjacket on policy reactions to technological advances is likely to be costly and counterproductive.

Some of the precise limits of what constitutes "green investments" are already contrary to the EU's own taxonomy of what is 'green' at present. The reformed ECT for example transitionally protects the production of energy emitting less than 380 grams of CO2 per kilowatt hour, while the EU taxonomy classifies power plants with more than 270 grams of CO2 emissions per kilowatt hour as "significantly harmful".[93] Fact is that the ECT will continue to protect activities by EU investors in non-EU countries that are outlawed within the EU. Yet, climate change remains a *cumulative global action problem*, where every ton of CO2 contributes to irreversible temperatures increases that will change life on Earth – irrespective of where it is emitted.

By way of conclusion, the reformed ECT continues to clash with EU climate policies at present and is likely to do so even more in the future. An increasing number of disputes as result of the energy transition are all but certain. This makes the questions of whether the reformed ECT, if it sees the light of the day, would be compatible with the EU's normative and regulatory autonomy particularly relevant. The high likelihood of many disputes challenging EU policy should also mean that if the Court was consulted it would take a close look at the reformed ECT.

V.2. Limiting normative autonomy – how far is too far?

As to the *normative* autonomy of EU law, the reformed text of the ECT replicates the procedural separation mechanisms of CETA.[94] The reformed text of the ECT hence *textually* offers the same safeguards as CETA. Whether the same level of procedural safeguards however is sufficient to reduce the likelihood of conflict to a legally acceptable level is a different issue. In this assessment, one would need to consider the multilateral nature of the ECT with 53 contracting parties and plans of extension into 40 additional countries (as opposed to Canada as the only non-EU state that is party to CETA), the fact that at present the ECT protects fossil fuel investments of 340 billion US dollars that are likely to be affected by climate policies, as well as the continuous possibility of arbitration by former EU investors against another EU Member State by move their seat to a non-EU state. The reformed text of the ECT contains a clause aiming to limit this possibility by requiring 'substantial business activity' in the area of the Contracting Party under which law the investor is constituted.[95] Overall, the normative effects on the EU legal order are likely to be greater than those of CETA. Whether this leads to classifying the reformed text of the ECT as violating the normative autonomy of EU law becomes a decision based on the degree of interference that the

[93] Klimareporter, *Die EU steuert auf einen Ausstieg aus der Energiecharta zu* www.klimareporter.de.
[94] See footnote 13 attached to art. 26(6) of the leaked text of the reformed Energy Charter Treaty.
[95] Art. 1(7)(ii) leaked text of the reformed Energy Charter Treaty.

Court is willing to tolerate. In light of the low normative legitimacy of arbitral tribunals,[96] the Court may feel insufficiently threatened in its jurisdictional authority.

V.3. EU REGULATORY AUTONOMY INTERPRETED BY ARBITRATORS

As to *regulatory* autonomy, the reformed text continues to contain all the identified problematic features, with certain qualifications. Under the amended ECT, the definition is limited by the need for the investment to entail "the commitment of capital or other resources, the expectation of gain or profit, a certain duration or the assumption of risk."[97] Nonetheless, even with these qualifications the definition of investment remains broad and hence problematic.

The amended ECT text offers several, but not all, of the safeguards included in CETA. The reformed text includes a "right to regulate" clause in Part III of the ECT. It also essentially introduces the same texts for the "fair and equitable treatment" standard and "indirect expropriation" standard as under CETA. Notably, the reformed text includes 'understandings' of the contracting parties and footnotes are added to several provisions serving as interpretative tools.[98]

However, even if the amended ECT text offers several safeguards the ECT remains a very different agreement than CETA. Importantly and unlike the Joint Interpretative Instrument in CETA, the reformed text of the ECT does not explicitly state that the ECT does "not lower [the standards and regulations of each Party] related to food safety, product safety, consumer protection, health, environment or labour protection" or that "imported goods, service suppliers and investors must continue to respect domestic requirements, including rules and regulations". The ECT only states that '[t]he Contracting Parties *shall not encourage* trade or investment in energy *by relaxing or lowering* the levels of protection afforded in their respective environmental or labour laws'.[99] This is a provision of a very different order as it only relates to the actions of the parties in terms of encouraging investment by lowering protection by changing domestic law. In short, while these sections of the Joint Interpretative Instrument were cited by the Court in Opinion 1/17 in finding CETA compatible with the regulatory framework in the EU they do not find an equivalent in the reformed ECT.[100]

Overall, the reformed text of the ECT aims at better protecting regulatory autonomy; however, the interpretation of these provisions lies in the hands of arbitrators appointed by the parties, who have so far been very reluctant to give weight to environmental and

[96] Many scholars have written on the legitimacy problems of ad hoc ISDS tribunals, see *e.g.*, C Olivet and P Eberhardt, 'Profiting from Crisis. How Corporations and Lawyers are Scavenging Profits from Europe's Crisis Countries' (TNI CEO 2012) corporateeurope.org.

[97] Art. 1(6) leaked text of reformed Energy Charter Treaty.

[98] See as an example footnote 13 added to art. 26(6) leaked text of the reformed Energy Charter Treaty, that clarifies the relation of international law to the law of the contracting parties.

[99] Art. 19(3) leaked text of the reformed Energy Charter Treaty.

[100] Opinion 1/17 cit. para. 155.

social protection.[101] The difficulty of finding arbitrators that are not captured by the industries does not lead to greater trust in the system.[102] The ISDS provision in the ECT does neither meet the standard of the Investment Court System under CETA nor the standards of independence and coherence that the EU strives for in its general investment protection policy.[103] It remains hence likely that also arbitration under the reformed text will continue to interfere with the regulatory autonomy of the contracting parties, particularly in light of the significant and growing substantive incompatibilities between the ECT and the EU's climate ambitions.

The combination of the exceptionally intensive use of the ECT by investors, the high amount of fossil fuel investments protected under the ECT, and the EU's ambition to reduce emissions sharply in the coming years could very well meet the threshold of a probability assessment carried out by the Court under the opinion procedure. If the ECT reform is (partially) successful and the EU and some of its Member States remain a party it would certainly be worth testing.

VI. The dark side of the EU's external regulatory autonomy

External regulatory autonomy, it should be recalled, refers to the EU institutions' ability to act externally without being dependent on either the Member States or any external actors, such as non-EU states or non-state actors. However, as the reform of the ECT illustrates EU external regulatory autonomy can translate into executive power unbound, *i.e.*, the Commission pushing for its preferred policy without public debate and without the support of either the Council or the European Parliament. This is highly problematic from a separation of powers perspective.

In October and November 2022, Member States one after the other announced that they planed to withdraw from the ECT,[104] all at least also because the ECT, including in the reformed version, constitutes an obstacle to climate policies. States predominantly point at the continuous protection of investments into fossil fuels. Civil society organisations have in large numbers criticised the amended ECT as a continuous obstacle to domestic climate policies, including because it extends protection to renewable energy

[101] Climate Change Counsel, *The Energy Charter Treaty, Climate Change and Clean Energy Transition, A Study of the Jurisprudence* www.climatechangecounsel.com.

[102] A Neslen, 'Revealed: secret courts that allow energy firms to sue for billions accused of 'bias' as governments exit' (14 November 2022) The Guardian www.theguardian.com; see also: A Arcuri, 'The Great Asymmetry and the Rule of Law in International Investment Arbitration' in L Sachs, L Johnson and J Coleman (eds), *Yearbook on International Investment Law and Policy* (Oxford University Press 2018); C Olivet and P Eberhardt, 'Profiting from Crisis' cit.

[103] European Parliamentary Research Service, *Investor-state protection disputes involving EU Member States – State of Play* www.europarl.europa.eu.

[104] France, Germany, the Netherlands, Slovenia, Spain, Poland and Luxembourg have done so, B Moens, 'Germany to leave Energy Charter Treaty' (11 November 2022) Politico www.politico.eu.

sources, such as biomass and hydrogen and that this is likely stand in the future in the way during the search for the best way to realise the energy transition.[105] However, the European Commission remains silent on the either of these two points of criticism, continues to refer to the sunset clause (which remains unchanged in the reformed text) and keeps the legal advice on the requirements and consequences of EU withdrawal secret.[106] It simply emphasises that in principle the plan remains that the EU in its own right will remain a party of the ECT and that the Commission will have to conduct further legal assessments of EU withdrawal at this point.[107]

In the context of a mixed agreement that contains ISDS provisions at its heart, the EU and its Member States must cooperate closely. Opinion 2/15 explicates that Member States must consent to ISDS because it removes disputes from national judiciaries and the institutional mechanism of judicial dialogue that is the "keystone" of European integration, namely the preliminary ruling procedure under art. 267 TFEU.[108] As has been pointed out, the choice of words of the Court of "shared competence" in Opinion 2/15 may be confusing but the meaning of the judicial reasoning of the court leaves little doubt that the EU alone cannot conclude international agreements that contain ISDS provisions.[109] A contextual reading of paras 292 and 293 of Opinion 2/15 demonstrate that consent of the Member States would require ratification as a party to a mixed agreement.

However, the vital question is whether, in the future, after eight Member States, representing more than 70 per cent of the EU's population, have left the ECT (France, Germany, Italy, Luxembourg, the Netherlands, Slovenia, Spain, and Poland), the EU can actually remain a contracting party to an investment treaty that is centrally built around an ISDS mechanism. Withdrawal for these Member Sates would have no effect if at the same time they gave consent for the EU remaining a party in its own right. This question is an intricate question of EU competences. It stands next to the strong substantive criticism that the reformed ECT continues to hinder domestic climate policies, including those adopted by the EU.[110]

[105] See *e.g.*, the letter of 12 NGOS to the Dutch government: Urgenda, 'Dringende oproep aan kabinet: stap nu uit het Energiehandvestverdrag' (10 October 2022) www.urgenda.nl.

[106] P Leino-Sandberg and C Eckes, 'The European Commission's Assessment of EU Withdrawal from the Energy Charter Treaty' cit.

[107] Previously, the Commisson refused to further investigate withdrawal: B Moens, Germany to leave Energy Charter Treaty, politico, available at: www.politico.eu; however, early December, Cristina Lobillo Borrero mentioned a change in position in this respect, as reported by Anna Hubert on her Twitter account (@AnnaHbrt) on 6 December 2022 at twitter.com.

[108] Opinion 2/15 cit.

[109] L Ankersmit, 'Opinion 2/15 and the future of mixity and ISDS' European Law Blog (18 May 2017) europeanlawblog.eu and D Thym, 'Mixity after Opinion 2/15: Judicial Confusion over Shared Competences' Verfassungsblog (31 May 2017) verfassungsblog.de.

[110] M Peigné, 'ECT: "ecocide" treaty puts Member States and EU Commission at odds' (25 July 2022) Investigate Europe www.investigate-europe.eu; K Tienhaara and L Cotula, *Raising the Cost of Climate Action? Investor-state Dispute Settlement and Compensation for Stranded Fossil Fuel Assets* (International Institute for Environment and Development 2020) www.iied.org.

The Commission does not engage with the discussion of how the EU can remain a party to the ECT in its own right, when eight Member States have left. The Commission, led by DG Trade, appears to stick, for the moment, to its course of action of pushing the reform of the ECT, irrespective of the increasing opposition of the Member States. The only publicly available reaction of the Commission so far is that it amended the proposal for the Council decision on the EU's position at the Energy Charter Conference. The first proposal dating from 5 October 2022 suggested for the EU "to support the adoption [...] of the proposed amendments".[111] The proposal of 14 November 2022 by contrast states "The position to be taken on the Union's behalf, as regards matters falling within Union competence, at the 33rd meeting of the Energy Charter Conference shall be to participate in the vote and to raise no objection".[112] However, no public position has been taken by the Commission on what its position is what "matters falling within Union competence" means and more specifically what this means with regard to the ECT's ISDS mechanism. Hence, this remains a matter of speculation.

As the Commission explains in its proposal of 5 October 2022: "At the 33rd meeting of the Energy Charter Conference on 22 November 2022, the decisions related to the modernisation of the ECT will be subject to a unanimity vote. If the vote is successful, i.e. if no Contracting Party raises an objection, the decisions for the modernisation of the ECT will be considered "adopted" by the Energy Charter Conference. This adoption will trigger subsequent processes for the ratification, provisional application, and eventual entry into force of the various elements of the reform package." In other words, for the moving forward of the ECT reform, the change of the text of the proposal does not seem to matter.

After having been put on the Council's agenda and removed again, on 17 November 2022, the preparation for the adoption of the Council decision on the EU's position at the Energy Charter Conference was put back on the agenda of COREPER I for 18 November 2022. At this meeting, a blocking minority of Member States (DE, ES, FR & NL) blocked the adoption of the Commission proposal to "vote and raise no objection" at the Energy Charter Conference on 22 November 2022.

Effectively, if the Council had adopted the Commission's proposal the reform had moved forward, and the EU and its Member States would have been in principle expected by the other Contracting Parties to the ECT to conclude/ratify the amendments. The decision to take a position at the Energy Charter Conference is similar to a decision to sign an international agreement or to initial its text. Hence, while it creates expectations of third countries, it is not legally binding under international law.

[111] Proposal COM(2022) 521 final of 5 October 2022 for a Council decision on the position to be taken on behalf of European Union in the 33rd meeting of the Energy Charter Conference.

[112] Draft Council decision on the position to be taken on behalf of the European Union at the 33rd meeting of the Energy Charter Conference, 14 November 2022, 14399/22, Interinstitutional File: 2022/0324(NLE) data.consilium.europa.eu.

The intra-EU discussions between the Commission and the Member States all take place behind closed doors and it is ultimately impossible to know why a Member State like France, which was one of the first to announce withdrawal, changed its position from voting in favour of the Commission's proposal on the position of the EU at the Energy Charter Treaty to voting against. What we do know is that besides the Slovakian minister of foreign affairs, who is also the former Secretary-General of the ECT, no Member State or representative of a Member State has publicly argued in favour of reforming and staying in the ECT.[113] That no public debate on the position of the Member States has taken place.

While the Parliament was kept out of the discussions of the Commission proposals for a Council position at the Energy Charter Conference, the position of the European Parliament is vital at the later stages of provisional application and conclusion.[114] Already on 23 June 2022, the European Parliament had adopted a very critical resolution, calling on the Commission to withdraw from the ECT if the reformed text, which was endorsed a day later, did not deliver what was asked of the Commission in the negotiating directives, crucially the exclusion of intra-EU arbitration and compliance with the 2015 Paris Agreement.[115] On 23 November 2022, the EP adopted a resolution calling on the EU to withdraw from the ECT.[116] It emphasised several important points regarding first the reform procedure and second lack of support for the outcome. First, the EP concluded that "the legal text of the final agreement has not yet been formally published, which does not meet the level of transparency of other EU trade and investment agreements".[117] The EP further stressed 'that the Commission ha[d] not adequately prepared th[e] coordinated withdrawal nor shared any information about it, despite Parliament's several demands since the beginning of the modernisation negotiations, as an alternative in case of unsatisfactory results or the failure of the modernisation process'.[118]

In terms of lack of support, the EP recalled that "since the conclusion of negotiations, Germany, France, Spain, the Netherlands, Poland, Slovenia and Luxembourg, who combined represent more than 70 % of the EU's population, announced their intention to withdraw from the ECT".[119] Finally, the EP "[u]nderline[d] the need to act in a coordinated manner in order to be stronger in the withdrawal negotiations and to limit the negative

[113] See, *e.g.*, U Rusnák, 'UNFCC COP23 on International Energy Charter' (16 November 2017) unfccc.int and U Rusnák, 'Mission statement for the International Energy Charter in 2022-2026' (February 2021) www.euractiv.com.

[114] Legally speaking, the EP's consent is not necessary pursuant to art. 218(5) TFEU. It is necessary for conclusion pursuant to art. 218(6) TFEU.

[115] European Parliament resolution P9_TA(2022)0268 of 23 June 2022 on the future of EU international investment policy.

[116] European Parliament, resolution P9_TA(2022)0421 of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty.

[117] *Ibid*. section J.

[118] *Ibid*. section 20.

[119] *Ibid*. section K.

effects of the sunset clause and to effectively prevent intra-EU disputes"; it "urge[d] the Commission to initiate immediately the process towards a coordinated exit of the EU from the ECT and call[ed] on the Council to support such a proposal" as it "believes this to be the best option for the EU to achieve legal certainty, and prevent the ECT from putting the EU's climate and energy security ambitions in further jeopardy".[120]

The EP's resolution of 23 November 2022 leaves DG Trade isolated with eight Member States that have either already left or plan to leave, a minority of Member States blocking a positive EU common position on the reform, an EP that calls for coordinated exit of the EU and its Member States. However, what is more shocking is that no vocal defender of the pro-reform, pro-ECT position has emerged in the EU context. It seems difficult to imagine that the Commission can further refuse to consider EU withdrawal from the ECT. However, for the moment it seems to be playing for time and perhaps also a shift of public opinion away from the ECT reform.

Against the backdrop of an increasing number of Member States announcing withdrawal from the ECT as parties in their own right, complex legal considerations come into play. On the side of the withdrawing Member States, if the Council had adopted a positive EU common position and Member States had then – as announced – unilaterally withdrawn, without having made the intention to withdraw formally clear when they supported amendment of the ECT withdrawal could trigger loyalty obligations. In light of stringent loyalty obligations in external relations, unilateral withdrawal could arguably be considered to undermine the EU's unity in external representation.[121] This would mean that those Member States that withdraw shortly after a – now hypothetical - positive Council vote on the EU's participation in the reform, withdraw in full knowledge that the EU needs their participation in the reformed ECT for the ISDS provisions to take effect would breach EU loyalty obligations.

At the same time, if the EU wishes to stay in the ECT, while Member States are withdrawing the question arises to what extent the EU is able to bind Member States under international law to a Treaty that largely governs FDI, which is an exclusive competence of the EU, but contains ISDS provisions that cannot be concluded by the EU without the consent of the Member States. The Commission has throughout taken the position that the EU is competent to stay; yet, this is far from uncontroversial, as it would have to make clear that it does not bind the withdrawing Member States to the ISDS provision, and it is very unlikely that any non-EU-Contracting Party to the ECT would accept this.

All in all, the reform process demonstrates the difficulty arising from the legal requirement that 28 international actors, with their own interests and political constraints, must approve and conclude a multilateral agreement as one party. This difficulty is well

[120] *Ibid*. section 21.

[121] See art. 4(3) TEU as the provision setting out the general duty of EU loyalty C Eckes, 'Disciplining Member States: EU Loyalty in External Relations' (2020) CYELS 85.

known in the context of mixed agreements, in particular multilateral mixed agreements. However, international trade and investment agreements have increasingly become politicised.[122] An increasing part of society (and certainly of academics) questions the inherent value of more and freer trade and greater protection of investors in light of what this contributes to the planetary degradation and inequality. This makes an open public debate about the desirability of such agreements stand in conflict with their smooth conclusion. The negotiation process of CETA and TTIP are illustrative in this respect. The public debates surrounding MERCOSUR are just another example. Seemingly, the Commission quite routinely shuts down public debate the Member States and civil society.[123] However, how the Commission failed to push through the amendment of the ECT may indicate that public opinion cannot structurally be ignored. The Commission's attempt of silently pushing for a Council decision approving an expansion of the controversial ISDS mechanism under the ECT demonstrates the legitimacy crisis of EU decision-making in the field of trade. It exposes the Commission to strong criticism from a separation of powers perspective. Its actions of pushing through a reform without public debate and its refusal to consider withdrawal lack democratic legitimacy and go beyond what an executive body should do without support of the other branches.

What would be desperately needed from a democratic legitimacy perspective is a public debate on the legal and other consequences of a coordinated EU withdrawal that is preferred by eight EU Member States representing more than 70 per cent of its population. This debate should also address whether it is possible for the EU to remain a party to the ECT and for which parts of the ECT after these Member States have withdrawn. Similarly, what are the options of the Member States that wish to remain a party to the ECT, despite the fact that it is contrary to EU climate policy.

The compatibility of the amended text of the ECT with EU law could be challenged before the CJEU via different avenues. As long as the EU itself remains a party to the ECT the revised text could be made subject to an opinion procedure before the Court. After the agreement in principle, the text would qualify as an "envisaged agreement" within the meaning of art. 218(11) TFEU.[124] If the EU withdraws but some Member States remain party to the amended ECT, their continuous participation in an international treaty that contradicts and hinders EU climate policy could be challenged under arts 258 or 259 TFEU. However, in both cases, one of the priviledged parties mentioned in these provisions would have to initiate proceedings. Actions for annulment could equally be brought

[122] D De Bièvre and A Poletti, 'Towards Explaining Varying Degrees of Politicization of EU Trade Agreement Negotiations' (2020) Politics and Governance 243; S Meunier and R Czesana, 'From Back Rooms to the Street? A Research Agenda for Explaining Variation in the Public Salience of Trade Policy-Making in Europe' (2019) Journal of European Public Policy 1847.

[123] In the case of Mercosur, the EU did not even wait for the sustainability impact assessment to be concluded.

[124] Opinion 1/20 was declared inadmissible on 16 June 2022 because no "envisaged agreement" existed yet. At the time, the negotiating parties had not yet agreed on a text.

by privileged applicants under art. 263 TFEU against EU actions that are not in line with EU powers, *e.g.*, if the EU acts *ultra vires* by taking a position at the Energy Charter Conference on matters that do not fall under EU competences.

More importantly in the current context, the reform process of the ECT demonstrates how vesting the EU with greater external regulatory autonomy by expanding its competences and external relations objectives places the Commission and DG Trade as the negotiator of this and future trade and investment treaties in a very powerful position. The process also demonstrate that the Commission/DG Trade is willing to use this power to push through the approval of reforming a highly controversial agreement even if this requires ducking away from public scrutiny and debate in a way that violates the EU's commitment to democratic values.

VII. Conclusion

The normative autonomy of EU law, as it is construed by the CJEU, is the basis of allows the Court and the other EU institutions to conceive of the EU legal order as self-contained and not depending in its validity on either national or international law. In turn, it is the foundation of the EU's regulatory autonomy, *i.e.*, its ability to take the position of an (international) actor in its own right. The EU Treaties and the legal practice of the EU institutions presuppose both normative and regulatory autonomy.[125] At the same time, both the construction of the EU legal order as autonomous and the EU's ability to determine its own position internationally remains contested by national actors, in particular highest courts and governments, and international actors, for example arbitration tribunals. Furthermore, the regulatory autonomy of the EU remains constrained in practice by the intricate and dynamic division of competences between the EU and its Member States. In 2022, the attempted reform of the ECT was the context in which the different constraints on the normative autonomy of EU law and regulatory autonomy of the EU and their practical consequences became most apparent. At present, the way forward for the EU and its Member States as (former) Contracting Parties of the ECT remains unclear. From the competence division (EU exclusive competence for FDI and Member States' consent necessary for ISDS) it appears that neither can remain a party to the ECT without (at least explicit consent) of the other. This leaves the EU and the Member States paralyzed in the face of an international agreement that is in its current form incompatible with EU (constitutional) law and that remains in its revised form contrary to the EU's climate policy.

The ECT as the only international treaty to which the EU itself is a party that contains a mechanism of quasi-judicial review open to individuals, namely ISDS, conflicts with EU law. For intra-EU arbitration, the CJEU has ruled in September 2021 in *Komstroy* that the current ECT violates the jurisdictional autonomy of EU law. The Court left open the issue of whether extra-EU arbitration under the current ECT equally violates the jurisdictional autonomy of

[125] See *e.g.* for the EU as an international actor arts 3(5) and 21 TEU.

EU law. A close analysis of the CJEU's acceptance of the investment chapter in CETA in Opinion 1/17 demonstrates that the positive assessment cannot easily be transferred to the ECT. The legal implications for the EU legal order of having intra- and extra-EU arbitration taking place under on treaty framework suggest the conclusion that the ECT undermines the jurisdictional autonomy of EU law. In addition, the Court's positive analysis in Opinion 1/17 that CETA does not impinge on the regulatory autonomy of the EU cannot be transferred to the current ECT. The ECT, while containing many of the problematic features that endanger regulatory autonomy, does not offer the necessary legal safeguards.

The reformed text of the ECT, as leaked in the summer of 2022, rules out intra-EU arbitration through the so-called REIO clause.[126] This formally brings the ECT in line with the Court's ruling in *Komstroy*. However, in practice EU investors may for example move their seat, use an existing seat, or have shareholders bring the claim to continue to be able to bring claims, which could avoid a formal conflict with the jurisdictional autonomy but still removes disputes that would otherwise be decided by European courts to arbitral tribunals. A similar argument could be made for the case of withdrawal and sunset clause termination but the issue could be partially tackled through tighter rules against circumvention in the *inter se* agreement. Furthermore, because of the (growing) substantive inconsistencies between the EU's climate policies and the ECT's 'neutral' position of protecting all energy sources equally, extra-EU arbitration will also likely have to engage frequently with EU law and policies. By way of conclusion, the reformed text may meet the formal requirements of sufficiently protecting the jurisdictional autonomy of EU law, while tensions and clashes between EU law and the reformed ECT (if provisionally adopted/entered into force) are nonetheless not only possible but likely.

In terms of the regulatory autonomy, the reformed text introduces several of the necessary safeguards, such as an explicit right to regulate. Yet, the reformed text of the ECT is not accompanied by the commitment that the ECT will not lower the protection of the environment or the climate ambitions of the contracting parties. On the contrary, the ECT's logic continue to prioritize investment protection over public policy objectives. This does not change with the reference to climate change mitigation and adaptation.[127] Ultimately, the scope of regulatory autonomy is the hands of ad hoc arbitration tribunals that do not meet the standards of transparency and consistency that the EU aims for in its general investment strategy.

In addition, but importantly, the reform process of the ECT demonstrates that the autonomy of the EU has a dark side. In particular, giving the EU greater external regulatory autonomy strengthens the role of the Commission as the EU's negotiator. In the debate around the reform of the ECT, the Commission, with DG Trade in the driving seat,

[126] Art. 24(3) of the leaked text of the reformed Energy Charter Treaty.

[127] New article on the right to regulate: "The Contracting Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of the environment, including climate change mitigation and adaptation, protection of public health, safety or public morals".

has not acted with the necessary commitment to democracy or respect for national parliaments. In fact, it has failed to make public its assessment of and position on the scope and consequences of national or EU withdrawal, including when withdrawal plans were announced by Spain, the Netherlands, France, Slovenia, and Germany. The Commission has simply reiterated that they will not propose withdrawal of the EU. In public debates, Commission representatives, if participating,[128] continued to emphasize that the current ECT contains a 20-year sunset clause without engaging with the legal possibility – that the Commission itself confirmed and promoted[129] - of concluding an inter se modification treaty that ends the sunset clause for all those participating. The Commission has not engaged in a public debate of why the EU should want a treaty like the ECT. All arguments are based on the starting point that the current ECT is less desirable, but no positive argument is made why the reformed text is desirable beyond being – in some respects – an improvement on the current text. In addition, this later point, namely that reform is overall an improvement, may hold true from an EU constitutional perspective, it does not hold true from a sustainability perspective.

No public argument is made how the ECT is compatible with the EU's emission reduction objectives in general or the Green Deal in particular. Instead, the Commission lobbies behind the scenes to convince Member States, including those withdrawing, to allow for a positive vote in the Council to continue EU participation in the ECT without offering any public arguments. The attempted reform of the ECT demonstrates that the EU's regulatory autonomy cannot be achieved at the cost of public debate.

The ECT may be in several respects an extreme example. It is not only institutionally incompatible with the EU's normative and regulatory autonomy, but substantively incompatibility with the EU's climate laws. However, there is also a general lesson to learn: The complex competence division within the EU and the diverging interests of 28 international actors make policy change difficult and hence structurally work in favour of the *status quo*. This stands in obvious conflict with the deep socio-economic changes urgently required by the green transition. The existing fundamental constitutional tensions within the EU, including with regard to the EU's normative and regulatory autonomy, are likely to resurface in light of the diverging levels of commitment to move away from the *status quo* of carbon dependency.

[128] *E.g.*, no Commission official joined Calling Europe for an online debate on the ECT with more than 1,200 registrations.

[129] Communication COM(2022) 523 final from the Commission to the European Parliament and the Council, as well as to the Member States on an agreement between the Member States, the European Union, and the European Atomic Energy Community of 5 October 2022 on the interpretation of the Energy Charter Treaty.

ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

Edited by Justin Lindeboom *and* Ramses A. Wessel

EPILOGUE. *HIGH HOPES*: AUTONOMY AND THE IDENTITY OF THE EU

KOEN LENAERTS* AND JOSÉ A. GUTIÉRREZ-FONS**

ABSTRACT: This epilogue rejects the idea that the principle of autonomy is an end in itself or a tool for judicial self-empowerment. On the contrary, we support the contention that that principle serves first and foremost as a means of promoting and protecting the values on which the EU is founded. In so doing, that principle also contributes to defining the identity of the EU as a common legal order. Compliance with those values does not mean that the Member States must adopt a specific constitutional model. Instead, those values limit themselves to providing a framework of reference within which the Member States may make their own constitutional choices. Finally, it is submitted that in times when authoritarian tendencies are on the rise, the principle of autonomy allows the EU to operate as a beacon of freedom, democracy and justice for the wider world.

KEYWORDS: identity – common legal order – values – constitutional alignment – framework of reference – international law.

I. INTRODUCTION

This *Special Section* of *European Papers* is devoted to studying the principle of autonomy from the perspective of legal theory. The authors have put forward a series of theories,

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sometimes conflicting, sometimes complementary, that seek to explain the nature of that principle, its content and how it functions in the EU legal order.

In this epilogue, we seek to shed light on an aspect of the principle of autonomy that has always been present, often implicitly, in the contributions to this *Special Section*. As the title of the epilogue indicates, we aim to explore the inextricable link between the identity of the EU as a "common legal order"[1] and the principle of autonomy. In our view, the principle of autonomy is not an end in itself, but a means to an end. That principle serves to protect and promote the values contained in art. 2 TEU – *i.e.*, respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. That protection and promotion is its "endgame". In doing so, it must also safeguard the structural tenets on which the EU is founded, since those tenets implement those values.

The principle of autonomy is governed by two different, albeit interrelated, dynamics. On the one hand, it operates as a *shield* against external norms that may constitute a threat to the values contained in art. 2 TEU and a threat to the EU constitutional framework. On the other hand, autonomy operates as a *sword* that contributes to defining what European integration is all about, by serving as a guiding compass for the EU to navigate a course through often unchartered waters.[2] In protecting and promoting liberal values, the principle of autonomy enables the EU to find its own identity, whilst allowing room for openness towards the laws of the Member States and international law.[3]

In order to explore the inextricable link between autonomy and identity, this epilogue is divided into three sections. First, we explore the elements that define the identity of the EU. It is submitted that the values contained in art. 2 TEU constitute the core of that identity. In turn, since the EU constitutional structure is instrumental in protecting and promoting those values, the principle of autonomy must also protect that structure. Autonomy is, in essence, about protecting and promoting values and structures (section II). Once the *raison d'être* of the principle of autonomy is clarified, section III looks at the way in which that principle requires the Member States to align their own constitutional identity with the values on which the EU is founded. By requiring such constitutional alignment, it is posited that the principle of autonomy defines what it means to be a member of the EU. In section IV, we turn to international law. The principle of autonomy also prevents the EU and/or the

[1] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97, para. 127, and case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98, para 145.

[2] K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' (2021) HJIL 47, 87. Those two dynamics of autonomy may also be recast as 'wall-identity' referring to 'the act of making something distinct from something else' and as 'mirror-identity' 'consisting of the positive identification of some common elements through a moment of self-reflection'. See, in this regard, G Martinico, 'The Autonomy of EU Law: A Joint Celebration of *Kadi II* and *Van Gend en Loos*' in M Avbelj, F Fontanelli and G Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2014) 157–171, 158.

[3] D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' (2023) European Papers www.europeanpapers.eu 1403, 1427 (noting that "[a]utonomy is ordering pluralism of legal systems in the European Union").

Member States from entering into international agreements that may threaten the autonomy of the EU legal order, by removing from the judicial system of the EU disputes that may concern the interpretation and application of EU law. Again, precluding such jurisdictional stripping amounts to protecting the values contained in art. 2 TEU. Moreover, cases like *Schrems*[4] show that the principle of autonomy may also produce a specific type of "Brussels effect", *i.e.* that of requiring economic operators –and public authorities – located in third countries to align their practices to the values on which the EU is founded, notably that of respect for fundamental rights.[5] Finally, we support the contention that in times when authoritarian tendencies are on the rise, the principle of autonomy allows the EU to operate as a beacon of freedom, democracy and justice for the wider world. That is why this epilogue has *high hopes* for the principle of autonomy.

II. The identity of the EU and European values

With the entry into force of the Treaty of Lisbon, the notion of "national identity", enshrined in art. 4(2) TEU, drew the attention of academic literature and, to some extent, national courts that sought to rely on that Treaty provision in order to limit the competences of the EU and the primacy of EU law.[6] However, little or no attention was paid to the existence (or absence) of an "EU identity". Does the EU have an identity? And if so, what is it? Alternatively, is the EU only defined by the objectives it pursues? Is the EU just its internal market or has it evolved into something more? Far from being trivial, those questions are of constitutional importance because they help us understand the very Leitmotiv of European integration. In the so-called *Conditionality Judgments*, the Court of Justice provided some valuable insights into what the identity of the EU is.

In those two cases, Hungary and Poland each brought an action for annulment against Regulation 2020/2092,[7] which protects the EU budget in the case of breaches of the principles of the rule of law in the Member States by means of a conditionality mechanism. In application of the conditionality mechanism, breaches of those principles may, for example, entail the suspension of payments from the EU budget to the Member State concerned, provided that those breaches "affect or seriously risk affecting the

[4] See case C-362/14 *Schrems* ECLI:EU:C:2015:650. See also case C-311/18 *Facebook Ireland and Schrems* ECLI:EU:C:2020:559.

[5] We borrow the expression "Brussels Effect" from A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2019). See also A Bradford, 'The Brussels Effect' (2012) Northwestern University Law Review 1.

[6] See, for example, the special issue published by European Public Law on that topic. See D Fromage and B de Witte, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives' (2021) EPL 411. Regarding national courts, see case C-430/21 *RS (Effect of the decisions of a constitutional court)* ECLI:EU:C:2022:99.

[7] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

sound financial management of the [EU] budget or the protection of the financial interests of the Union in a sufficiently direct way".[8] Nevertheless, the suspension "must be lifted where the impact on the implementation of the budget ceases, even though the breaches of the principles of the rule of law found may persist".[9] Hungary and Poland argued *inter alia* that the conditions for the receipt of financing from the EU budget "must be closely linked either to one of the objectives of a programme or of a specific EU action, or to the sound financial management of the Union budget".[10] However, the Court of Justice took a different view, holding that the conditionality mechanism can also entail "horizontal conditionality", meaning that the condition in question can be linked to the value of the rule of law contained in art. 2 TEU.

At the outset, the Court of Justice proceeded to stress the cardinal importance of the values on which the EU is founded. Before accession, a candidate State for EU membership must align its own constitution and national identity with those values. Once accession takes place, it is therefore presumed that the new Member State respects the values on which the EU is founded and thus may join a legal structure based on the principle of mutual trust. In the light of that principle, each Member State is equally committed to upholding those values and in so doing, to respecting EU law provisions that implement them. Next, "[c]ompliance with those values", the Court held, "cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession".[11] On the contrary, that compliance must be guaranteed for as long as a Member State remains within the EU, since it is essential for the enjoyment of all the rights derived from the application of the Treaties to that Member State. Most importantly for present purposes, the Court of Justice reached the following conclusion, which merits quotation in full: "The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the *very identity* of the European Union as a *common legal order*. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties."[12]

There is a lot to unpack from that concluding paragraph. First, the Court of Justice observed that the values contained in art. 2 TEU flow from the constitutional traditions common to the Member States. Those values are not the result of a "top-down" approach but follow a "bottom-up" dynamic. They crystallise the struggle of previous generations of Europeans who strived for freedom, democracy and justice. They form part of our common heritage as Europeans.

Second, the Court of Justice established a conceptual link between those values and the identity of the EU as a common legal order. That link serves to cultivate a sense of

[8] Art. 4(1) Regulation 2020/2092 cit.

[9] *Hungary v Parliament and Council* cit. para 113, and *Poland v Parliament and Council* cit. para 127.

[10] *Hungary v Parliament and Council* cit. para 123, and *Poland v Parliament and Council* cit. para 141.

[11] *Hungary v Parliament and Council* cit. para 126, and *Poland v Parliament and Council* cit. para 144.

[12] *Hungary v Parliament and Council* cit. para 127, and *Poland v Parliament and Council* cit. para 145 (emphasis added).

belonging to a community of values where traditional elements forming part of national identity, such as language, history and tradition, are not relevant. The EU endorses a new type of identity that operates outside the paradigms of the nation-State. The identity of the EU brings all Europeans together, since we can all identify with the values contained in art. 2 TEU, regardless of our national identity. That identity is the bedrock on which to build "the process of creating an ever-closer union among the peoples of Europe".[13] We, Europeans are diverse in that we may speak a different language, pray to a different god or have a different understanding of family life and yet we are united because we share and cherish those founding values. As a community of values, the EU is "united in diversity".

Last but not least, the Court of Justice stated that the EU has the obligation to defend those values. That last sentence echoes the principle of autonomy. As two contributors to this *Special Section* have rightly observed, that principle may operate as a "shield" that protects the constitutional tenets of the EU legal order,[14] which include first and foremost the values contained in art. 2 TEU. This is corroborated by the reasoning of the Court leading to that concluding paragraph, since it recalls previous findings grounded in the principle of autonomy. As it did in *Repubblika*,[15] the Court observed that respect for those values is a prerequisite for the accession of any State applying to become a member of the European Union.[16] As it did in Opinion 2/13 and *Associação Sindical dos Juízes Portugueses*, it also stressed the importance of the link between the structural principle of mutual trust and the common values contained in art. 2 TEU. It held that the EU "legal structure … is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, the common values contained in Article 2 TEU, on which the European Union is founded".[17]

[13] Preamble to the Treaty on European Union.

[14] D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' cit. 1406-1407 (in his view, understanding autonomy as a shield does not fully grasp the role of autonomy in the case law of the Court of Justice, given that autonomy is "the Court's 'one big thing', which has made the EU legal system what it is today"), and J van de Beeten, 'On Metaphor and Meaning: The Autonomy of EU legal order Through the Lens of Project and System' (2023) European Papers www.europeanpapers.eu 1441, 1442. Moreover, while other contributors do not use the expression "shield", they seem to agree with the fact that the principle of autonomy contributes to protecting the EU legal order. See, *e.g.*, C Eckes, 'The Autonomy of the EU Legal Order: The Case of the Energy Charter Treaty' (2023) European Papers www.europeanpapers.eu 1465, 1466 (who observes that "[t]he Court of Justice is very protective of the normative or jurisdictional autonomy of the EU legal order").

[15] The Court of Justice cited joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others* ECLI:EU:C:2021:1034 paras 160–161 and the case law cited, which goes all the way back to case C-896/19 *Repubblika* ECLI:EU:C:2021:311 paras 60–61.

[16] *Repubblika* cit. para. 61.

[17] *Hungary v Parliament and Council* cit. para. 125, and *Poland v Parliament and Council* cit. para. 143. In those paragraphs, the Court cited Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 paras 166–168; case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 para. 30, and *Repubblika* cit. para. 62.

It follows that the EU must defend the values contained in art. 2 TEU, given that they define its very identity as a common legal order. Logically, the question that arises is whether it is only for the political process to defend those values or whether the Court of Justice and national courts also play a leading role in protecting them. Stated differently, what is the legal value of values?[18] Are they merely a statement of policy guidelines or intentions that lack any binding legal effects? Is the enforceability of values a political question? In the *Conditionality judgments*, the Court of Justice replied in the negative to those questions, ruling that the values contained in art. 2 TEU pervade the entire body of EU law. It held that "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which… are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States".[19]

The principles that give concrete expression to those values relate both to the substantive nature of EU law and to the constitutional structure of the EU. For example, the fundamental freedoms set out in the Treaties and the fundamental rights enshrined in the Charter give concrete expression to values contained in art. 2 TEU. Similarly, the right to effective judicial protection gives concrete expression to the value of respect for the rule of law within the EU.[20]

Those values also permeate throughout the constitutional structure of the EU. Five structural principles may illustrate this point. Both the primacy of EU law and mutual trust give concrete expression to the value of equality. As the Court of Justice recently ruled in *Euro Box Promotion and Others* and in *RS*, "Article 4(2) TEU provides that the Union is to respect the equality of Member States before the Treaties. However, the Union can respect that equality only if the Member States are unable, under the principle of the primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature."[21] That same finding of "concrete expression" can be held to apply to the principle of direct effect, which is inherently linked to the protection of rights that EU law confers upon individuals. Similarly, the principles of conferral and institutional balance seek to uphold the values of respect for the rule of law within the EU, while protecting individual liberty from the arbitrary exercise of public power.[22]

As the case law of the Court of Justice demonstrates, those values are in a mutual reinforcing relationship. As is the case at national level, the values of respect for democracy,

[18] Expression borrowed from LS Rossi, 'La valeur juridique des valeurs. L'article 2 TUE: relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels' (2020) RTDE 639.

[19] *Hungary v Parliament and Council* cit. para. 232, and *Poland v Parliament and Council* cit. para. 264.

[20] *Associação Sindical dos Juízes Portugueses* cit. para. 32.

[21] *Euro Box Promotion and Others* cit. para 249, and case C-430/21 *RS (Effect of the decisions of a constitutional court)* cit. para. 55.

[22] As James Madison noted, those two principles give rise to a "double security" to the rights of individuals, because "[t]he different governments will control each other [i.e. federalism], at the same time that each will be controlled by itself [*i.e.*, separation of powers]". See J Madison, 'The Federalist No 51' in A Hamilton, J Madison and J Jay, *The Federalist Papers* (Oxford University Press 2008) 256.

the rule of law and fundamental rights are interdependent at EU level. There can be no democracy without the rule of law and fundamental rights, because democratic choices must respect the rules of the game and may not alienate discrete and insular minorities. There can be no rule of law without fundamental rights and democracy, because the rule of law within the EU must serve to protect individual freedom and to establish a system of governance of laws, not men. There can be no respect for fundamental rights without democracy and the rule of law, since only a system of democratic governance may provide effective protection to the exercise of individual freedom.

Yet, one cannot rule out the fact that the values contained in art. 2 TEU may occasionally conflict with one another. This conflict is nothing new, nor is it unique to the EU legal order, but forms part of the daily life of liberal democracies when confronted with hard choices. For example, a democratic government may adopt decisions limiting the exercise of individual freedom, and courts may subsequently set aside those decisions in order to uphold that freedom.[23] In the same way, upholding the rule of law may sometimes oppose an unfettered protection of fundamental rights.[24]

However, the existence of a conflict of values has nothing to do with the argument put forward by van de Beeten in this *Special Section*, according to which the principle of autonomy would prioritise the structure of the EU legal order over values.[25] The problem with that argument is that it is based on the (incorrect) assumption that the EU constitutional structure is an empty shell. Whilst we are firm supporters of judicial reasoning grounded in structural considerations,[26] we reject the idea that the EU constitutional structure is "value-neutral". On the contrary, that structure is a means of protecting and promoting the values contained in art. 2 TEU and it is not an end in itself. Put differently, the principle of autonomy protects the EU constitutional structure because the latter gives concrete expression to the values contained in art. 2 TEU. As Judge Kukovec

[23] When exercising their powers of judicial review, courts may set aside laws that give concrete expression to democratic principles in order to protect constitutional rights. In the US, this conflict of values is known as the counter-majoritarian difficulty.

[24] This situation arises where an enhanced protection of fundamental rights would require the Court of Justice to overstep the limits of its own jurisdiction, thereby modifying the Treaties via judicial interpretation. See, *e.g.*, case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:462; and case C-263/02 P *Commission v Jégo-Quéré* ECLI:EU:C:2004:210.

[25] J van de Beeten, 'On Metaphor and Meaning: The Autonomy of EU Legal Order Through the Lens of Project and System' cit. 1459-1460, who notes that "the case law of the [Court of Justice] shows that the need to maintain the functioning and existence of the EU legal system on its own terms can clash with the objectives and values pursued by the EU" and then proceeds to find that "the autonomy of EU law … expresses *a structural bias towards the very structure of [the] EU legal order*."

[26] For example, we have recently posited that the judgment of the Court of Justice in case 26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1, is underpinned by a reasoning based on structural considerations. The same applies to the case law relating to art. 19 TEU and judicial independence. See, in this regard, K Lenaerts and JA Gutiérrez-Fons, '*Van Gend* and the Union Legal Order' in P Craig and R Schütze (eds), *Landmark Cases in EU Law* (Hart Publishing, forthcoming)

rightly observes in this *Special Section*, the idea of "autonomy *or* values" is not well founded because those values "form the fundamental part of autonomy's axiology". [27]

In support of his argument, van de Beeten relies on two examples taken from the case law of the Court of Justice, *i.e.*, Opinion 2/13 and *Getin Noble Bank*.[28] Regarding Opinion 2/13, he criticises the passage where the Court held that "[t]he autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU".[29] Is this passage to be read as the Court of Justice giving priority to structure over values? As mentioned above, the question is based on an incorrect assumption because the EU constitutional structure is imbued with values. Moreover, this passage reflects the Court of Justice's commitment to upholding the value of respect for the rule of law within the EU. Compliance with that value means that the Court of Justice must not overstep the limits that the authors of the Treaties and the Charter sought to impose on the EU system of fundamental rights protection. Notably, with respect to the Member States, this means applying the Charter only when they are "implementing EU law", within the meaning of art. 51(1) thereof. Furthermore, one could argue that this passage is actually promoting and protecting the value of respect for human rights, in so far as international obligations that lower the level of fundamental rights protection guaranteed by the Charter may not be incorporated into the EU legal order.[30]

In relation to *Getin Noble Bank*, van de Beeten observes that the Court of Justice "has quietly abandoned the more stringent test developed in *Banco de Santander*". The problem with that statement is that *Getin Noble Bank* and *Banco de Santander* do not belong to the same line of case law. In other words, *Getin Noble Bank* is not the right comparator to examine whether *Banco de Santander* remains good law. In *Banco de Santander*, the Court of Justice was asked to examine whether the Spanish Central Tax Tribunal, a body that was not part of the national judiciary, could be considered a "court or tribunal" within the meaning of art. 267 TFEU. Overruling its previous findings in *Gabalfrisa*,[31] the Court replied in the negative, holding that the criterion of independence, as developed in *Associação Sindical dos Juízes Portugueses*, was not fulfilled. The Court has continued to develop that line of case law in *NV Construct* and *Minister Sprawiedliwości*.[32]

[27] D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' cit. 1426.

[28] Opinion 2/13 cit., and case C-132/20 *Getin Noble Bank* ECLI:EU:C:2022:235.

[29] Opinion 2/13 cit. para 170.

[30] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission ("Kadi I")* ECLI:EU:C:2008:461 paras 281–285.

[31] Joined cases C-110/98 to C-147/98 *Gabalfrisa and Others* ECLI:EU:C:2000:145.

[32] In case C-403/21 *NV Construct* ECLI:EU:C:2023:47, the Court of Justice found, on the basis of the information available to it, that the Romanian National Council for the Resolution of Disputes was to be considered a "court or tribunal" within the meaning of art. 267 TFEU. See paras 47–58. Similarly, in case C-55/20 *Minister Sprawiedliwości* ECLI:EU:C:2022:6, the Polish Bar Association Disciplinary Court had access to the preliminary reference mechanism. See paras 48–79.

By contrast, *Getin Noble Bank* involved a part of the national judiciary (the Supreme Court of Poland) whose independence was called into question because of several irregularities in its appointment process. Sitting in a single court formation, it had made a reference to the Court of Justice. Whether that reference was admissible raised new and important questions: could a "court or tribunal" within the meaning of art. 267 TFEU cease to be one where it was no longer independent? And if so, what was the standard of proof? Whereas the answer to the first question seems straight forward, the second question is very complex. One must not forget that the preliminary reference procedure is ill fitted for fact-finding. It is not for the Court of Justice to establish the relevant facts of the case at hand but for the referring court.[33] That inability to establish the relevant facts becomes problematic when doubts arise regarding the independence of the referring court. For example, the latter may rely on the black letter of the law in order to support its independence, whilst other parties to the proceedings may pinpoint factual and legal elements to the contrary. As the Court of Justice has held, in order to determine whether a court is independent, one must undertake 'an overall assessment of a number of factors which, taken together, serve to create in the minds of individuals reasonable doubt as to the independence and impartiality of the judges'.[34] In the context of the preliminary reference procedure (and different from what is the case in infringement proceedings), the Court of Justice lacks jurisdiction to undertake that overall assessment, since it implies examining the factual and legal context of the case at hand. This may explain the rebuttable legal presumption that was adopted by the Court of Justice in *Getin Noble Bank*. Unable to establish itself the facts, the Court of Justice requires an impartial court to carry out that assessment. That is the reason why it requires a final judgment of a national court or of an international court holding that the judge in question is not independent.[35] In our view, that presumption seeks to strike the right balance between the criterion of independence as a precondition for having access to the preliminary reference procedure and the role of the Court of Justice in the context of that procedure. That presumption does not give priority to structure over values, but, in our view, seeks to accommodate two aspects of the same

[33] See, *e.g.*, joined cases C-52/16 and C-113/16 *SEGRO* ECLI:EU:C:2018:157 para. 98 and case law cited, where the Court of Justice held that "in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts is a matter for the national court".

[34] See, to that effect, case C-824/18 *A.B. and Others* (*Appointment of judges to the Supreme Court – Actions)* ECLI:EU:C:2021:153 paras 131–132, and case C-487/19 *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* ECLI:EU:C:2021:798 paras 152–154.

[35] In respect of the judge at issue, the ECtHR found that he was not independent. See ECtHR *Advance Pharma sp. z o.o v. Poland* App. n. 1469/20 [3 February 2022]. However, as the Court of Justice observed in *Getin Noble Bank* (judgment delivered on 29 March 2022), that judgment of the ECtHR could not be taken into account, since it was not yet definitive (it became final on 3 May 2022) and, moreover, delivered after the closing of the oral part of the procedure (which took place on 8 July 2021, when AG Bobek delivered his Opinion). See, in this regard, *Getin Noble Bank* cit. para. 73.

value of respect for the rule of law, *i.e.*, judicial independence and the need for the Court of Justice to respect the limits of its own jurisdiction.

III. A constitutional moment: becoming a member of the EU

The Court of Justice has consistently held that respect for the values contained in art. 2 TEU is what being a Member State of the EU is all about. On the one hand, a candidate State for EU membership must align its own constitution and national identity with those values as *conditio sine qua non* for accession. The so-called Copenhagen Criteria imply, *inter alia*, a strict control of that alignment. The decision to align its own constitutional arrangements with EU values is a sovereign choice of the candidate State for EU membership.[36] However, if such a State fails to do so, art. 49 TEU bars it from becoming a member of the EU.[37]

Acquiring the status of Member State is, therefore, a "constitutional moment" for the State concerned since at that very moment, the legal order of the new Member State is deemed by the "Masters of the Treaties" to uphold the values on which the EU is founded. The principle of mutual trust applies, from day one, to that new Member State. This stands in sharp contrast to third countries in relation to which compliance with those values cannot be presumed. Accordingly, as the Court wrote in Opinion 1/17 (*EU-Canada CET Agreement*), the principle of mutual trust does not apply to third countries as a matter of principle.[38] That said, a third country may gain that trust, if it establishes a special relationship with the EU and is equally committed to upholding the values on which the EU is founded.[39]

On the other hand, after accession, the Member State in question commits itself to respecting those values for as long as it remains a member of the EU. That ongoing commitment means that there is "no turning back the clock" when it comes to respecting the values contained in art. 2 TEU. Accession is the starting point in value protection and not the finish line. A Member State can always improve its own level of value protection. However, EU law precludes such a Member State from engaging in an authoritarian drift or from falling into democratic backsliding. "Compliance with those values", the Court of Justice has held, "cannot be reduced to an obligation which a candidate State must meet

[36] The same applies where a Member State decides to withdraw from the EU. See case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999 para. 50.

[37] That provision states that "[a]ny European State *which respects the values referred to in Article 2* and is committed to promoting them may apply to become a member of the Union." (Emphasis added). *Repubblika* cit. para.61.

[38] Opinion 1/17 *EU-Canada CET Agreement* ECLI:EU:C:2019:341 para. 129 (holding that "[the] principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State").

[39] Case C-897/19 PPU *Ruska Federacija* ECLI:EU:C:2020:262 paras 44, 77.

in order to accede to the [EU] and which it may disregard after its accession".[40] The Member States must respect those values "at all times".[41]

That said, compliance with the values contained in art. 2 TEU does not rule out constitutional diversity. Value alignment must *not* be confused with constitutional modelling.[42] As the Court of Justice made clear in *Euro Box Promotion and Others* and in *RS*, the rule of law within the EU does not seek to impose 'a particular constitutional model' to which all Member States must aspire.[43]

Imposing such a model would be contrary to the principle of respect for national identity enshrined in art. 4(2) TEU, which expressly states that the EU shall respect the identities of the Member States, 'inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. Instead, as the Court of Justice pointed out in the *Conditionality Judgments*, "[the Member] States enjoy a certain degree of discretion in implementing the principles of the rule of law".[44] However, the obligation to implement those principles "as to the result to be achieved may [not] vary from one Member State to another".[45] This is because the Member States share a common understanding of the rule of law despite having "separate national identities" which the EU respects.[46]

It follows from the case law of the Court of Justice that EU law provides for a framework of reference within which the Member States may make their own constitutional choices.[47] Those choices may vary from one Member State to another, but no choice must give rise to authoritarian tendencies that would call into question the values contained in art. 2 TEU.[48] On the contrary, those choices must, first, be sufficient in themselves to guarantee compliance with those values and, second, not constitute a value regression. Subject to those two limitations, a Member State may organise its own system of checks and balances as it wishes.

[40] *Hungary v Parliament and Council* cit. para. 126, and *Poland v Parliament and Council* cit. para. 144.

[41] *Hungary v Parliament and Council* cit. para. 234, and *Poland v Parliament and Council* cit. para. 266.

[42] See, in this regard, case C-397/19 *Statul Român – Ministerul Finanţelor Publice* ECLI:EU:C:2020:747, opinion of AG Bobek points 100 and 101.

[43] *Euro Box Promotion and Others* cit. para. 229 and the case-law cited, and *RS (Effect of the decisions of a constitutional court)* cit. para. 43.

[44] *Hungary v. Parliament and Council* cit. para. 233, and *Poland v. Parliament and Council* cit. para. 265.

[45] *Ibid*.

[46] *Hungary v. Parliament and Council* para. 234, and *Poland v. Parliament and Council* para. 266.

[47] S Prechal, 'Effective Judicial Protection: Some Recent Developments – Moving to the Essence' (2020) 13 *Review of European Administrative Law* 175, 187 (pointing out that '[an] issue like the independence of the judiciary operates in a specific institutional, political, legal and cultural context. What is unacceptable in one system may seem rather normal in another. There should certainly not be "one-size fits all solutions"; space should be left to the Member States to make their choices').

[48] A von Bogdandy, 'Towards a Tyranny of Values?' in A von Bogdandy, P Bogdanowicz, I Canor, C Grabenwarter, M Taborowski and M Schmidt (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) 73, 91 (observing that the values contained in art. 2 TEU "do not constitute 'laws of construction', but rather 'red lines'").

Arguments that consider that framework as being "ultra vires" are ill founded, since without that framework, the EU cannot operate. The values contained in art. 2 TEU would become an empty promise. The constitutional structure of the EU would collapse in the absence of a rule of law based on common values. Value alignment and the prohibition of value regression are two essential conditions for a Member State to participate in the European integration project.[49]

Accordingly, the framework within which the Member States may make their own constitutional choices is an essential component of the identity of the EU. In some ways, the relationship between the identity of the EU and national identities mirrors that of EU citizenship and nationality, and that of the EU principle of democracy and national democracies. Just like EU citizenship and nationality, the identity of the EU and national identities are not in competition but they add up to each other. Similarly, just like the EU principle of democracy and national democracies, the identity of the EU and national identities are in a mutually reinforcing relationship when it comes to protecting and promoting European values. On the one hand, the identity of the EU is grounded in the constitutional traditions common to the Member States that draw on national identities. On the other hand, the identity of the EU prevents the Member States from deviating from those traditions, thereby protecting national identities from incorporating authoritarian elements.

IV. The principle of autonomy and the wider world

In the field of international law, the principle of autonomy also seeks to protect that framework of reference. International obligations that would call into question the values contained in art. 2 TEU and the EU's constitutional structure cannot be incorporated into the EU legal order.

However, just as the identity of the EU allows room for national diversity, that identity enables the EU to interact with the wider world, provided that the international obligations in question do not call into question the framework of reference. Again, that proviso boils down to protecting and promoting European values.

For example, in *Achmea*,[50] the Court of Justice held that the principle of autonomy precludes a provision (*i.e.*, an arbitration clause) contained in a Bilateral Investment Treaty ("BIT") concluded by two Member States (the Netherlands and Slovakia), the effects of which would be to remove from the jurisdiction of national courts investor-related disputes that may involve the interpretation and application of EU law. According to the BIT in question, investor- related disputes were to be solved by an arbitral tribunal that was not part of the judicial system of the two Member States concerned. The Court of Justice reasoned that the arbitration clause contained in the BIT "could prevent those disputes from being resolved in

[49] *Repubblika* cit. para. 63; compare opinion of AG Tanchev in case C-824/18 *A.B. and Others* (*Appointment of judges to the Supreme Court – Actions)* ECLI:EU:C:2020:1053 point 83.

[50] Case C-284/16 *Achmea* ECLI:EU:C:2018:158.

a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law".[51] In addition, the Court also stated that such arbitration clause calls into question the principle of mutual trust, since it is based on the assumption that courts of the Member State where investments are made do not offer effective judicial protection to the rights that EU law confers on investors.[52] Accordingly, one may argue that the reasoning of the Court of Justice in *Achmea* is grounded in two values. The Court of Justice seeks to guarantee the principle of effective judicial protection of EU rights, which gives concrete expression to the value of respect for the rule of law. It also seeks to protect the principle of mutual trust that, in turn, gives concrete expression to the value of equality. By contrast, in Opinion 1/17 (*EU-Canada CET Agreement*), the Court of Justice found that the mechanism for settling disputes between investors and States contained in the CETA entered into by Canada, on the one hand, and the EU and its Member States, on the other hand, did not adversely affect the autonomy of the EU legal order. That mechanism provided for the creation of a Tribunal, an Appellate Tribunal (the "envisaged tribunals") and, in the long term, a multilateral investment tribunal. However, unlike the arbitral tribunal at issue in *Achmea*, the envisaged tribunals did not compromise the judicial dialogue between the Court of Justice and national courts, since those tribunals did not enjoy jurisdiction to interpret and apply EU law other than that relating to the provisions of CETA.

Moreover, there is another aspect of the principle of autonomy that is worth exploring, *i.e.*, the fact that that principle contributes to producing a specific type of "Brussels effect". As Bradford explains, the Brussels effect seeks to describe the phenomenon through which the EU "externalize[s] its law and regulations outside its borders through market mechanisms, resulting in the globalization of standards".[53] She posits that five conditions have to be met in order for EU standards to produce that extraterritorial effect.[54] First, the EU must enjoy market power, in so far as companies located in third countries may want to benefit from "the high value of market access to the EU". Second, the EU enjoys regulatory competences in the area in question. Third, it has exercised those competences by adopting strict standards. Fourth, those standards have "inelastic targets", meaning that there is no risk of escaping EU regulation by

[51] *Ibid*. para. 56. In case C-109/20 *PL Holdings* ECLI:EU:C:2021:875 paras 47, 56, the Court of Justice added that the principle of autonomy also precludes "national legislation which allows a Member State to conclude an ad hoc arbitration agreement with an investor from another Member State that makes it possible to continue arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement, where that clause is contained in an international agreement concluded between those two Member States and is invalid on the ground that it is contrary to [the Treaties]". The Court of Justice reasoned that such an ad hoc arbitration agreement would in fact entail "a circumvention of the obligations arising for [the Member State concerned] under the Treaties" in the light of the *Achmea* judgment.

[52] *Achmea* cit. para. 58.

[53] A Bradford, 'The Brussels Effect' cit. 3.

[54] A Bradford, *The Brussels Effect: How the European Union Rules the World* cit. 25–66.

relocating to a foreign jurisdiction. Fifth and last, EU standards are indivisible in that foreign companies have economic incentives to apply those standards worldwide.

In our view, the principle of autonomy may produce a concrete type of Brussels effect, *i.e.*, that of requiring economic operators – and public authorities – located in third countries to accommodate their practices to the values on which the EU is founded. The case law of the Court of Justice in the area of data protection may illustrate this point. As Bradford explains, the Brussels effect may take place in that area, given that the five conditions mentioned above are likely to be met. Indeed, access to the EU digital market offers unlimited business opportunities. The area of data protection has been heavily regulated by the EU legislature, even more so with the adoption of the GDPR.[55] In addition, in *Google Spain* the Court of Justice interpreted Directive 95/46,[56] the predecessor of the GDPR, in a way that applies to "an undertaking that has its seat in a third State but has an establishment in a Member State", in so far as their activities are "inextricably linked".[57] It appears that the GDPR goes a step further in so far as it also applies to undertakings that are not established in the EU but whose activities target EU residents.[58] Moreover, there are economic incentives for undertakings to control data in the same way regardless of the origins of that data, since adopting different data processing practices would be difficult and costly.[59]

For example, in *Schrems*, the Court of Justice for the first time declared an EU measure invalid on the ground that it did not respect the essence of two fundamental rights, namely, the right to respect for private life and the right to effective judicial protection. That case concerned a preliminary reference made by the High Court of Ireland in which that court questioned the validity of Commission Decision 2000/520 (the "Commission Decision") providing that personal data could be transferred from the EU to the United States on the basis that the *safe harbor privacy principles* applicable to organisations established in the

[55] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data.

[56] See Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, repealed by Regulation 2016/679 cit.

[57] Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317 para. 55 (holding that "it must be held that the processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out 'in the context of the activities' of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable").

[58] See art. 3(2) Regulation 2016/679 cit.

[59] A Bradford, *The Brussels Effect: How the European Union Rules the World* cit. 162 (who observes that "[w]hether the Brussels Effect occurs therefore often comes down to the question of non-divisibility of the products and services across global users. Various examples suggest that, for today's global digital companies, maintaining different data practices across global markets is often both difficult (due to technical non-divisibility) and costly (due to economic non-divisibility)").

U.S. ensured an adequate level of protection of these data.[60] After holding that the expression "adequate protection," within the meaning of Directive 95/46, was to be interpreted as meaning that such transfer could only take place where the US legal order offered an "essentially equivalent protection" to that guaranteed under EU law, the Court of Justice observed that the Commission Decision permitted US public authorities, notably the National Security Agency, to have access, on a generalized basis, to the *content* of incoming electronic communications from across the Atlantic.[61] Such access was found to constitute such a serious and intrusive breach of the fundamental right to respect for private life guaranteed by art. 7 of the Charter, that it compromised the very essence of that right.[62] In the same vein, the Commission Decision did not refer to the existence of "any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data."[63] Accordingly, the Court of Justice found that the contested decision did not respect the essence of the fundamental right to effective judicial protection, as enshrined in art. 47 of the Charter.[64]

In the aftermath of the *Schrems* judgment, new so-called "privacy-shield" principles were applicable to organisations established in the US that operated as controllers of data coming from the EU. In the light of those principles, the Commission adopted a new decision allowing the transfer of data from the EU to the US in respect of those organisations.[65] However, in *Schrems II*,[66] the Court of Justice declared the new Commission decision invalid, on the ground that the privacy-shield principles and US law fell short of providing a protection equivalent to the right to respect for private life and the right to effective judicial protection guaranteed by EU law.[67] The *Schrems II* judgment led the Commission and US authorities to adopt a "Trans-Atlantic Data Privacy Framework" that sought to implement the main findings of the Court of Justice in that latter judgment.

[60] Decision 2000/520 of the Commission of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441).

[61] *Schrems* cit. paras 94-97.

[62] *Ibid*. para. 94.

[63] *Ibid*. para. 95.

[64] *Ibid.*

[65] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46 on the adequacy of the protection provided by the EU–US Privacy Shield.

[66] *Facebook Ireland and Schrems* cit.

[67] The Court of Justice found that the access and use by US public authorities of personal data transferred from the EU to that third country was not limited to what was strictly necessary. Notably, US law did not indicate any limitations on the powers conferred on public authorities to implement certain surveillance programmes, nor any guarantees for non-US nationals who were targeted by those programmes (see *Facebook Ireland and Schrems* cit. para. 180). Moreover, US law did not grant to those persons any actionable rights before U.S. courts against the US authorities (*ibid*. para. 181). Whilst the privacy-shield principles provided for the creation of an Ombudsperson mechanism, the latter did not offer guarantees substantively equivalent to those required by EU law, since such a body was not independent, nor had the capacity to issue decisions binding upon US intelligence services (*ibid*. paras 190-197).

Read in the light of the principle of autonomy, the *Schrems I and II* judgments sent a clear message to the EU political institutions: they may not follow standards that lower the level of fundamental rights protection applicable within the EU. In interacting with the wider world, the EU may not forgo its own system of fundamental rights protection, since that protection forms part of our common identity as Europeans. That message is of paramount importance in the digital sphere where data moves fast and free and where territorial boundaries become meaningless. Furthermore, coupled with the Brussels effect, the principle of autonomy not only serves to protect the identity of the EU as a common legal order, but may also favour a "race to the top" worldwide, since it promotes the protection of fundamental rights and, more broadly, that of liberal values. An undertaking that has its seat in a third State and wants to have access to the EU digital market must respect the right to privacy as defined under EU law. Since it may make economic sense for such an undertaking to apply EU standards of fundamental rights protection to all data it collects worldwide, that undertaking has incentives to improve the privacy of the data it controls.

V. Concluding remarks

More often than not, the principle of autonomy is understood as an end in itself or as a tool for judicial self-empowerment. However, we respectfully disagree with such an understanding of that principle.

The principle of autonomy is, first and foremost, a means of protecting and promoting the values on which the EU is founded. In doing so, it serves to define the very identity of the EU as a common legal order. That identity is not built following a top-down approach but stems from the constitutional traditions common to the Member States.

At the outset, the principle of autonomy requires a candidate State for EU membership to align its constitution – and even its own identity – with the values on which the EU is founded. Such constitutional alignment is not a "one-off" objective but an ongoing commitment that applies for so long as a Member State remains within the EU. Since authoritarian tendencies are incompatible with the values contained in art. 2 TEU, the principle of autonomy serves to keep those tendencies at bay. They can never form part of our common constitutional traditions. At the same time, that constitutional alignment reduces the chances of normative conflicts between the identity of the EU and that of the Member State concerned, since both are built on shared values.

In this epilogue, we also posit that the Court of Justice does not choose constitutional structures over fundamental values, since those structures serve to implement and protect those values. In our view, protecting constitutional structures contributes to upholding the values on which the EU is founded, such as respect for the rule of law.

In addition, we sought to demonstrate that the principle of autonomy does not seek to insulate the EU from the wider world. On the contrary, the EU may engage in international obligations, provided that the values on which it is founded are properly

protected. Stated differently, when engaging with other international actors, the EU must not lose sight of its own identity.

Last but not least, coupled with the Brussels effect, the principle of autonomy operates as a powerful instrument that promotes liberal values outside the EU, enabling the latter to operate as a beacon of freedom, democracy and justice for the wider world. In a world where authoritarian regimes are on the rise, we should all have *high hopes* for the principle of autonomy.

ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

Edited by Enzo Cannizzaro, Marco Fisicaro, Nicola Napoletano *and* Aurora Rasi

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES? THE PERSPECTIVE OF INTERNATIONAL LAW

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TABLE OF CONTENTS: I. The present meaning of State sovereignty. – II. The sovereignty of EU Member States. – III. Concluding remarks.

ABSTRACT: The present *Article* addresses the issue of the sovereignty of EU Member States from the perspective of general international law. In a first part, it tries to define the present meaning of sovereignty in international law. As a guide, three main approaches to sovereignty are used, *i.e.* an understanding of sovereignty as independence, as *Völkerrechtsunmittelbarkeit* (direct legal relationship between a State and international law), and as an autonomy of States under the constitution of the international community. In a second part, the *Article* applies the criteria of these three approaches to the Member States of the EU. It also addresses the question of whether the EU itself can be qualified as sovereign, and the issue of a "shared" or "divided" sovereignty in Europe. By way of conclusion, the third part makes a plea for defending the concept of supranationalism, as established in Europe after World War II, against the idea of State sovereignty.

KEYWORDS: sovereignty – independence – autonomy – United Nations Charter – European sovereignty – new legal order.

I. THE PRESENT MEANING OF STATE SOVEREIGNTY

"Sovereignty of States" is a notion used in different branches of legal science, for instance in legal history, legal theory, legal philosophy, or the general theory of law and State (*Allgemeine Staatslehre*). In this *Article* (which presents thoughts and questions rather than definite answers), the notion is studied as a term of public international law, as defined by the United Nations Charter, international treaty and customary law.

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The notion of sovereignty has been criticised by international lawyers for a long time. In 1925, no less a figure than Hans Kelsen remarked that "it would be high time that this term, after having played a more than questionable role in the history of legal science for centuries, finally disappeared from the dictionary of international law".[1] Kelsen criticised in particular a misuse of the term in a political sense, in that the inadmissibility of international organisation and specifically of the submission of a State to the jurisdiction of an international court was inferred from the concept of sovereignty.[2] After the Second World War, efforts to eliminate or replace the notion have become even stronger. Some readers will remember Professor Louis Henkin's attack on "that S-word", as he called it. In an address of 1999, he said: "I don't like the 'S word'. Its birth is illegitimate, and it has not aged well. The meaning of 'sovereignty' is confused and its uses are various, some of them unworthy, some even destructive of human values".[3] Professor Henkin blamed "the delusions and mythology of sovereignty for the failure of States to collaborate more extensively", and criticised that "[t]he banner of sovereignty still waves ominously over all human rights issues".[4] Another prominent critic is Professor Martti Koskenniemi who in 2011 observed that

> "at least since the time of the League of Nations, we international lawyers have been critical of sovereignty. We have thought it a narrow, ethnocentric way to think about the relations of human beings. We have rehearsed a *moral* case against it. Sovereignty, we say, upholds egoistic interests of limited communities against the world at large, providing unlimited opportunities for oppression at home. [...] From a *sociological* perspective, we have attacked it because it fails to articulate the economic, environmental, technological, and ideological interdependencies that link humans all across the globe, giving a mistaken description of the reality of human relationships across the world. And from a *functional* perspective, we have observed its failure to deal with global threats such as climate change, criminality, or terrorism, while obstructing such beneficial projects as furthering free trade and protecting human rights".[5]

More recently, Professor Don Herzog opened his book "Sovereignty, RIP" with the words: "I come not to praise the concept of sovereignty, but to bury it [...]. I do want to denounce the concept's role in our politics and law as obsolete, confused, and pernicious".[6] With the phrase "*our* politics and law" he particularly referred to the United States.

[1] H Kelsen, 'Souveränität, völkerrechtliche' in K Strupp (ed.), *Wörterbuch des Völkerrechts und der Diplomatie*, vol. II (Walter de Gruyter & Co 1925) 554, 559 (my translation, B.F.).

[2] *Ibid.*

[3] L Henkin, 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera' (1999) FordhamLR 1.

[4] *Ibid.* 3, 5.

[5] M Koskenniemi, 'What Use for Sovereignty Today?' (2011) Asian Journal of International Law 61.

[6] D Herzog, *Sovereignty, RIP* (Yale University Press 2020) ix.

While all that critique was and still is plausible, the notion of sovereignty has survived in international law (and in the vocabulary of governments), and will likely also live on in the future as long as States as we know them remain the central building-blocks of the international legal order. What the poet and writer Hermann Hesse once remarked applies to the term: "that the older a word is, the more vitality and evocative power it contains".[7]

It is that old (but not necessarily venerable) age of the notion which complicates the endeavour to define State sovereignty today.[8] Since the French jurist and philosopher Jean Bodin introduced it into the theory of State in the sixteenth century,[9] it has been used in many different historical contexts and with different intentions. Often, it was resorted to as an argument in a concrete political conflict – as a description of what was desired or aspired to rather than of what really already existed. At the beginning of the modern European system of States, the notion was used to establish and defend the independence of the French King from the Pope and the Emperor of the Holy Roman Empire, and the supremacy of the King's orders over those of particularistic powers in what gradually became France. In the second half of the twentieth century, the decolonized States of Africa and Asia relied on the notion of sovereignty to stabilise and strengthen their newly won independence.[10]

And today, sovereignty is used as an argument both in favour and against a more intense political and economic integration of States on a regional as well as a universal level. In an aspirational way, President Emmanuel Macron speaks of a "sovereign Europe" to promote a more unified Europe that can guarantee security in all its dimensions, can respond to the challenge of migration, be a model of sustainable development, etc.: "La seule voie qui assure notre avenir, [...] c'est à nous, à vous de la tracer. C'est la refondation d'une Europe souveraine, unie et démocratique. [...] L'Europe seule peut, en un mot, assurer une souveraineté réelle, c'est-à-dire notre capacité à exister dans le monde actuel pour y défendre nos valeurs et nos intérêts. Il y a une souveraineté européenne à construire, et il y a

[7] H Hesse, 'Über das Wort "Brot"' in H Hesse, *Gesammelte Werke in zwölf Bänden* vol. 11 (Suhrkamp 1970) 283, 284.

[8] For an overview of the history of sovereignty (with bibliographic references), see B Fassbender, 'Sovereignty' in H Volger (ed.), *A Concise Encyclopedia of the United Nations* (Martinus Nijhoff Publishers, 2nd edn 2010) 663, and B Fassbender, 'Commentary on Art. 2(1) of the UN Charter' in B Simma and others (eds), *The Charter of the United Nations* (Oxford University Press, 3rd edn 2012) vol I, 133, 136 ff.

[9] J Bodin, *Les six Livres de la République* (Jacques du Puys 1576). A facsimile of the book is available in the "Gallica" collection of the Bibliothèque nationale de France gallica.bnf.fr.

[10] See, as one of numerous examples, the 'Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty' adopted by the UN General Assembly on 21 December 1965, UN Doc A/RES/2131(XX).

la nécessité de la construire".[11] By contrast, President Donald Trump referred to sovereignty to promote his "America First" policy.[12]

The Charter of the United Nations of 1945 avoided the term "sovereignty".[13] The drafters of the Charter associated it with the often violent competition and rivalry of nation States in the nineteenth and twentieth century, their fight over political, economic and military power, which eventually had led to the two World Wars of 1914 and 1939. They also considered traditional sovereignty incompatible with the new general prohibition of the use of force in international relations and the respective far-reaching powers given to the Security Council. Instead of "sovereignty", the Charter proclaimed the "sovereign equality" of States (art. 2(1) UN Charter), a notion emphasizing not the self-reliant, or self-absorbed, autonomy of a State but its co-existence with other States and a shared membership in the international community. The idea of equality of States in law was given precedence over that of sovereignty by relegating the latter to the position of an attributive adjective merely modifying the noun "equality". In this combination, sovereign equality meant to exclude a legal superiority of any one State over another, but not to exclude a greater role of the (organized) international community played *vis-à-vis* all its members. As the Friendly Relations Declaration of the UN General Assembly of 1970, interpreting the Charter rule, put it, "[a]ll States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature".[14] Wolfgang Friedmann aptly described that shift as the advent of a new international "law of cooperation", replacing or at least complementing the traditional "law of coexistence", as "a move of international society from an essentially negative code of rules of abstention to positive rules of cooperation".[15]

Similar to the founders of the United Nations, the six European States which in 1951 established the European Coal and Steel Community did not use the word "sovereignty"

[11] President E Macron, 'Speech at the Sorbonne' (26 September 2017) www.elysee.fr. See also 'Déclaration de M. Emmanuel Macron, président de la République, sur les principaux facteurs de la souveraineté européenne, à La Haye le 11 avril 2023' www.vie-publique.fr. For a discussion from a legal point of view, see S Barbou des Places, 'Taking the Language of "European Sovereignty" Seriously' (2020) European Papers www.europeanpapers.eu 287, and T Verellen, 'European Sovereignty Now? A Reflection on What It Means to Speak of "European Sovereignty"' (2020) European Papers www.europeanpapers.eu 307.

[12] See, *e.g.*, US President Donald J Trump in his third annual speech to the UN General Assembly, 24 September 2019: "If you want freedom, take pride in your country. If you want democracy, hold onto your sovereignty. And if you want peace, then love your nation". Wise leaders always place the good of their people and country first, he said, emphasizing that the future belongs not to globalists but to patriots, to sovereign independent nations that protect their citizens, respect their neighbours and honour the differences that make each nation special and unique. UN Meetings Coverage GA/12183 of 24 September 2019 press.un.org.

[13] See B Fassbender, 'Commentary on Art. 2(1) of the UN Charter' cit. 153 f.

[14] General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, UN Doc A/RES/2625(XXV).

[15] W Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964) 60 ff., 365 ff.

in the Treaty of Paris but instead declared, in the treaty's preamble, their determination "to replace the centuries-old rivalries by uniting their essential interests".[16] Sovereignty was opposed with the new guiding idea of supranationalism, which was meant to reconcile a certain autonomy of States with their intensified cooperation – a cooperation deemed necessary to stabilise the autonomy of the participating States. The difficult and divisive question of sovereignty was deliberately left aside, in an effort to create something new, to make a fresh start in the relations between States "divided for a long time by bloody conflicts".[17] Supranational integration was "a new form of international connection between its members, which, in a peculiar state of uncertainty, neither necessarily aims at a European federal State as its ultimate goal nor wants to be satisfied with the limited binding force of international law".[18]

In the early period of European integration some observers saw the creation of the Communities both as a model for other regions of the world and as a possible forerunner of new legal and political arrangements on a global level. In 1964, Wolfgang Friedmann in a hopeful way wrote:

> "While national sovereignty continues, in the world at large, to be the dominant legal and political fact of international law and society, there have been certain regional developments towards a supranational order and authority. Far and away the most important laboratories of such an evolution are the European Communities which are to a certain extent developing a new 'common' order, with a legal and constitutional momentum of its own".[19]

Professor Friedmann regarded the Communities as "pioneers in the transition from international to community law"[20] and in the "gradual transition from multinational arrangements to a common constitutional order"[21] – expectations which until now have been unfulfilled, with the European Union worldwide remaining to be an exceptional and unique case, "an international legal experiment"[22] mirroring the political and economic one.

There is no definition of the term "sovereignty" in a written rule of positive international law.[23] However, as an expression of customary international law a majority of international lawyers will probably still approve of Max Huber's famous dictum in the *Island of Palmas* arbitral award of 1928: "Sovereignty in the relations between States signifies

[16] Treaty establishing the European Coal and Steel Community (1951), preamble.

[17] *Ibid.*

[18] T Oppermann, 'Der Europäische Traum zur Jahrhundertwende' (1999) Juristenzeitung 317, 320.

[19] W Friedmann, *The Changing Structure of International Law* cit. 370.

[20] *Ibid*. 367.

[21] *Ibid*. 114.

[22] B de Witte, 'The European Union as an International Legal Experiment' in G De Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2011) 19.

[23] However, the term "sovereign equality" was defined in the Friendly Relations Declaration which here largely followed an interpretative statement adopted by the San Francisco Conference in June 1945; see B Fassbender, 'Commentary on Art. 2(1) of the UN Charter' cit. 145 ff., 148 ff.

independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State".[24] What, at the time, was generally meant by those State "functions" becomes clear from the definition of independence by the Permanent Court of International Justice in its 1931 advisory opinion on the *Customs Régime between Germany and Austria*:

> "[T]he independence of Austria, according to Article 88 of the Treaty of Saint-Germain[25], must be understood to mean the continued existence of Austria within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other with the result that that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible".[26]

Most international lawyers will also still agree with Alfred Verdross when he equated sovereignty with *Völkerrechtsunmittelbarkeit*, or a direct legal relationship between a State and the international legal order: "A State is sovereign if it is subject only to international law, *i.e.* if it is a direct and immediate subject of international law without any intervening authority".[27] Very similarly, Dionisio Anzilotti defined sovereignty in his individual opinion in the case of the *Customs Régime between Germany and Austria* when he wrote:

[24] The full quotation reads as follows: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations". *Island of Palmas* case (Netherlands v United States of America), Award of 4 April 1928, Reports of International Arbitral Awards vol II, 829. For an analysis of the case, see DE Khan, 'Max Huber as Arbitrator: The *Palmas (Miangas)* Case and Other Arbitrations' (2007) EJIL 145, 158 ff.

[25] That article reads as follows: "The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently, Austria undertakes in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another Power". PCIJ *Customs Régime between Germany and Austria* (Advisory Opinion) [5 September 1931] PCIJ Series A/B No 41, 37, 42; Treaty of Peace with Austria (St. Germain-en-Laye, 10 September 1919), Australian Treaty Series 1920 No 3, www.austlii.edu.au.

[26] PCIJ *Customs Régime between Germany and Austria* (Advisory Opinion) [5 September 1931] PCIJ Series A/B No 41, 37, 45. For an analysis of the historical context, see A Orde, 'The Origins of the German-Austrian Customs Union Affair of 1931' (1980) Central European History 34.

[27] A Verdross and B Simma, *Universelles Völkerrecht* (Duncker & Humblot, 3rd edn 1984) 28 f., 226 (my translation, B.F.). See also H Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization' (1944) Yale Law Journal 207, 208: "[T]he State is then sovereign when it is subjected only to international law, not to the national law of any other State. Consequently, the State's sovereignty under international law is its legal independence from other States".

> "[T]he independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law ; it may also be described as *sovereignty (suprema potestas)*, or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law".[28]

Accordingly, Anzilotti's line of thought can be described as follows: if a State is subject only to international law, it possesses (external) sovereignty, and if it does so, it is legally independent.

Both Huber's and Verdross'/Anzilotti's approaches to sovereignty predate the UN Charter of 1945 which according to a generally held view designated the beginning of a new era in international law. In an effort to appreciate and to recognise that watershed in the development of modern international law, the author of the present *Article* has defined the sovereign equality of States as their "constitutional autonomy" in the international legal order, guaranteeing each State an equal status under the constitution of the international community, with rights protecting that autonomy, and rights of participation in the international community.[29]

Although they include some substantial elements (like a "sole right of decision in all matters economic, political, financial"),[30] the three definitions of sovereignty (as independence, as *Völkerrechtsunmittelbarkeit*, and as an autonomy under the constitution of the international community) are largely formal. Thus the question arises as to what actually is the substance of State sovereignty today. Already Jean Bodin made an effort to define what he called the "marks" of sovereignty (*marques de la souveraineté*):[31] "This then is the first and chiefest mark of Sovereignty, to be of power to give laws and command to all in general, and to every one in particular", "to have power to give laws unto all and every one of the subjects, & to receive none from them".[32] For the present, Professor

[28] PCIJ *Customs Régime between Germany and Austria* (Advisory Opinion) [5 September 1931], individual opinion of Judge Anzilotti, PCIJ Series A/B No 41, 55, 57. See JM Ruda, 'The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice' (1992) EJIL 100, 110 f.

[29] See B Fassbender, 'Commentary on Art. 2(1) of the UN Charter' cit. 154 ff. See also B Fassbender, 'Sovereignty and Constitutionalism in International Law' in N Walker (ed.), *Sovereignty in Transition* (Hart 2003) 115. My understanding of sovereign equality is based on a constitutional reading of the UN Charter, as elaborated in B Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff Publishers 2009).

[30] PCIJ *Customs Régime between Germany and Austria* (Advisory Opinion) cit. 45.

[31] J Bodin, *Le six Livres de la République* cit. 221.

[32] J Bodin, *The Six Bookes of a Commonweale: A Facsimile Reprint of the English Translation of 1606 Corrected and Supplemented* (KD McRae ed., Harvard University Press 1962) 162 f., quoted from D Herzog, *Sovereignty, RIP* cit. 277 f.

Herzog proposed (recognisably from an American perspective) the following "list of incidents of sovereignty", namely "the powers to:

- Control the country's territory, with a monopoly on legitimate coercion;
- Control the country's borders;
- Raise and command armed forces;
- Control the money supply;
- Promulgate laws of property and other matters;
- Declare war;
- Negotiate treaties and other international agreements;
- Send representatives to international organizations;
- Punish criminals, including with the 'power of life and death'; and
- Impose taxes".[33]

That list is not exhaustive (one could add, for instance, the power to confer citizenship in accordance with a State's own nationality law, or the right to provide diplomatic and consular protection, or the rights summarised as the sovereign immunity of a State) but enlightening on what today most governments have in mind when they claim sovereignty for their respective State. The list also illustrates that despite the generally assumed process of an ongoing relativisation and limitation of State sovereignty since the first half of the twentieth century, important "sovereign rights" remain identifiable.

II. The sovereignty of EU Member States

If we let ourselves be guided by the above definitions, can the EU Member States still be characterised as sovereign States under international law? One is tempted to take a shortcut to an answer by noting that most certainly the European Union in its present legal condition is *not* enjoying sovereignty under international law.[34] The reason for that is simple: In international law, sovereignty has remained a status reserved for States,[35] and the EU has not claimed statehood, and even excluded the possibility of being regarded as a State[36] – notwithstanding the fact that its general aims are the same as those of the classical modern (Western) State, namely "to promote peace [...] and the well-being of its peoples" (art. 3(1) TEU), that it has its own citizenship (art. 20 TFEU) and a defined

[33] D Herzog, *Sovereignty, RIP* cit. 279.

[34] The same view is held by C Eckes, 'EU Autonomy: Jurisdictional Sovereignty by a Different Name?' (2020) European Papers www.europeanpapers.eu 319, 320.

[35] By contrast, constitutional law and legal theory know the notion of *popular sovereignty*, or *sovereignty of the people* (of which not the State but an organised community of humans is the owner), or the notion of *Parliamentary Sovereignty* as a principle of the constitution of the United Kingdom and other States.

[36] See Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 156: "Those amendments [of the ECHR, as provided for in the draft revised agreement on the accession of the EU to the ECHR] are warranted precisely because, unlike any other Contracting Party, the EU is, under international law, precluded by its very nature from being considered a State".

territory, and legislative powers (with a primacy of its law) similar to those of a (federal) State.[37] Art. 1(1) TEU describes the EU as an entity "on which the Member States confer competences to attain objectives they have in common". Those competences can also be characterised as sovereign rights transferred by Member States to the EU.[38] That is, for instance, the concept and language of the German Constitution (art. 23(1)) or the Italian Constitution (art. 11). Accordingly, the EU is in possession of certain sovereign rights given to it by its Member States, but it is not sovereign under international law because it is not a State, as the so far only legal entity to which international law attributes sovereignty.

Furthermore, the EU lacks sovereignty because it does not possess a *Kompetenz-Kompetenz*, that is the right to decide itself and autonomously about the scope of its competences, and its possible expansion.[39] To the contrary, the competences of the EU are "limited", and "[c]ompetences not conferred upon the Union in the Treaties remain with the Member States" (art. 5(2) TEU). New EU competences require the consent of Member States given by way of amendment of the Treaties in accordance with an ordinary or a simplified revision procedure (see art. 48 TEU), and measures of the EU adopted according to the so-called "enabling clause" (art. 352(1) TFEU) need a unanimous decision by the Council. Consequently, the *Kompetenz-Kompetenz* (a notion devised in the later nineteenth century to clarify the legal nature of the new German federal State, and to distinguish between a "federation" and a "confederation" of States[40]), still rests with the Member States (who must, however, comply with the obligations assumed in the EU Treaties).

So if the EU is not sovereign, does this automatically mean that the individual Member States are? Not necessarily, I think. The Member States could have lost their sovereignty without the EU having gained it. There could have emerged a kind of "sovereignty

[37] For an analysis of "State-like" actions of the EU in international relations and their implications for the issue of sovereignty, see C Eckes and R Wessel, 'The European Union: An International Perspective' in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law, vol. 1: The European Union Legal Order* (Oxford University Press 2018) 74.

[38] See Opinion 2/13 cit. para. 157: "As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields [...] (see, in particular, judgments in *van Gend & Loos*, 26/62, p. 12, and *Costa*, 6/64, p. 593, and Opinion 1/09, para. 65)".

[39] In a judgment of 5 May 2020 regarding the Public Sector Purchase Programme of the European Central Bank, the German Federal Constitutional Court reiterated that "[t]he Basic Law does not authorise German State organs to transfer sovereign powers to the European Union in such a way that the European Union were authorised, in the independent exercise of its powers, to create new competences for itself. It [the Basic Law] prohibits conferring upon the European Union the competence to decide on its own competences (*Kompetenz-Kompetenz*)". German Federal Constitutional Court of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, www.bverfg.de, marginal no. 102.

[40] See M Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. II: *1800–1914* (C.H. Beck 1992) 358, 367.

vacuum" in which neither the EU nor its Member States are sovereign entities under international law.

Within the EU, that is in the relations between Member States and the Union as determined by the Treaties, the concept of sovereignty as such is of no importance.[41] In that relationship, the ownership of sovereignty (under international law) cannot change the allocation of competences as defined by the Treaties. That vertical distribution of rights and duties does not leave room for a "super-competence" of Member States existing somewhere in the background. The horizontal relations between Member States are also not controlled by each State's sovereignty under international law but by a mutual respect for their relative and equal autonomy in the legal order of the EU which they owe each other as parties to the Treaties.[42] To that extent, the special regime established by EU law supersedes the rules of general international law.

But does not the right of a Member State unilaterally to withdraw from the Union, as enshrined in art. 50 TEU, prove the persistent sovereignty of Member States *vis-à-vis* the EU? This was the view of the German Federal Constitutional Court in its *Maastricht* decision of 1993,[43] and similarly the CJEU in its 2018 *Wightman* judgment stated that art. 50 TEU "enshrin[ed] the sovereign right of a Member State to withdraw from the European Union".[44] Indeed, the right of a State to terminate an international treaty can be seen as

[41] But see the *Maastricht* decision of the German Federal Constitutional Court of 12 October 1993: "The Federal Republic of Germany remains to be, even after the entry-into-force of the TEU, a member of a group of States [*Staatenverbund*] the public authority of which is derived from the Member States, and which in the German sovereign sphere [*Hoheitsbereich*] only can become effective because of the German parliamentary act of approval to the TEU. [...] Therefore, Germany preserves the quality of a sovereign State in its own right, and the status of sovereign equality in its relations with other States in the sense of Art. 2 para. 1 of the UN Charter". German Federal Constitutional Court of 12 October 1993 2 BvR 2134, 2159/92, BVerfGE vol. 89, 155, 190 (my translation, B.F).

[42] It is a different question whether there still exists a legal relationship between Member States which is not controlled by their EU membership, for instance with regard to their bilateral diplomatic relations under the regime of the 1961 Vienna Convention on Diplomatic Relations, or with regard to international treaties concluded among them which are outside the scope of EU law. For the latter issue, see, *e.g.*, B Fassbender, 'Der deutsch-französische Elysée-Vertrag von 1963: Idee und Zukunft eines bilateralen Freundschaftsvertrags im Rahmen der Europäischen Union' (2013) Die Öffentliche Verwaltung 125.

[43] See the *Maastricht* decision of the German Federal Constitutional Court, cit. 190: "Germany is one of the 'masters of the Treaties' which have bound themselves to the TEU, 'concluded for an unlimited period' (Art. Q TEU), with intent to maintain a long-term membership, but which could ultimately also revoke that membership by an *actus contrarius*" (my translation, B.F.).

[44] Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999 para. 56. See also *ibid.* para. 50: "The decision to withdraw is for that Member State alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice", and para. 57: "the sovereign nature of the right of withdrawal enshrined in Article 50(1) TEU". See further case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:978, opinion of AG Campos Sánchez-Bordona, para. 92: "The withdrawal decision, unilaterally adopted in the exercise of the departing Member State's sovereignty, [...]".

an emanation of its sovereignty. But in the case of the EU, a Member State's right of withdrawal can just as well be explained by the character of the Union as a voluntary association of States and their peoples which has never been called into question since the ECSC was founded. In other words, it was never assumed that a State could be compelled to remain a member of the Communities, or the Union, against its will.

The system of competences established by the Treaties has sometimes been said to result in a sovereignty "shared" by, or "divided" between, the Union on the one hand, and the Member States together, or each Member State individually, on the other hand.[45] In Europe, the concept originates from the German discussion about the "nature of the federal State" in the middle of the nineteenth century, in the context of the Frankfurt Constitution (or Constitution of St. Paul's Church, *Paulskirchenverfassung*) of 1849 which attempted to create a unified German federal State.[46] However, the concept of a divided sovereignty could not well explain the structure of the German *Reich* actually constituted in 1871, and it ran counter to the long-established belief in the absolute and exclusive character of sovereignty which had been its hallmark since Bodin. Understood as *suprema potestas*, sovereignty defies a partition or divide, and this seems still to be the view of the majority of writers addressing the *locus* of sovereignty in the European Union. If a "shared" sovereignty is assumed, it is the sovereignty of Member States exercised through the organs of the EU. In that sense the German Federal Constitutional Court explained in its *Maastricht* decision that the "Member States have founded the European Union in order to carry out together a part of their tasks, and in so far jointly to exercise their sovereignty".[47]

If, for those reasons, the concept of sovereignty is not of a legal significance *within* the Union, what about the legal status of EU Member States in their relationship with third States (non-Member States), and as members of the international legal community? In that respect, the sovereignty of Member States is still generally recognized, as is apparent, in particular, from their continuing full membership in universal international organizations, above all the United Nations. Art. 4 of the UN Charter restricts membership

[45] See, *e.g.*, SD Krasner, 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law' (2004) MichJIntlL 1075, 1085 f. See also J Habermas, *Zur Verfassung Europas: Ein Essay* (Suhrkamp 2011) 48 ff., in relevant parts reprinted as 'Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts' (2012) ZaöRV 1, 18 ff. (proposing to establish a sovereignty divided between the citizens of the EU and the European nations).

[46] The authorship of the concept is attributed to the legal historian Georg Waitz (1813-1886) who was a prominent member of the Frankfurt National Assembly. See G Waitz, 'Das Wesen des Bundesstaates' (1853) Allgemeine (Kieler) Monatsschrift für Wissenschaft und Literatur 494, reprinted in G Waitz, *Grundzüge der Politik* (Homann 1862) 153. For context, see M Stolleis, *Geschichte des öffentlichen Rechts* cit. 271 ff., 365 f., and D Grimm, *Souveränität* (Berlin University Press 2009) 61 ff. (with a sketch of the US-American discussion of a sovereignty divided between the federal government and the individual States).

[47] *Maastricht* decision of the German Federal Constitutional Court cit. 189 (my translation, B.F.).

in the United Nations to "States" – "a term that, from the very beginning, has been unanimously interpreted to refer to entities that meet the requirements of statehood under international law: *i.e.* a defined territory and a permanent population effectively controlled by an independent government".[48] To that extent, international law is turning a blind eye to the incorporation of Member States into the EU. At the United Nations, the EU is an "observer" of the work of the General Assembly only; in UN terminology it belongs to the presently twenty-five "Intergovernmental Organizations having received a standing invitation to participate as Observers in the sessions and the work of the General Assembly and maintaining Permanent Offices at Headquarters".[49] So far, international law and UN law have not found in their system of international legal persons a proper place for a "supranational organization" such as the EU. In its resolution entitled "Participation of the European Union in the work of the United Nations" of May 2011, the UN General Assembly expressly reaffirmed "that the General Assembly is an intergovernmental body whose membership is limited to States that are Members of the United Nations", that the representatives of the EU shall be seated among the observers (*i.e.* not among the delegations of Member States), and that they shall not have the right to vote, to co-sponsor draft resolutions or decisions, or to put forward candidates in the General Assembly or its subsidiary organs.[50]

Let us here return to the three approaches to sovereignty in international law discussed above (Huber's definition of sovereignty as independence, Verdross' definition of sovereignty as *Völkerrechtsunmittelbarkeit*, and my own understanding of sovereignty as an autonomy of States under the constitution of the international community), and apply them to the Member States of the EU.

If, according to Max Huber, sovereignty is the right of a State to exercise, on a specific territory, the (typical) functions of a State *to the exclusion of any other State*, each EU Member State must be regarded as sovereign because (with the EU not being a State) each Member State is the only *State* exercising State functions on its respective territory.

As regards Verdross' criterion of *Völkerrechtsunmittelbarkeit*, a membership of a State in the EU has not (or not yet) abolished or overridden its direct (immediate) relationship with international law because there is not, between the domestic law of that State and international law, a layer of another *State* law (like the federal law of a federal State). International law is content with the fact that the EU remains an organisation the existence of which depends on international treaties, and that there is, on the part of a Member State, the legal possibility of leaving the Union.

[48] U Fastenrath, 'Commentary on Art. 4 of the UN Charter' in B Simma and others (eds), *The Charter of the United Nations* (Oxford University Press, 3rd edn 2012) vol I, 341, 346.

[49] See United Nations, *Intergovernmental Organizations having Received a Standing Invitation to Participate as Observers in the Sessions and the Work of the General Assembly and Maintaining Permanent Offices at Headquarters* www.un.org.

[50] General Assembly, Resolution 65/276 of 3 May 2011, UN Doc A/RES/65/276, para. 1 and Annex, paras 2 and 3.

Lastly, an understanding of sovereignty as an autonomy of States under the constitution of the international community (made up of the rights which, at a given time, international law accords an independent State, and of the duties which the same law imposes on a State) also supports a continuing sovereignty of EU Member States.

Accordingly, the hypothesis of a "sovereignty vacuum" in which neither the EU nor its Member States are sovereign entities under international law has to be rejected: In their relationship with non-Member States and as members of the international legal community at large, EU Member States still must be regarded as sovereign while the EU still lacks a sovereign status under international law.

III. Concluding remarks

By way of conclusion of these provisional thoughts, I want to refer once more to Wolfgang Friedmann as a scholar who studied very closely the strained relationship between the concepts of State sovereignty and international cooperation. In 1964, Professor Friedmann wrote: "In terms of objectives, powers, legal structure and scope, the present state of international organisation presents an extremely complex picture. It reflects the state of a society that is both desperately clinging to the legal and political symbols of national sovereignty and being pushed towards the pursuit of common needs and goals that can be achieved only by a steadily intensifying degree of international organisation".[51] As we saw earlier, Friedmann set his hope on the process of European integration as the main example of "regional developments towards a supranational order and authority".[52] He saw the Communities as a possible "prototype of developments that may occur elsewhere in the world, or eventually extend to the international community as a whole".[53]

Oddly enough, some sixty years later the situation described by Professor Friedmann has not significantly changed on a global level. European supranational integration, much intensified since, has remained an exception in a world of nation States and national State sovereignty. Very much contrary to Kelsen's desire of 1925, sovereignty continues to be a prominent keyword in the dictionary of international law and relations. It is curious that Europe, as the political space that gave rise to the concept of sovereignty in early modern times and eventually imposed it throughout the world, has today relativised it the most and replaced it with new and more expedient supranational forms of exercising public authority. Paradoxically, however, a further intensification of European integration would likely lead to some form of federal statehood, which in turn would re-establish a global uniformity of public government in the form of the State.

But even the Member States of the EU have not been ready completely to relinquish the concept of (their individual) sovereignty. In their relations with third countries, they

[51] W Friedmann, *The Changing Structure of International Law* cit. 293-294.
[52] *Ibid.* 370.
[53] *Ibid.* 113.

attach importance to acting as independent States on an equal footing, to concluding treaties under international law, to maintaining diplomatic and consular relations, and to exerting influence on the development of international law.[54] Professor Colin Warbrick once remarked that "[t]here are powerful legal advantages to being a [sovereign] State, which in practically every case, cause a qualified entity to want to claim its prerogatives".[55] It seems that the same advantages cause EU Member States to hold on to their independent statehood. Within the EU, the notion of sovereignty today stands for a final reservation of Member States in favour of their autonomous statehood which allows them to keep performing, in the words of art. 4(2) TEU, "their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security".[56] Sovereignty so understood serves as a kind of insurance policy covering a real or imagined ultimate freedom of the individual European nations.

Sovereignty, as we have seen, is an ancient and powerful concept that has survived in international law for centuries under very different conditions of international relations. But that does not mean that we are prisoners of this terminology. This is impressively demonstrated by the founding of the European Communities, a truly "creative effort", as the preamble to the Treaty establishing the European Coal and Steel Community puts it, which replaced the long-standing and often violent rivalries between European States with a union of their essential interests. We should therefore use the notion of

[54] One may add that a renunciation of independent statehood in this sense would make central institutions (such as the head of state, the foreign minister or the diplomatic service) with their entire civil service to a large extent superfluous. Bureaucracies, however, do not tend to abolish themselves.

[55] C Warbrick, 'States and Recognition in International Law' in MD Evans (ed.), *International Law* (Oxford University Press, 2nd edn 2006) 217, 218.

[56] In its *Lissabon* judgment of 30 June 2009, the German Federal Constitutional Court expressed that reservation in a rather far-reaching way as follows: "However, European unification on the basis of a treaty union of sovereign States must not be realised in such a way that there is no longer sufficient room in the Member States for the political shaping of economic, cultural and social living conditions. This applies in particular to areas which shape the living conditions of citizens, above all their private sphere of personal responsibility and personal and social security protected by fundamental rights, as well as to those political decisions which are particularly dependent on prior cultural, historical and linguistic understandings and which unfold discursively in the party-politically and parliamentarily organised space of a political public sphere. Essential areas of democratic organisation (*demokratische Gestaltung*) include citizenship, the civil and military monopoly on the use of force, income and expenditure, including borrowing, as well as the decisive elements of an interference with fundamental rights, especially in the case of intensive infringements such as the deprivation of liberty in the administration of criminal justice or measures of involuntary commitment. These important areas of democratic organisation also include cultural issues such as the control of the use of language, the organisation of family and educational affairs, the regulation of freedom of expression, of the press and of assembly, or the treatment of religious or ideological confession". See German Constitutional Court of 30 June 2009 BVerfGE vol. 123, 267, 357 ff. (my translation B.F). For an analysis of the case law of the CJEU regarding art. 4(2) TEU, see T Boková, 'Exploring the Concept of Essential State Functions on the Basis of the CJEU's Decision on the Temporary Relocation Mechanism' (2022) European Papers www.europeanpapers.eu 773.

sovereignty as little as possible so that peoples outside Europe, too, see that "the State" today does not represent an absolute and supreme power, but is a part of a *Stufenordnung* of universal law, an "intermediate structure in a continuous sequence" of legal communities that leads from the "international legal community through the various associations of States, member States of federations, autonomous provinces, and municipalities to the smallest treaty community" (Kelsen).[57] Europeans should be proud of having created legal relations between their countries which largely can do without the notion of sovereignty.

[57] H Kelsen, 'Souveränität, völkerrechtliche' cit. 554 (my translation, B.F.).

ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

Edited by Enzo Cannizzaro, Marco Fisicaro, Nicola Napoletano *and* Aurora Rasi

THE EUROPEAN UNION'S PARTICIPATION IN THE CREATION OF CUSTOMARY INTERNATIONAL LAW AND ITS IMPACT ON MEMBER STATE SOVEREIGNTY

CHRISTINA BINDER* AND PHILIPP JANIG**

ABSTRACT: This *Article* argues that the ability of the European Union to participate in the creation of customary international law curtails the sovereignty of its Member States. First, it shows that authority to participate in norm-creation constitutes a core aspect of sovereignty under international law. Second, it argues that the conduct of the European Union (as an international organization) may be determinative in ascertaining the existence and content of customary norms. However, that authority lacks an explicit basis in the treaties. Third, it asserts that this encompasses norms that are directly relevant for the Member States, potentially in circumstances outside of the scope of EU law. The *Article* then specifically discusses three types of acts of the Union and their relevance for the creation of customary international law, while providing examples that touch upon traditional interstates relations. In particular, this concerns the legislative practice of the Union, the judicial practice of the Court of Justice of the European Union (CJEU) and public statements made by the Commission in (quasi-)judicial proceedings.

KEYWORDS: customary law – international organizations – sovereignty – legislative practice – judicial practice – statements in proceedings.

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I. Introduction

This *Article* argues that the ability of the European Union to participate in the creation of customary international law curtails the sovereignty of its Member States, beyond the express devolution of sovereign powers to the organization through the treaties. For that purpose, it makes three specific arguments. First, the authority to participate in norm-creation constitutes a core aspect of (state) sovereignty under international law. Second, the conduct of the European Union (as an international organization) may be determinative in ascertaining the existence and content of customary norms. Third, this encompasses norms that are directly relevant for the Member States, potentially in circumstances not governed by EU law.

These three observations result in the conclusion that the endowment of the European Union with further competences and powers not only leads to an *explicit* transfer of sovereign authority, but also an *implicit* transfer of the authority to contribute to customary international law. That process of relinquishing sovereignty is neither abrupt nor absolute. Nevertheless, gradually and partially, the EU may increasingly enjoy what traditionally is a core prerogative of states within the international legal system.

II. Law-making capacity as an expression of sovereignty

The sovereignty of states is considered to comprise of an internal and an external element, with the latter denoting "that a State is not subject to the legal power of another State or of any other higher authority".[1] This also entails the lack of any central law-making authority on the international level. As the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber emphasized in *Tadić*, "[t]here is [...] no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community".[2] The law-making capacity in principle rather rests with states themselves, as the principal subjects of international law. While consensualist and voluntarist conceptions – which required that all norms had to be based in state consent[3] – no longer find general support in mainstream scholarship (and rightfully so), the inherent connection between state sovereignty on the one hand and the creation of international law on the other remains.

That connection between sovereignty and the capacity to enter into legal commitments was also emphasized by Permanent Court of International Justice (PCIJ) in *S.S. Wimbledon*: "[...] the Court declines to see in the conclusion of any treaty by which a State

[1] NJ Schrijver, 'The Changing Nature of State Sovereignty' (2000) British Yearbook of International Law 65, 71.

[2] International Criminal Tribunal for the former Yugoslavia decision on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995 IT-94-1-A *Prosecutor v Duško Tadić* para. 43.

[3] R Kolb, *Theory of International Law* (Hart 2016) 105 ff; Permanent Court of International Justice dissenting opinion of M Weiss of 2 September 1927 Rep Series A No 10 *S.S. Lotus* (*France v Turkey*) at 43-44.

undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty; on the contrary, the right of entering into international engagements is an attribute of State sovereignty".[4]

Thus, the mere fact that a state's freedom of action is restricted as a result of an international legal obligation it validly entered into does not alter its sovereignty as such. This may likewise be extended to circumstances in which the commitment consists of complying with decisions made on the level of international organizations. However, such a transfer of law-making powers requires the "[e]xpress prior consent" of any Member State to the "surrender of specific competences or elements of its sovereignty".[5]

Therefore, the extensive transfer of competences from Member States to the European Union (EU) through the treaties does not *ipso facto* affect their sovereignty, in particular insofar as it is reversible both for Member States on the individual level[6] as well as them more generally.[7] That transfer – in addition to internal legislative powers – also includes the explicit mandate to contribute to "the development of international law".[8] For that purpose, the EU may enter into "international engagements"[9] with third states and other international organizations through treaties that also bind the Member States.

In contrast, the EU treaties contain no internal legal basis transferring the Union the authority to contribute to the emergence of customary international law.[10] However, as will argued below, the Union has the capacity to participate in the creation of customary norms from the perspective of international law. While that might not (seriously) affect the freedom of action of Member States in all contexts – in particular insofar as we are concerned with norms relevant for international organizations as such – the Union also contributes to customary law that is directly relevant for the Member States. Given that the EU was never explicitly granted that authority, it may be seen as a curtailment of the sovereignty of Member States. This applies to both its actual exercise (which potentially impacts the weight of state practice and *opinio juris* of Member States), as well as the norms that may eventually result from a process in which the Union participated. The

[4] Permanent Court of International Justice judgment of 17 August 1923 Rep A No 1 *The S.S. 'Wimbledon' (UK, France, Italy, Japan v Germany; Poland intervening)* at 25; see also R Kolb, 'Sovereignty' in C Binder, M Nowak, JA Hofbauer and P Janig (eds), *Elgar Encyclopedia of Human Rights* (Edward Elgar 2022) 306 para. 19; L McNair, *The Law of Treaties* (OUP 1986) 35 ("The making of treaties is one of the oldest and most characteristic exercises of independence or sovereignty on the part of States").

[5] N Schrijver, 'The Changing Nature of State Sovereignty' cit.; see, art. 25 of the Charter of the United Nations.

[6] Art. 50 TEU; see also case C-621/18 *Wightman and Others* ECLI:EU:C:2018:978.

[7] Given their status as the 'Masters of the Treaties'.

[8] Art. 3(5) TEU.

[9] In the words of *The S.S. 'Wimbledon' (UK, France, Italy, Japan v German; Poland intervening)* cit.

[10] Cf. arguing that such an explicit authorization would be necessary, see United States in International Law Commission, Comments and Observations on Identification of Customary International Law of 14 February 2018, UN Doc A/CN.4/716, 20.

next Section will explore to what extent international organizations in general, and the EU in particular may contribute to the emergence of customary international law.

III. The participation of International Organizations in the formation of customary international law

III.1. Overview

In many ways, international organizations (and its organs) play a central role in the development of international law and may "promote" certain positions[11] or "catalyse" the practice of states[12]. The International Law Commission (ILC) might be a prime example of that: while its work has (from a formal perspective) no direct influence on the state of customary international law, it gives states ample opportunity to develop their practice or voice their *opinio juris* – whether in debates in the Sixth Committee, decisions of domestic courts referencing the ILC or otherwise. However, this Section concerns whether international organizations may *as such* contribute to the emergence of customary international law. In its 2018 Conclusions on the Identification of Customary International Law, the ILC has – cautiously – acknowledged that possibility. In Conclusion 4(2), the ILC considers that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law".[13]

This is supported by a rather broad consensus among scholars, who – at least in principle – consider certain acts of international organizations to be relevant.[14] However, scholarly opinion differs in explaining why that should be the case. Kristina Daugirdas has recently summarized three different possible rationales.

First, it may be the *subjective intent* of Member States to endow an international organization (IO) with the power to contribute to the creation of customary international law. As already alluded to above, there is in principle no conceptual barrier to transferring law-making powers to IOs.[15] However, given that so far no IO was explicitly granted that power, this subjective intent could in practice only be inferred.

[11] See, J Vanhamme, 'Formation and Enforcement of Customary International Law: The European Union's Contribution' (2008) NYIL 127, Section 3.3.

[12] International Law Commission, Draft Conclusions on Identification of Customary International Law, with commentaries of 2018 UN Doc A/73/10, Draft Conclusion 4, Commentary para. 4.

[13] *Ibid*.

[14] T Treves, 'Customary International Law' in A Peters (ed.), *Max Planck Encyclopedia of Public International Law* (2006) para. 50 ("As subjects of international law, intergovernmental organizations participate in the customary process in the same manner as States. Ascertainment and assessment of such participation and of its relevance must, nevertheless, be made with particular caution [.]"); see, with further references, International Law Commission, Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur of 27 March 2015, UN Doc A/CN.4/682, para. 76, fn 179.

[15] K Daugirdas, 'International Organizations and the Creation of Customary International Law' (2020) EJIL 201, 206 ff.

Second, the capacity to contribute to customary norms may constitute an *implied power* of the IO.[16] Thus, in addition to the powers an IO is expressly granted by states (on the basis of their subjective intent), it has "those powers which [...] are conferred upon it by necessary implication as being essential to the performance of its duties".[17] These two rationales presumably underpin the position of the ILC (as well as many scholars and a number of states) discussed in more detail below, which considers that the potential of an organization to contribute to custom is dependent on its competences.

The third rationale discussed by Daugirdas sees the potential of IOs to contribute to customary norms as a function of their international legal personhood, in connection with their capacity to operate on international level.[18] The notion of legal personality is also underpinning the argument of Jean d'Aspremont, who centres his argument on the notion of customary international law as a self-created restraint. In that view, the only determinative factor whether IOs may contribute to a customary norm is whether they are covered by its scope *ratione personae*: that the pertinent norm creates rights and/or obligations for a particular IO (such as in the case of immunities). Thus, their capacity to do so is not dependent on their specific competences – according to d'Aspremont "there is no such thing as an *ultra vires* practice or *opinio juris*".[19] In comparison to other theories, and in almost all circumstances, that argument would significantly broaden the capacity of IOs to contribute to customary international law.[20]

In the debates in the Sixth Committee, the ILC's work has met varied responses by states.[21] Certain states – most notably the United States – rejected the notion that IOs as

[16] *Ibid*. 207 ff.

[17] ICJ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [11 April 1949] Rep 174, 182. See also ICJ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [8 July 1996] Rep 66, para. 25 ("the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities").

[18] K Daugirdas, 'International Organizations and the Creation of Customary International Law' cit. 210 ff; V Lowe, 'Can the European Community Bind the Member States on Questions of Customary International Law' in M Koskenniemi (ed.), *International Law Aspects of the European Union* (Brill 1998) 149, 158 (considering that European "Community statements may count as State practice [...] in as much as they are acts of an international person"). See also the position of Netherlands in Comments and Observations on Identification of Customary International Law cit. 16.

[19] J d'Aspremont, *The Discourse on Customary International Law* (OUP 2021) 69 ff.

[20] When it comes to the EU, there might be problem arising from the separation of the law-making authority and the actual enforcement. Insofar as the enforcement of EU law remains with the Member States, they must be bound by a given customary rule (potentially prohibiting certain measures of enforcement). However, it is not entirely clear whether – in d'Aspremont's theory – EU legislation in such circumstances could be considered as relevant practice.

[21] See also International Law Commission, Fifth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur of 14 March 2018 UN Doc A/CN.4/717, paras 36 ff.

such could contribute to customary international law, limiting their relevance to assessing the practice of states that might *act through* organizations.[22] However, most states appeared to accept – with varying degrees of enthusiasm (or hesitancy) – the role of organizations: some being in full agreement with the Draft Conclusion and the commentary,[23] others advocating for a more expansive[24] or more limited approach[25].

In summary, there is widespread support that IOs may contribute to the formation and development of customary international law. This is particularly true for the EU[26], which itself has repeatedly and explicitly claimed that its conduct may contribute to the development of customary international law – such as in the debates in the Sixth Committee[27] or, more recently, Advocate General Szupnar in his Opinion in *LG v Rina SpA*[28]. The next part will explore to what extent the practice of IOs should be considered solely a reflection of the collective opinion of Member States or whether it stands on its own.

III.2. Whose practice?

The notion that acts of international organizations may have relevance to ascertain the existence of customary norms is not a particularly novel one: the International Court of Justice (ICJ) has famously relied on resolutions by the UN General Assembly (UNGA) in *Nicaragua*[29] and it reaffirmed their relevance in several cases thereafter.[30] However, as also highlighted by the ILC Commentary, the output of such political organs (consisting of state representatives) is referenced as they "offer important evidence of the collective

[22] Comments and Observations on Identification of Customary International Law cit. 18 ff; citing other states *ibid*. 20 fn 15; see also Belarus in *ibid*. 14; Singapore in *ibid*. 18 ("in these cases, the practice of international organizations *reflects the practice of States*"; emphasis in the original).

[23] *Ibid*. Denmark, on behalf of the Nordic countries (at 14-15).

[24] Austria, *ibid*. 13 ff; the Netherlands, *ibid*. 16.

[25] New Zealand, *ibid*. 17 ff: "the practice of an international organization cannot contribute to the formation of a rule of customary international law unless: it is authorized by that organization's legal functions and powers; has been generally accepted over time by the organization's Member States; and the rule of customary international law is one to which the international organization itself would be bound."; see also Israel, *ibid*. 15.

[26] Third report on Identification of Customary International Law by Michael Wood, Special Rapporteur cit. paras 77 ff.

[27] General Assembly, Sixth Committee: Summary record of the 25th meeting of 28 November 2014 UN Doc A/C.6/69/SR.25, paras 77 ff.

[28] See case C-641/18 *Rina* ECLI:EU:C:2020:3, opinion of AG Szpunar, para. 123 ("so far as customary international law concerns questions pertaining to matters falling within the mandate of international organisations, the practice of international organisations may also contribute to the formation or expression of rules of customary international law.").

[29] ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [27 June 1986] Rep 14, paras 188 ff.

[30] See in particular *Legality of the Threat or Use of Nuclear Weapons* cit., para. 70; ICJ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [25 February 2019] Rep 95, para. 151.

opinion of its Members"[31] – even though they are technically acts of the international organization.[32] Thus, the ILC Conclusions understand "conduct in connection with resolutions adopted by an international organization" as a potential form of practice by *states*[33] and evidence of their *opinio juris*.[34]

This may also be seen in a decision by the ICTY Appeals Chamber in *Tadić*, where it cited declarations of the Council of the European Union in support of the customary nature of common Article 3 Geneva Conventions. However, these were taken to reflect the *opinio juris* of the "fifteen Member States of the European Union" and not that of the Union itself.[35] The relevance of these types of practice is no longer disputed, not even by states who otherwise reject the role of IOs in this context.[36]

The more relevant question in the present context is whether the acts of other organs – whose actions are not directly determined by the political will of the Member States – may also play a similar role. Depending on the set-up of the international organization, this could concern political, judicial or even legislative organs. However, judicial recognition on the relevance of such organizational practice is limited at best.[37] Already in 2003, the German Federal Constitutional Court considered in general terms that the "recent legal developments on the international level, characterized by increasing differentiation and an increase in the number of recognized subjects of international law, must be taken into account when ascertaining state practice. Therefore, the acts of organs of international organizations [...] deserve special attention".[38] However, in its further reasoning,

[31] Draft Conclusions on Identification of Customary International Law, with Commentaries (2018) cit., Draft Conclusion 12, Commentary para. 2; see also *Ibid*., Draft Conclusion 4, Commentary para. 4 fn 692; T Treves, 'Customary International Law' cit. para. 50 ("Ascertainment and assessment of such participation and of its relevance must, nevertheless, be made with particular caution: [...] because it may be preferable to consider many manifestations of such practice, such as resolutions of the UN General Assembly, as practice of the States involved more than of the organizations.").

[32] See N Blokker, 'International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?' (2017) 14 IntlOrgLRev 1, 9 ff.

[33] Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 6(2).

[34] *Ibid*. Draft Conclusion 10(2).

[35] *Prosecutor v Tadić* cit. para. 115; *ibid*. para. 113 (the "twelve Member States of the European Community").

[36] See, *e.g*, the comments of Belarus in Comments and Observations on Identification of Customary International Law cit. 14. In the context of the contribution of international organizations to customary international law, Thirlway notably limits his discussions to these forms of practice, see H Thirlway, *The Sources of International Law* (OUP 2019) 72, 92 ff.

[37] See, noting that the Third Report of the ILC Special Rapporteur does not refer to judicial practice, SD Murphy, 'Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission' (2015) AJIL 822, 828; J Odermatt, 'The European Union's Role in the Making and Confirmation of Customary International Law' in F Lusa Bordin, A Th Müller and F Pascual-Vives (eds), *The European Union and Customary International Law* (CUP 2022) 66, 77.

[38] German Federal Constitutional Court decision of 5 November 2003, 2 BvR 1243/03, 2 BvR 1506/03 [BVerfGE] 109, 38, para. 50 ("ist bei der Ermittlung der Staatenpraxis den neueren Rechtsentwicklungen auf

the Federal Constitutional Court only based itself on case law of the ICTY, which hardly could be considered as organizational practice in the sense discussed above.[39]

That being said, the actual limiting factor of the role of IOs constitutes the *type* of customary norms to which organizational practice may contribute.

III.3. Which norms?

ILC Conclusion 4(2) considers that organizational practice may 'in certain cases' contribute to the creation of customary international law. While the Conclusions themselves do not elucidate the matter any further, the commentary argues that this may be the case in case of norms: (*a*) whose subject matter falls within the mandate of the organizations, and/or (*b*) that are addressed specifically to them (such as those on their international responsibility or relating to treaties to which international organizations may be parties).[40]

This *Article* will focus on the first type of norms,[41] *i.e.* on norms whose subject matter falls within the mandate of the organizations. In that context, IOs can contribute to norms that have typically developed in an inter-state (or even intra-state) setting and, as a result, will more directly impact the freedom of action of states.

According to the ILC, an international organization should be able to contribute to norms that fall within its mandate.[42] The Commission argues that pertinent practice "arises most clearly" in cases of exclusive competence, but "may also arise" where the IO was awarded "competences [...] that are functionally equivalent to powers exercised by states".[43] This would otherwise lead to a situation in which the "Member States would themselves be deprived of or reduced in their ability to contribute to State practice".[44]

internationaler Ebene Rechnung zu tragen, die durch fortschreitende Differenzierung und eine Zunahme der anerkannten Völkerrechtssubjekte gekennzeichnet sind. Deshalb verdienen die Handlungen von Organen internationaler Organisationen und vor allem internationaler Gerichte besondere Aufmerksamkeit"; translation by the authors).

[39] *Ibid*. paras 54 ff.

[40] See Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 4, Commentary para. 5.

[41] With regard to those norms that 'are addressed specifically' to IOs, see in more detail K Daugirdas, 'International Organizations and the Creation of Customary International Law' (2020) EJIL 201, 215 ff.

[42] See, *e.g.*, GM Danilenko, 'The Theory of International Customary Law' (1988) GYIL 9, 20 ff ("it is widely recognized that the practice of international organisations also contributes to the creation of customary rules in areas of their competence."); T Treves, 'Customary International Law' cit. para. 50 ("Ascertainment and assessment of such participation and of its relevance must, nevertheless, be made with particular caution [...] because of the limited scope of the competence of the organizations"); see, *contra*, J d'Aspremont, *The Discourse on Customary International Law* cit. 72 ff (arguing that the question of competences should be irrelevant).

[43] Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 4, Commentary para. 6.

[44] Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur cit. para. 77; see also F Lusa Bordin, *The Analogy between States and International Organizations* (CUP 2018) 123 ("doing otherwise would exclude from the picture practice stemming from the collective action of States").

This is particularly stark in the context of exclusive competences of the EU, where "EU Member States may be legally prevented from taking a separate position in international legal forums, especially when the EU has adopted a position on a certain subject".[45] For instance, the common commercial policy as an exclusive competence includes the power to enter into agreements on international trade and foreign direct investment.[46]

In this context, some scholars and states argue that organizational practice should only be relevant if the IOs enjoys "exclusive competences".[47] That view is arguably too narrow. In effect, it would limit the group of international organizations able to contribute to customary norms to the EU – at least it is not apparent whether any other IO enjoys "exclusive competences".[48] The concerns raised by some that certain states could – through creating numerous IOs – gain an outsized influence on the creation of customary norms,[49] may be mitigated by appropriately weighing the importance of organizational practice in each instance. That being said, the specific situations in which IOs (to take the words of the ILC) are "functionally equivalent" to states remain somewhat elusive.[50] The matter will be further discussed in the following Section.

While the ILC Conclusions themselves include a specific reference to organizational practice, they do not address the question of *opinio juris*.[51] However, the Commentary notes that "practice of international organizations in international relations (when accompanied by *opinio juris*) may count as practice that gives rise or attests to rules of customary international law".[52] Thus, IOs similarly have to act out of the belief that they are legally permitted, required or prohibited to do so under customary international law.[53] For

[45] J Odermatt, 'The European Union's Role in the Making and Confirmation of Customary International Law' cit. 77.

[46] Art. 206 TFEU; see also Opinion 2/15 *Accord de libre-échange avec Singapour* ECLI:EU:C:2017:376, paras 33 ff.

[47] See in particular SD Murphy, 'Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission' (2015) AJIL 822, 828 (citing statements by several states purportedly in favour of that restriction); see also the views of Israel in Comments and Observations on Identification of Customary International Law cit. 15.

[48] N Blokker, 'International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?' cit. 8.

[49] See F Lusa Bordin, *The Analogy between States and International Organizations* cit. 122 ff.

[50] N Blokker, 'International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?' cit. 8 ff.

[51] *Ibid*. cit. 5 ff; see also, noting the absence, the comments by the Netherlands, in Comments and Observations on Identification of Customary International Law cit. 16 and the United States *ibid*. 20 ff; see also H Thirlway, *The Sources of International Law* cit. 65, fn20 ("A point that remains somewhat obscure is whether an international organization which engages in a potentially custom-creating practice must, if the practice is to be regarded as relevant, similarly be inspired by *opinio juris*, and if so, what form this might take.").

[52] Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 4, Commentary para. 5 (footnote omitted).

[53] See also comments by the United States in Comments and Observations on Identification of Customary International Law cit. 20 ff ("If the practice of an international organization ever directly contributed

that purpose, IOs themselves may (and might necessarily have to) formulate their own *opinio juris* – according to the Commentary, the non-exhaustive list in Conclusion 10(2) "applies *mutatis mutandis* to the forms of evidence of acceptance of law (*opinio juris*) of international organizations".[54]

III.4. Conclusion

The capacity of the EU to contribute to customary international law is dependent on its competences. More specifically, it should be examined whether the organization, in light of those competences, has *functionally replaced* the Member States.[55] In that context, it should not be necessary that the Member States are *fully* replaced (such as with regard to exclusive competences), as long as the organization meaningfully has the ability to act with regard to subject matters and in certain forms that are traditionally the prerogative of states. Moreover, with regard to certain issues, it is readily apparent that a *functional* replacement may well be *partial*. For instance, the allocation of competences pertaining to international agreements depends on the subject matter of a given specific agreement. When it comes to customary principles of treaty law that are of relevance for all types of treaties it appears sensible to inquire into the practice and *opinio juris* of both the EU and its Member States. The next Section will address in more detail the existing activities of the EU in that regard.

IV. The Practice of the EU and its Relevance in the Creation of Customary International Law

IV.1. Overview

The ILC Conclusions provide non-exhaustive lists of forms of state practice (Conclusion 6(2))[56] and evidence of *opinio juris* (Conclusion 10(2)).[57] According to the Commentary, these

to the formation or expression of customary international law, it would only be when the international organization engages in the practice out of a sense that it has the legal obligation to do so").

[54] Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Conclusion 10, Commentary para. 7.

[55] See already C Binder and JA Hofbauer, 'Applicability of Customary International Law to the European Union as a *Sui Generis* International Organization: An International Law Perspective' in F Lusa Bordin, A Th Müller and F Pascual-Vives (eds), *The European Union and Customary International Law* cit. 7, 20 ff; see also T Treves, 'Customary International Law' cit. para. 52.

[56] International Law Commission, Draft Conclusions on Identification of Customary International Law of 2018 UN Doc A/73/10, Conclusion 6, para. 2: "Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts".

[57] *Ibid*. Conclusion 10, para. 2: "Forms of evidence accepted by law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions;

should apply *mutatis mutandis* to the practice and *opinio juris* of international organizations.[58] The EU organs indeed regularly take acts that fit into these different categories, which (similar to states) may relate to internal matters or external relations with states or other international organizations. However, whether the Union has the competence to take certain measures, as well as the residual influence of the Member States, will depend on the subject matter at issue. While it might be most apparent that the Common Foreign and Security Policy (CFSP) touches upon questions of customary international law,[59] it is also the field in which the Member States have retained the most influence.[60]

This Section will discuss three types of acts and their relevance in the present context, namely the *legislative practice* of the Union, the *judicial practice* of the Court of Justice of the European Union (CJEU) and *public statements* made by the Commission in (quasi-)judicial proceedings.[61]

IV.2. Legislative practice of the Union

The ILC Conclusions list "legislative and administrative acts"[62] (*i.e.* "the various forms of regulatory disposition effected by a public authority"[63]) as one potential form of state practice, while "public statements made on behalf of States"[64] expressing their *opinio juris* may include statements made "when introducing draft legislation before the legislature"[65].

Within the EU competences, the Union organs may be empowered to pass legislation and – in certain circumstances – take administrative (enforcement) acts.[66] In numerous

diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference".

[58] Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 4, Commentary para. 4; *ibid*. Draft Conclusion 6, Commentary para 7; *ibid*. Draft Conclusion 10, Commentary para. 7.

[59] See, e.g., J Vanhamme, 'Formation and Enforcement of Customary International Law: The European Union's Contribution' (2008) NYIL 127, 130 ("It can [...] be stated with confidence that all EU external relations based on the EC Treaty count as relevant practice under international law").

[60] Given that the decision-making authority rests with the European Council and the Council of the EU, which generally decide with unanimity in the context of the CFSP. See art. 31 TEU.

[61] There are of course other forms of relevant practice. With regard to treaty practice, see, J Odermatt, 'The European Union's Role in the Making and Confirmation of Customary International Law' cit. 80 ff.

[62] Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 6(2).

[63] *Ibid*. Commentary, para. 5.

[64] *Ibid*. Draft Conclusion 10 para. 2.

[65] *Ibid*. Commentary, para. 4.

[66] These enforcement acts might likewise touch upon questions of customary international law, thus qualifying as organizational practice and assertions to their legality as *opinio juris*. See Decision 85/206/EEC of the Commission of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/26.870 – Aluminium imports from eastern Europe) (Only the German, English, French, Italian and Dutch

matters, that may touch upon inter-state relations or international law they either fully or at least partially replace domestic legislatures. This already starts with the *jurisdictional link* the EU applies in its legislation and in particular in which circumstances it will apply extraterritorially, which will impact the customary norms on jurisdiction.[67]

However, EU legislation might similarly be important when it comes to substantive questions. This was recently confirmed by the UK Supreme Court in *General Dynamics United Kingdom Ltd v State of Libya*. Libya argued that there was a norm of customary international law requiring the service of documents through diplomatic channels in case of instituting proceedings against a sovereign defendant (as foreseen in art. 22 of the UN Jurisdictional Immunities Convention). The Court rejected that argument after a survey of state practice, which – in addition to Australia, Hong Kong, New Zealand, Singapore, Switzerland, the UK and the US – included a reference to the EU Service Regulation.[68] This is arguable the most explicit confirmation that EU legislation constitutes practice relevant for the ascertainment of customary international law.[69]

In addition, organs are required under EU primary law to state the reasons for any measure taken (art. 296(2) TFEU). These reasons "must disclose in a clear and unequivocal fashion the reasoning followed by the institution that adopted that measure"[70], which may also include considerations pertaining to (customary) international law.[71] For instance, the European Parliament recently adopted the Anti-Coercion Regulation in the first reading – designed to counteract "economic coercion" by third states.[72] The reasons reaffirm the customary nature of the principle of non-intervention, as defined in the

texts are authentic), para. 9.2. (dismissing a plea of sovereign immunity concerning foreign trade organizations of socialists states in competition proceedings, as these "[s]uch claims are properly confined to acts which are those of government and not of trade").

[67] In that context, the EU has repeatedly asserted that the extra-territorial application of domestic legislation violates international. See, *e.g.*, Council of the European Union, Sanctions Guidelines – update, 5664/18, 4 May 2018, para. 52.

[68] UK Supreme Court judgment of 25 June 2021 *General Dynamics United Kingdom Ltd (Respondent) v State of Libya (Appellant)* [UKSC] 22, see Lord Lloyd-Jones (Lord Burrows agreeing) para. 54, Lord Stephens (Lord Briggs agreeing) paras 149-150, 156.

[69] See also the legal position of Croatia voiced in International Centre for Settlement of Investment Disputes, Decision on the Respondent's Jurisdictional Objections *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (I)*, of 30 September 2020 N. ARB/17/34, para. 56 (in which Croatia referred to the "inviolability of diplomatic archives, documents and official correspondence [...] as confirmed by the widespread practice of both States and the European Union itself.").

[70] Case C-611/17 *Italy v Council (Fishing Quota for Mediterranean Swordfish)* ECLI:EU:C:2019:332, para. 40.

[71] Although "[i]t is not necessary for the reasoning to go into all the relevant facts and points of law", see *ibid*. See also generally K Lenaerts, P Van Nuffel, *EU Constitutional Law* (OUP 2021) 717 ff, para. 27.

[72] European Parliament Resolution P9_TA(2023)0333 of 3 October 2013 on the proposal for regulation of the European parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries. For a brief analysis, see A Nguyen, 'Questioning the EU Anti-Coercion Instrument – Conflating the Curtailment of "Strategic Autonomy" with the Erosion of Sovereignty?' (10 October 2023) EJIL:Talk! www.ejiltalk.org.

Friendly Relations Declaration[73] and quite notably assert that: "Coercion is prohibited and therefore a wrongful act under international law when a country deploys measures [...] in order to obtain from another country an action or inaction which that country is not obliged to perform under international law and which falls within its sovereignty, and when the coercion reaches a certain qualitative or quantitative threshold, depending both on the objectives pursued and the means used".[74] Likewise, the reasons confirm that the rules on state responsibility as codified in the 2001 ILC Articles constitute customary international law, in particular those concerning attribution, reparation and countermeasures.[75]

IV.3. Judicial practice of the CJEU

When it comes to the relevance of the work of adjudicatory bodies, the ILC Conclusion draw a clear distinction between *national* and *international* courts. While decisions of both might be relevant as subsidiary means for the determination of customary international law,[76] only the former can directly contribute to the emergence of customary norms.[77] Conclusion 6(2) lists "decisions of national courts" as a form of state practice,[78] and the Commentary to Conclusion 10 notes that they might contain statements expressing an *opinio juris* when "pronouncing upon questions of international law".[79] The ILC does not provide a definition for its understanding of 'national courts' and notes that the distinction between them and international courts "is not always clear-cut". In particular, the former "includes courts with an international composition operating within one or more

[73] See *ibid*. recital 5. In that context, the reasons also suggest that the Union itself is protected by the principle of non-intervention. In addition, *ibid*. recital 7: the "third country" from which the intervention emanates "should be understood to include not only a third State, but also a separate customs territory or other subject of international law because such entities are also capable of economic coercion".

[74] See *ibid*. recital 15. The reasons further provide a non-exhaustive list of the factors to be taken into account, naming "the form, the effects and the aim of the measures which the third country is deploying. [...] In addition, [...] whether the third country pursues a legitimate cause, because its objective is to uphold a concern that is internationally recognised, such as, among other things, the maintenance of international peace and security, the protection of human rights, the protection of the environment, or the fight against climate change".

[75] See *ibid*. recital 13 (countermeasures), recital 14 (reparation) and recital 16 (attribution). With regard to the proportionality analysis in the context of countermeasures, the reasons assert that an "injury to the Union or a Member State is understood under international law to include injury to Union economic operators" (see recitals 5, 13).

[76] As already foreseen by art. 38(1)(d) ICJ Statute; see Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 13.

[77] J Odermatt, 'The European Union's Role in the Making and Confirmation of Customary International Law' cit. 82 ff.

[78] See already ICJ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [3 February 2012] Rep 99, paras 72 ff.

[79] Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 10, Commentary para. 5.

domestic legal systems, such as "hybrid" courts and tribunals involving mixed national and international composition and jurisdiction".[80] In addition, the Commentary does not list the CJEU among those bodies exemplary of "international courts and tribunals".[81]

However, in light of the arguments made above, it is not altogether clear why the international/national court distinction should be of relevance here. The question is rather whether the CJEU's case law constitutes *organizational* practice and represents the *opinio juris* of the EU *as an organization* in those fields in which it may contribute to customary international law.[82] In most instances that is undoubtedly the case.[83] At any rate, even if one insists on the pertinence of the international/national court distinction, there are good reasons to conceive the CJEU as a "domestic" court for the purposes of the emergence of customary international law, at least in significant parts of its jurisprudence. While the CJEU is clearly an international court from a certain perspective,[84] it is in many ways functionally closer to domestic (constitutional) courts.[85] Firstly, EU law constitutes an autonomous legal order, distinct from international law.[86] Secondly, the CJEU enjoys compulsory and exclusive jurisdiction to adjudicate upon disputes arising from EU law (see art. 344 TFEU). Thirdly, the decisions of the CJEU have direct effect within the domestic legal orders of the Member States and – depending on the particular type of proceeding and the specific case – will tend to provide for much more specific legal consequences than an international court.

[80] *Ibid*. Draft Conclusion 13, Commentary para. 6.

[81] *Ibid*. Draft Conclusion 13, Commentary para. 4; J Odermatt, 'The European Union's Role in the Making and Confirmation of Customary International Law' cit. 83 ff.

[82] Whether a particular decision constitutes practice or *opinio juris* would depend on the specific circumstances. For instance, in *Racke* the CJEU's decision was limited to examining the lawfulness of a prior decision to terminate a treaty, with the Court considering that the Council was permitted to base itself on a "fundamental change of circumstances" under customary international law. In those circumstances, the decision itself may understood as representing the *opinio juris* of the organization, with the prior (political) decision to terminate potentially constituting organizational practice. See case C-162/96 *Racke v Hauptzollamt Mainz* ECLI:EU:C:1998:293.

[83] In addition, in comparison to other international courts, it is more readily apparent that the CJEU's decisions "represent" the EU. The subject matters upon which the CJEU adjudicates – *i.e.* disputes or questions arising in the context the EU legal order – are as such inherently linked to the EU as an organization. In contrast, such an "inherent connection" typically does not exist between the legal questions addressed by the ICJ in its case law and the United Nations, at least in contentious cases.

[84] In that it is created through treaty and oversees the interpretation and implementation of treaties. See J Allain, 'The European Court of Justice Is an International Court' (1999) NordicJIL 249.

[85] In contrast, Odermatt argues for a case-specific analysis, in which the CJEU "may be considered an international court in certain instances and analogous to a national court in others". However, apart from the context of customary norms addressed specifically to international organizations, Odermatt essentially relegates the role of the CJEU to restating the views of the Member States. See J Odermatt, *International Law and the European Union* (CUP 2021) 51 ff.

[86] See in particular case 6/64 *Costa v E.N.E.L.* ECLI:EU:C:1964:66, 593.

The CJEU has addressed a broad range of different matters of customary international law in its case law so far.[87] A field in which the EU has at least partly "functionally replaced" the Member States, and where the CJEU has been especially active, is treaty law, where the Court engages with the customary principles reflected in the Vienna Convention on the Law of Treaties[88]. In that context, it may well be read as further developing these rules. For instance, it considered that art. 34 VCLT (*pacta tertiis nec nocent nec prosunt*)[89] is an expression of a broader principle of customary international law on the "relative effect of treaties". In the Court's case law, it functions as an interpretative rule and requires that treaties also do not infringe the rights of other "third parties", in particular peoples entitled to self-determination.[90]

IV.4. Positions taken by the Commission in (quasi-)judicial proceedings

When it comes to *opinio juris*, ILC Conclusion 10 also lists "public statements made on behalf of States", which according to the Commentary may in particular include "assertions made in written and oral pleadings before courts and tribunals".[91] The power to represent the Union in legal proceedings rests with the Commission. While the pertinent art. 335 TFEU explicitly provides this only for domestic legal proceedings "[i]n each of the Member States", the CJEU considered the provision to be "the expression of a general principle that the European Union has legal capacity and is to be represented, to that end, by the Commission".[92] As a result, the European Commission is authorized to represent the EU in legal proceedings before foreign and international (quasi-)judicial bodies as well.[93] Most importantly, while the Commission has to *consult* the Council prior to expressing positions on behalf of the EU[94], it does not have to seek prior approval for those

[87] See, with further references to case law, K Lenaerts and P Van Nuffel, *EU Constitutional Law* cit. 708 ff, para 26.

[88] Which, quite notably, is not ratified by all Member States. See United Nations, *United Nations Treaty Collection* treaties.un.org.

[89] The provision provides that a "[a] treaty does not create either obligations or rights for a third State without its consent".

[90] See case C-386/08 *Brita* ECLI:EU:C:2010:91 paras 44 ff (regarding the Palestinian territories); case C-104/16 P *Council v Front Polisario* ECLI:EU:C:2016:973 paras 100 ff (regarding Western Sahara); see also case T-279/19 *Front Polisario v Council* ECLI:EU:T:2021:639 paras 194 ff.

[91] Draft Conclusions on Identification of Customary International Law, with Commentaries (2018) cit., Draft Conclusion 10, Commentary para. 4. On the relevance of "views expressed by European Union institutions" (not necessarily in connection with legal proceedings) for purposes of customary international law, see the Dissenting Opinion of Gavan Griffith QC in Permanent Court of Arbitration Final Award of 2 October 2003 PCA Case No. 2001-03 *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention* (*Ireland v United Kingdom*) (fn 46].

[92] Case C-73/14 *Council v Commission* ECLI:EU:C:2015:663 para. 58.

[93] *Ibid*. para. 59 (regarding proceedings before ITLOS); see case C-131/03 P *Reynolds Tobacco and Others v Commission* ECLI:EU:C:2006:541 para. 94 (regarding proceedings before domestic courts of third states).

[94] *Council v Commission* cit., para. 86.

submissions.[95] Whether the same principles apply with regard to legal proceedings relating to the Common Foreign and Security Policy is not yet fully clear, given that it is generally excluded from the Commission's competence to "ensure the Union's external representation" (art. 17(1) TEU).[96]

The competence of the Commission most importantly involves the dispute settlement mechanisms of those treaties and organizations to which the EU itself is a party, namely the World Trade Organization (WTO) and the UN Convention on the Law of the Sea (UNCLOS). In both of these forums – before WTO Panels[97] and ITLOS[98] – the Commission has made assertions on the state of general (customary) international law in its submissions. Similarly, it made assertions on custom in *amicus curiae* briefs in proceedings before the US Supreme Court[99] and US District Courts[100]. However, arguably the most notable practice in that context has been the (unsuccessful) attempt of the European Commission to provide an international law reasoning for the inapplicability of intra-EU Bilateral Investment Treaties (BITs). In the annulment proceedings *Micula v Romania* it argued that in accordance with customary international law codified in art. 59(1)

[95] *Ibid*. paras 76, 82.

[96] The question in particular arises in the context of the recent written submissions by the European Union in the context of ICJ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russia Federation)* [27 September 2023]. However, the content of the submissions is not yet public, and the press statement by the ICJ does not indicate which EU organ submitted it. See A Melzer, 'The ICJ's Only Friend in Ukraine v. Russia: On the EU's Memorial in the Case of Ukraine v. Russia before the ICJ' (7 October 2022) Völkerrechtsblog voelkerrechtsblog.org.

[97] Communication COM(2000) 1 final from the Commission of 2 February 2000 on the precautionary principle; WTO, European Communities: Measuring Affecting the Approval and Marketing of Biotech Products – Reports of the Panel of 29 September 2006 WT/DS291/R, WT/DS292/R and WT/DS293/R, paras 7(78) ff (on the precautionary principle).

[98] The only contentious case involving the European Union has been struck out of the list prior to reaching the stage of arguments, see International Tribunal for the Law of the Sea order of 16 December 2009 n. 7 *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*. However, the Commission has made statements in advisory proceedings, see International Tribunal for the Law of the Sea written statement of the European Commission on Behalf of the European Union of 29 November 2013 n. 21 *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, paras 54 ff, and para. 104; International Tribunal for the Law of the Sea written statement by the European Union of 15 June 2023 N. 31 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, para. 24.

[99] See Supreme Court of the United States of 23 January 2004 N. 03–339 *Jose Francisco Sosa v Humberto Alvarez-Machain*, paras 15 ff.

[100] See Proposed Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of the Kingdom of Spain (3 May 2019) US District Court for DC Civil Action No. 1:18-cv-2254, *Masdar Solar & Wind Cooperatief U.A. v The Kingdom of Spain*, at 18-19 (asserting the customary status of Articles 30 and 59 VCLT).

VCLT, intra-EU BITs were terminated as the (subsequently concluded) EU Treaties governed the same matter.[101] The *amicus curiae* brief in *Micula* as part of a longer-standing push by the Commission for the termination of intra-EU BITs, in which its position on their impermissibility – at least initially – differed from that of a number of Member States.

V. Conclusions

This *Article* made the argument that the European Union in principle has the capacity to contribute to customary international law, before exploring various forms in which its practice and *opinio juris* might show itself. Most notably, the EU's contribution is distinct from that of the Member States[102] and, at times, unusually explicit. For instance, the definition of "economic coercion" in the context of the Anti-Coercion Regulation and for the purposes of the principle of non-intervention is, while in line with mainstream scholarship, arguably much more categorical than positions typically expressed by states. The examples discussed above moreover concern norms and principles that are equally of relevance for Member States, be it issues of treaty law or the service of documents on sovereign defendants. That should not necessarily go to say that the EU is particularly *successful* in its attempts to shape customary international law: the various arguments in connection with intra-EU BITs or the CJEU's reasoning in *Racke* have generally garnered little support by other actors.

However, that observation does not detract from the core argument of this contribution, namely that the increasing relevance of the EU's conduct in the ascertainment of customary international law impacts on the sovereignty of the Member States. For one, the competence of the EU in this context lacks a clear foundation in the treaties. In addition, as already noted above, the EU's conduct goes beyond matters relevant for international organizations as such and touches upon issues that might become relevant in disputes between any individual Member State and a third state under international law. The extent to which the freedom of action of Member States is restricted as a result will of course differ from instance to instance, depending on various factors: whether it concerns exclusive or shared competences of the Union, the residual influence of the Member States on decision-making and (as a factual matter) whether the position of the Union actually differs from those of the Member States. At any rate, the topic exemplifies how sovereign authorities are continuously re-balanced between the Union and the Member States and attests to the increasing relevance of the EU on the international level.

[101] While not making that argument explicitly in terms of customary international law, Romania was not a party to the VCLT making it as such inapplicable to the dispute, see International Centre for Settlement of Investment Disputes, Decision on Annulment *Ioan Micula, Viorel Micula and Others v Romania* of 26 February 2016 N. ARB/05/20, paras 330 ff.

[102] See also C Ryngaert, 'Universal Tort Jurisdiction over Gross Human Rights Violations' (2007) NYIL 3, 55 ff.

ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

Edited by Enzo Cannizzaro, Marco Fisicaro, Nicola Napoletano *and* Aurora Rasi

EUROPEAN MIGRATION LAW BETWEEN "RESCUING" AND "TAMING" THE NATION STATE: A HISTORY OF HALF-HEARTED COMMITMENT TO HUMAN RIGHTS AND REFUGEE PROTECTION

DANIEL THYM*

ABSTRACT: EU primary law reaffirms that States have the right to control the entry and stay of non-nationals, but it also entrusts the legislature with deciding, within the confines of human rights, how open or closed the external borders shall be. The ensuing tension between protection and state control is deeply engrained in the history and presence of European migration law. Supranational legislation often establishes a higher level of protection than human rights in the form of individual rights to legal entry or stay; these statutory guarantees considerably curtail the room for manoeuvre of the Member States, albeit on the basis of their "voluntary" consent. At the same time, EU migration law and policy can increase the practical leverage of States by means of inter-state cooperation. These contrasting dynamics coalesce in the contemporary debate about asylum policy. Protective elements exist, but several Member States violate their obligations, notably in the external border control context ("pushbacks"). While such instances of open resistance are unprecedented, they build on a history of half-hearted commitment ever since the signature of the Refugee Convention. EU migration law comprises reasonably generous domestic legislation and contributes to reducing the numbers of arrival at the same time, in particular via cooperation with third states such as Tunisia, Turkey, or Morocco, thus reiterating the simultaneity of "rescuing" and "taming" the nation-state.

KEYWORDS: migration – asylum – Schengen – border controls – pushbacks – visas.

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I. Introduction

European migration law is habitually presented as a restriction of state sovereignty. Judgments of the CJEU regularly censure the Member States for having violated secondary legislation. Critical academics and NGOs reinforce the impression that European migration law gives preference to migrants' rights over state interests. EU institutions are generally more inclined to question entrenched national practices than domestic courts. The Court's reputation of dynamic interpretation with regard to free movement and Union citizenship reinforced the impression. It seemed as if the EU institutions "colluded" with the European Court of Human Rights (ECtHR) in Strasbourg to restrict state sovereignty.

The central argument will be that an overall assessment paints a nuanced picture. Union law establishes important limits to state discretion, while advancing sovereignty in other regards. To describe this ambiguity, the title takes up two famous descriptions of the European project which accentuate the diversity of driving forces. On the one hand, political theorist Jan Werner Müller highlights the traditional function of "taming" the excesses of the nation-state by means of legal and political oversight. Today's European Union builds upon a network of institutions and coordination frameworks which had been designed to curtail the freedom of Western European democracies after World War II.[1]

On the other hand, economic historian Alan Milward coined the catchphrase "the European rescue of the nation-state"[2] to emphasise the element of self-interest underlying EU integration. States cooperate to gain factual influence, which they cannot exercise by themselves any longer. States gain leverage by pooling resources. Such neorealist accounts of the integration process are based on a factual conceptualisation of sovereignty as the ability to influence political, economic, social, military, and other developments in practice rather than a formal independence as the absence of legal obligations.[3]

The ensuing tension between "taming" and "rescuing" the nation-state defines the evolution of EU migration law up until today, thus echoing the evolution of the European project more broadly. To substantiate this hypothesis, our analysis will proceed in three steps. It will begin with an inspection of primary law, which essentially reiterates pre-existing guarantees for migrants and entrusts the specification of the policy design to the EU institutions (section II). Numerous pieces of supranational legislation curtail the freedom of the Member States, whereas others enhance the level of control of migratory movements in a typical European combination of restriction and protection (section III).

[1] See JW Müller, *Contesting Democracy. Political Ideas in Twentieth-Century Europe* (Yale University Press 2011) chapter 4; doing so prevented a return to nationalism and also limited the freedom of manoeuvre of national governments at a time when socialist and communist political parties were successful in several countries.

[2] A S Milward, *The European Rescue of the Nation State* (2nd edn, Routledge 2000).

[3] See also the case study on external human rights by David Garciandía Igal in 'EU Coordination in Multilateral Fora as a Means of Promoting Human Rights Abroad' (2024) European Papers (forthcoming).

Asylum law and policy face pronounced challenges of legal design and compliance, which are amplified by the failure to reform core elements of the asylum *acquis*. While the degree of mismatch is unprecedented, going as far as open resistance to Union law in the form of "pushbacks", the underlying hesitation is not new as such. Widespread references to "values" and "human rights" occasionally hide the element of "organised hypocrisy" in the Western self-description. The history of asylum law and policy can be portrayed as a succession of half-hearted commitment, which continues in today's EU (section IV).

II. Primary Law: migration management and its limits

Judgments of the ECtHR habitually start with the formula that States have, "as a matter of well-established international law and subject to [their] treaty obligations", the right to control the entry and stay of non-nationals into their territory.[4] Postcolonial studies and Third World Approaches to International Law (TWAIL) criticise the underlying assumption of state control, which had emerged during the second half of the 19th century when Western countries closed their doors to Asians and other "unwanted" aliens, thus supplanting earlier episodes of comparatively liberal mobility regimes in the era of colonial conquest.[5]

This criticism may be intellectually sound, but it does not undo the basic contours of international custom as a matter of positive law, which both the European Convention and supranational Union law reaffirm. To start with, a cursory survey of the Treaty articles signals a distinct outlook differing markedly from the freedom-enhancing rationale of Union citizenship and the single market. Arts 77–79 TFEU lay down diverse objectives. The abolition of internal border controls within the Schengen area shall be combined with "enhanced measures to combat illegal immigration"[6] and respect for human rights and the Refugee Convention.[7] Generally speaking, "the efficient management of migration flows"[8] should be accompanied by "fair[ness] towards third-country nationals"[9]. The vague notion of an "area of freedom, security, and justice" does not shed much light on how to operationalise this conglomerate of objectives in arts 67 and 77-80 TFEU.[10] They may be legally binding at an abstract level but do not usually translate into judiciable yardsticks for the design of secondary legislation.

[4] First used by ECtHR *Abdulaziz et al. v the United Kingdom* App n. 9214/80, 9473/81 and 9474/81 [28 May 1985] para. 67.

[5] See K de Vries and T Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of the European Court of Human Rights' (2021) NQHR 291; and V Chetail, *International Migration Law* (OUP 2019) 19–37.

[6] Art. 79(1) TFEU.

[7] *Ibid*. art. 78(1).

[8] *Ibid*. art. 79(1).

[9] *Ibid*. art. 67(2); similarly, art. 79(1).

[10] See D Thym, *European Migration Law* (OUP 2023) 33-40.

For our purposes, the contrast to Union citizenship stands out. Constitutional guarantees to transnational mobility give way to legislative competences on how to deal with third country nationals. The decision of how open or closed the external borders shall be rests with the legislative process. EU institutions benefit from a principled discretion on how to implement and balance policy objectives within the confines of human rights. When it comes to the latter, the Charter confirms the leeway, although it generally presents itself as an avant-garde catalogue.[11] In the field of migration, it essentially reiterates pre-existing guarantees. Free movement and labour market access are limited to Union citizens explicitly, in the same vein as the right to vote in municipal elections.[12]

When interpreting the Charter, the Court of Justice follows the guidance of the Strasbourg Court. The ECtHR has reinforced the principle of non-refoulement in the Refugee Convention, and it has also established limits for the expulsion of migrants residing in a country already.[13] With regard to access to the territory, however, neither the European Convention nor the Charter curtail state discretion extensively, with the exception of non-refoulement and the right to asylum.[14] There are few areas where the CJEU case law goes beyond the level of protection under the European Convention. The rights of the child and procedural guarantees in arts 24, 41, and 47 of the Charter are among them, as exemplified by an increasing number of judgments on these matters.[15] They are the exception to the rule that the EU Treaties refrain from introducing new limits to state sovereignty by essentially reiterating pre-existing obligations.

III. Secondary legislation: enhanced migrants' rights

Legislative leeway need not result in restrictive policy outcomes. Leaving room for political choices about how open or closed the external borders shall be entrusts the supranational institutions with taking the relevant decisions. Analysing the outcome of the legislative process, one notices a twofold dynamic: measures enhancing the rights of migrants coexist with instruments advancing state control. That combination does not come as a surprise. European politics are defined by a permanent "grand coalition", bringing together the views of political parties and national interests from across the political spectrum. The collection of policy objectives, enshrined in arts 77-79 TFEU, translates into a plethora of measures combining control imperatives with the interests of migrants.

[11] See Recital 4 EU Charter of Fundamental Rights.

[12] See arts 15(2), 39, 40, 45 CFR cit.; arts 52(2), (7) CFR and the official Explanations (OJ 2007 C 303/17) 23 confirm that they correspond to arts 45, 49, 56 TFEU.

[13] For a (critical) overview, see MB Dembour, *When Humans Become Migrants* (OUP 2015) chapters 4, 6, 7; as well as the contributions to D Moya and G Milios (eds), *Aliens before the European Court of Human Rights* (Brill 2021).

[14] On the case law on art. 3 ECHR and arts 4, 18, and 19 CFR, see D Thym, *European Migration Law* cit. 309-311, 351-355.

[15] See *ibid*. 135-136, 180-187.

III.1. Enhancing the rights of migrants

The relative weight of migrants' rights and control measures has fluctuated over time and according to the subject matter. Generally speaking, statal control imperatives gained the upper hand in the 1990s at a time which might be called Europe's first asylum policy crisis. Classic destinations countries in Western and Northern Europe sponsored the Europeanisation of asylum policy, as we shall see, to increase regulatory and practical leverage. In the new millennium, migrants' rights rose to prominence when intergovernmentalism gradually gave way to supranational co-decision and judicial oversight under the Treaties of Amsterdam, Nice, and Lisbon,[16] although migration control remained important. Recent years have witnessed a renewed emphasis on restrictions in the fields of border controls and asylum following the events of 2015/16.

This fluctuation entails that decisions taken years ago can limit state discretion in the future. The rigidity of the legislative procedure and the absence of a political consensus on how to move forward entail that States have to apply legislation which was agreed upon in a different geopolitical and factual context. The rise of populist parties across Europe reinforced the mismatch between contemporary policy preferences and the longevity of secondary legislation adopted previously.[17] States are often unhappy with what previous governments had signed up to. Rumour has it that the Commission has refrained from proposing a revision of the Family Reunification Directive in order not to provide governments with an opportunity to insist on stricter conditions during the negotiations. Directive 2003/86/EC has not been amended ever since its unanimous adoption two decades ago. Such rebuttal of legislative change can forestall toxic debates about migration, even though it is problematic from the perspective of democratic theory if statutory rules are effectively set in stone.[18]

External processing illustrates the underlying dynamics. The United Kingdom and Denmark, which has an opt out from the asylum directives, have recently initiated transfer arrangements with Rwanda and, possibly, Albania where asylum applicants shall be sent for status determination.[19] Populist politicians across Europe fancy the idea, which

[16] See K Groenendijk, 'Recent Developments in EU Law on Migration' (2014) European Journal of Migration and Law 313, 329–334; and D Acosta Arcarazo and A Geddes, 'The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy' (2013) JComMarSt 179.

[17] See the contributions to V Stoyanova and S Smet (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (CUP 2022).

[18] That limitation is rarely described as a deficit in the field of migration, unlike in monetary union; see C Colliot-Thélène, 'What Europe Does to Citizenship' in D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats' Dream* (CUP 2016) 127.

[19] Domestic decisions and court challenges, including before the ECtHR, were ongoing at the time of writing; see further Memorandum of understanding for the provision of an asylum partnership arrangement, 14 April 2022, www.gov.uk.

has been discussed on several occasions over the past 20 years.[20] Other Member States than Denmark cannot pursue similar strategies without the prior consent of the EU institutions. External processing presupposes an amendment to the Asylum Procedures Directive, which appears highly unrealistic at this juncture. Supranational legislation serves as a stumbling block for overly restrictive proposals. Even if the Directive was changed, it would have to be determined whether it complies with human rights are not.

The Family Reunification Directive exemplifies the doctrinal features of how legislation bolsters the legal position of migrants. It had originally been criticised by NGOs and critical academics on account of optional clauses and stricter standards in comparison to Union citizens. Nevertheless, the Directive has proven valuable for migrants in many respects.[21] The underlying doctrinal construction is simple. In a judgment of principle, the Court concluded that the Directive "imposes precise positive obligations with corresponding clearly defined individual rights", which are "[g]oing beyond" human rights.[22] Otherwise put, States must issue an entry visa where human rights do not require so.

Multiple instruments replicate this model: they establish individual guarantees to be admitted if third country nationals fulfil the entry requirements laid down in secondary legislation. Corresponding guarantees cover a wide range of subject areas, including border controls, visas, asylum, family reunification, labour migration, long-term residents, and return. The level of protection stays short of Union citizenship, but it is significant nonetheless. Practical effects will vary between countries and over time, depending on national laws. Numerous Court judgments censure restrictive state practices in light of secondary legislation. Doing so does not require far-fetched dynamic interpretation. Rather, judges analyse the wording, the objective, the general scheme, and the drafting history meticulously.[23] Such analyses will often stretch over several dozen paragraphs. EU migration law "tames" the nation-state by means of individual rights.

III.2. Promotion of State interests

Individual rights of migrants go hand in hand with measures enhancing migration control. A good example are the seminal Tampere Conclusions of 1999, which are generally

[20] See G Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' (2003) European Journal of Migration and Law 303; and C Levy, 'Refugees, Europe, Camps/State of Exception: "Into the Zone", the European Union and Extraterritorial Processing of Migrants, Refugees, and Asylum-Seekers (Theories and Practice)' (2010) Refugee Survey Quarterly 92.

[21] See K Groenendijk and T Strik, 'Directive 2003/86 on the Right to Family Reunification. A Surprising Anchor in a Sensitive Field' in E Tsourdi and P De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Elgar 2022) 306.

[22] See case C-540/03 *Parliament v Council* ECLI:EU:C:2006:429 paras 59–60.

[23] See D Thym, 'Between "Administrative Mindset" and "Constitutional Imagination"' (2019) ELR 138, 148–151.

cherished as the high point of progressive migration policies at a time of widespread optimism about globalisation. Besides protective elements, they similarly emphasised cooperation with third states and border controls to "stop" illegal immigration.[24] Such language gained prominence after the terrorist attacks of 2001 and the policy crisis of 2015/16.[25] "Securisation" has become a prominent theme in contemporary debates;[26] an embodiment is the impressive build-up of Frontex.

The underlying rationale can be explained by means of a historical example. The original choice for Schengen was primarily a political one. The abolition of internal border controls coincided with the single market and epitomised the move towards political union. Interior ministers were not a happy at first. Over the years, however, they understood that intergovernmental collaboration with peers in the Schengen area and under the Treaty of Maastricht allowed them to advance their agenda, thus spearheading the upsurge of control instruments. Political scientists speak of "venue shopping"[27], with governments escaping to Europe to realise policy objectives they cannot achieve domestically.

In doing so, Schengen was much more than the simple projection of previous internal practices upon the external borders. Schengen served as a laboratory for the design of new instruments, which gradually established a new "culture of border controls".[28] The Schengen Information System, for instance, was the prototype for other justice and home affairs databases, which have expanded significantly, and transnational operational cooperation prepared the ground for Frontex. A defining feature has been the move away from border-crossing points. The "control" of individual migrants by border guards is increasingly being replaced by generalised forms of "management" based on abstract risk assessments.[29] A decisive characteristic were pre-arrival measures, such as visas, and cooperation with third states, for instance with Turkey, which enhanced factual control over migration by means of a "border abroad"[30].

The element of "rescuing" the nation-state was particularly pronounced from the perspective of the classic destination countries in Western and Northern Europe. Germany

[24] See European Council Presidency Conclusions of 15 and 16 October 1999, 11-12, 22–27.

[25] On the change of direction in European Council conclusions, see CC Murphy and D Acosta Arcarazo, 'Rethinking Europe's Freedom, Security and Justice' in CC Murphy and D Acosta Arcarazo (eds), *EU Security and Justice Law* (Hart 2014) 1.

[26] On the theoretical concept, see the contributions to N Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization* (Springer 2020).

[27] V Guiraudon, 'European Integration and Migration Policy' (2000) 38 JComMarSt 251; see also S Lavenex, *The Europeanisation of Refugee Politics* (Ashgate 2001).

[28] See R Zaiotti, *Culture of Border Controls. Schengen and the Evolution of European Frontiers* (University of Chicago Press 2011) chapters 1, 2, 5.

[29] See T Spijkerboer, 'Changing Paradigms in Migration Law Research' in C Grütter, S Mantu and P Minderhoud (eds), *Migration on the Move* (Brill 2017) 13, 15–18.

[30] E Guild, 'The Border Abroad. Visas and Border Controls' in K Groenendijk, E Guild and P Minderhoud (eds), *In Search of Europe's Borders* (Kluwer 2003) 87.

received no less than two thirds (!) of all asylum seekers in Europe during 1985–2000.[31] It strongly supported Europeanisation to share that responsibility with other countries, including through the Dublin system on asylum jurisdiction. While "Schengen" is commonly remembered as an avant-garde of pan-European cooperation nowadays, the original debate embraced darker narratives. The exclusion of the founding member Italy was politically and symbolically significant; France, in particular, was doubtful as to whether it would control its external borders effectively.[32]

In the first years, Schengen was a closed shop of five countries facing comparable challenges and sharing similar interests at when governments in Western and Northern Europe were concerned with an increase in the number of asylum applications.[33] They agreed on a rulebook, in the Convention Implementing the Schengen Agreement and implementing decisions, which any country joining the Schengen area had to sign up to. One example was the minimum harmonisation of countries on the "black list" whose nationals required a visa for visiting the Schengen area.[34] When Italy joined Schengen, it had to introduce visa requirements for the Maghreb countries, thus closing a back-door for irregular onward movement to France.[35]

These historical anecdotes underline the element of self-interest, which has defined European migration law from the beginning – and continues to be critical. The example of France indirectly obliging Italy to introduce visa requirements exemplifies why Europeanisation can increase leverage. There is little France can do once Tunisians have reached the Franco-Italian border. Reintroducing internal border controls, as France has done repeatedly, is primarily a political symbol for a sceptical public opinion that the government is doing something.[36] In practice, migrants find it quite easy to enter France for the simple

[31] See the dataset of ER Thielemann, 'Why Asylum Policy Harmonisation Undermines Refugee Burden-Sharing' (2004) European Journal of Migration and Law 47, 48–54.

[32] See S Paoli, 'France and the Origins of Schengen' in E Calandri, S Paoli and A Varsori (eds), *Peoples and Borders* (Nomos 2017) 255, 258–265.

[33] On the historic context, see A Luedtke, 'Migration Governance in Europe. A Historical Perspective' in A Weinar, S Bonjour and L Zhyznomirska (eds), *The Routledge Handbook of the Politics of Migration in Europe* (Routledge 2019) 15, 16–19.

[34] See Annex I to Appendix I Decision SCH/Com-ex (99)13 on the definitive versions of the Common Manual and the Common Consular Instructions [2000] OJ L239/317.

[35] See S Paoli, 'The Schengen Agreements and their Impact on Euro-Mediterranean Relations' (2015) Journal of European Integration History 125.

[36] See D Thym and J Bornemann, 'Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: of Symbolism, Law and Politics' (2020) European Papers www.europeanpapers.eu 1143, 1144–1146; on the illegality of the measures, see M Mykyliuk, 'How to Tango? The Contradictory Nature of the Public Order and National Security Exemption Within the Schengen Area' (2024) European Papers (forthcoming).

reason that an effective border closure is not practically feasible within continental Europe. Rejection at the border is a frequent occurrence,[37] but migrants will typically manage to sneak across the second or third time.

If, by contrast, Italy requires prior authorisation by means of a visa, Tunisians who do not fulfil the entry conditions must use smugglers to reach Italy. That costs a lot of money and is dangerous, thus reducing the number of arrivals.[38] Arguably, visa requirements are the single most effective migration control instrument to this date. They are reinforced by carrier sanctions: airlines must pay a fine if they allow anyone not fulfilling the entry conditions to board a plane. Airline staff exercises *de facto* border controls abroad. Today's Visa List Regulation (EU) 2018/1806 and the Carrier Sanctions Directive 2001/51/EC have been instrumental in spreading these control measures across the continent. Additional measures buttress the ability of States to "combat illegal immigration"[39]: databases, international cooperation, Frontex, and legislation on smuggling. They reiterate our overall conclusion that European migration law is about "rescuing" the nation-state as much as it is about "taming" national excesses.

IV. Asylum policy: reform failure and circumvention

Anyone reading a newspaper knows about the dire state of asylum policy. The term "pushback" has become a symbol of persistent violations of Union law. States no longer respect legislation agreed upon in a different geopolitical and factual context. Failure to reform core elements of the asylum *acquis*, notably the Dublin III Regulation (EU) n. 604/2013, reinforce a sense of practical and political impasse, even though the political agreement, at the Justice and Home Affairs Council in June 2023, indicates that some kind of reform might be adopted.[40] Even the absence of reform does not present a political or even legal justification for Member States violating Union law, but it substantiates our argument about the malaise of asylum policy. Contemporary struggles increase the ambivalence and hypocrisy of an asylum policy which had been defined by conflicting impulses and objectives from the beginning, thus substantiating the combination of protective and restrictive elements in the design of EU migration law.

[37] See S Casella Colombeau, 'Crisis of Schengen? The Effect of Two "Migrant Crises" (2011 and 2015) on the Free Movement of People at an Internal Schengen Border' (2020) Journal of Ethnic and Migration Studies 2258.

[38] Higher (financial) costs, (administrative) hurdles, and personal (risks) involve that less migrants can be expected to use the "illegal" route when legal pathways are closed or narrowed down; there is not usually a simple diversion from legality to illegality.

[39] Art. 79(1) TFEU cit.

[40] On the latest reform proposals, see the contributions to D Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System* (Nomos 2022).

IV.1. "Pushbacks" as an extreme form of non-compliance

"Pushback" does not have a precise legal or practical meaning, although the term is usually employed for state practices which prevent entry onto the territory or force foreigners to leave without procedural safeguards. EU legislation lays down distinct procedures about refusal of entry at border crossing points.[41] By contrast, the legal regime for the surveillance of the (green) land and (blue) sea border is much more loosely knit; some uncertainties persist about the interaction of EU legislation on border controls with the asylum *acquis* and the outer limits of human rights.[42] Irrespective of the small print, domestic "pushback" practices are illegal whenever we conclude that an individual has applied for asylum with the border police. Doing so entails the obligation, on the part of the authorities, to respect the Asylum Procedures Directive 2013/32/EU.

Instances of non-compliance have haunted EU asylum policy from the beginning as a result of profound legal design and enforcement deficits. The Dublin system on asylum jurisdiction has never functioned well. States at the external borders have undermined Dublin for many years by not registering new arrivals, and even if they do so, they often refuse to accept take backs, as the Italian example illustrates.[43] Structural unfairness of the Dublin rulebook lent political support to a culture of tolerated non-compliance.[44] Member States saw that the legislation was structurally unfair and accepted - or even sponsored - onward movements of asylum applicants within the Schengen area. Informality became widespread, which is sustained, indirectly at least, by "voluntary" solidarity mechanisms on the basis of political *ad hoc* arrangements.[45]

Other core asylum instruments are similarly defined by structural design and enforcement deficits, of which the desolate state of receptions conditions and asylum procedures in the hotspots on the Greek islands are an extreme expression. These difficulties have to do with the lack of political will and administrative capacity by the Greek authorities, but they also reflect deeper problems. Reliance on complex procedures and court oversight in literally thousands of cases as the foundation of EU legislation has proven unrealistic, in particular in the geographical periphery or for higher numbers. One explanation for procedural complexity is the influence of the classic destination coun-

[41] See art. 14 of the Schengen Borders Code Regulation (EU) 2016/399.

[42] See D Thym, *European Migration Law* cit. 309-311, 330-334.

[43] In 2021, Italy took back 10.8 per cent of the asylum seekers from Germany for which it had assumed responsibility; see (German) Federal Government (*Bundesregierung*), 'Ergänzende Informationen zur Asylstatistik – Schwerpunktfragen zu Dublin-Verfahren' (Bundestag doc 20/861, 24 February 2022) 11; note that reasons for non-compliance include difficulties to enforce the law on the part of the German authorities.

[44] See E Tsourdi and C Costello, 'The Evolution of EU Law on Refugees and Asylum' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (3rd edn, OUP 2021) 793, 797–798.

[45] See L Marin, 'Waiting (and Paying) for Godot: Analyzing the Systemic Consequences of the Solidarity Crisis in EU Asylum Law' (2020) European Journal of Migration and Law 60.

tries. They dominated the early debate not as political hegemons but as a result of profound expertise, thus effectively uploading their domestic models to Brussels.[46] States in Southern and, later, Eastern Europe took over sophisticated procedural patterns, which worked reasonably well in the West and North but proved not fit for purpose elsewhere.[47] The first ever activation of the Temporary Protection Directive during 2022 may be perceived an act of liberation from procedural rigidity.

"Pushbacks" build on this tradition of non-compliance but raise it to a new level, nonetheless. While they had been pursued in the limelight for many years, with governments denying that they engage in them, the last two years have seen open resistance. Geopolitical confrontation with Turkey and Belarus provided the background for Greece, Lithuania, and Poland challenging EU legislation openly.[48] Commission President von der Leyen and the European Council lent some political coverage when they spoke of a "hybrid attack"[49] by Turkey and Belarus, which might possibly justify non-compliance with secondary legislation in light of art. 72 TFEU. The Court has rejected that argument in a case concerning the internal border between Lithuania and Poland, even though some ambiguities remain as to whether the provision can be relied upon in a different context.[50]

Such open resistance is unprecedented, and it reaffirms that Union law restricts state policies from a legal perspective. Members States openly refuse to comply with supranational legislation protecting the rights of migrants to advance restrictive tendencies. While that reading is correct in many respects, it risks painting on overtly rosy picture of EU legislation advancing the legal position of individual vis-à-vis statal control imperatives. Subtle forms of indirect tensions have defined to European commitment to human rights and refugee law from the beginning, as a form of "organised hypocrisy"[51]. Western States sign up to liberal values with much fanfare, while circumventing them in practice.

IV.2. Continuity of "organised hypocrisy" over time

The postcolonial critique emphasises that the Western commitment to refugee law, including in art. 78(1) TFEU, has always been ambivalent, notwithstanding the official praise

[46] See N Zaun, *EU Asylum Policies. The Power of Strong Regulating States* (Palgrave 2017).

[47] See R Byrne, G Noll and J Vedsted-Hansen, 'Understanding the Crisis of Refugee Law' (2020) LJIL 871, 881–888.

[48] See A Skordas, 'The Twenty-Day Greek-Turkish Border Crisis (Part I & II)' (5 and 8 May 2020) EU Immigration and Asylum Law; and ECRE, 'Weekly Bulletin' (15 October 2021) mailchi.mp.

[49] See U von der Leyen, 'Strengthening the Soul of our Union' (State of the Union Address, 15 September 2021); and European Council Conclusions of 22 October 2021 paras 19–21.

[50] See case C-72/22 PPU *Valstybės sienos apsaugos tarnyba* ECLI:EU:C:2022:505 paras 68–74; and D Thym, 'Upholding the right to asylum in times of its "instrumentalization" by neighbouring States' (2023) CMLRev 1.

[51] SD Krasner, *Sovereignty. Organized Hypocrisy* (Princeton University Press 1999).

of the Refugee Convention as the "magna carta" for refugee protection.[52] The Convention had originally been based on a geographic and temporal limitation: it concerned only refugees from Europe which were residing in another country already; millions of displaced persons on the Indian subcontinent and victims of late colonial suppression were not included (with the exception of Palestinian refugees under the auspices of UNRWA).[53] This changed in 1967 when the Convention was universalised in a rather haphazard manner; the core motivation was to secure the predominance of Western-style multilateralism in the age of decolonisation.[54] States did not change the narrow refugee definition, although it was manifestly insufficient to deal with mass displacement in the global South, for instance during the Biafran War.

European States willingly gave money to UNHCR and other actors to take care of refugees in the global South.[55] Once these refuges and migrants started moving towards Europe in greater numbers from the 1980s onwards, however, States developed "non-arrival", "protection elsewhere", and "non-admission" policies to manage migratory movements. Visa requirements, carrier sanctions, asylum border procedures, and safe third countries are among the measures aimed at reducing the numbers of arrival. Union law was instrumental in spreading these restrictions across the continent. They took centre-stage in the non-binding London Resolutions adopted in a purely intergovernmental setting prior to the Treaty of Maastricht and have defined the Schengen rulebook and supranational harmonisation ever since.[56] The generous reception of Vietnamese boat people was the exception to the rule, allowing the West to present the Communist regimes of Southeast Asia as evil persecutors.[57]

This history of half-hearted commitment continues. "Externalisation" is a crucial component of Union law and policy. Both the Member States and the EU institutions cooperate with third states to indirectly reduce the number of arrivals. Germany spearheaded that practice thirty years ago, as did Spain and Italy in cooperation with Libya, Morocco, and Mauritania after the millennium change.[58] For the classic destination countries in Western and Northern Europe, the EU was an exercise of "externalisation" in itself. The Common

[52] The formula goes back to the first UN Deputy High Commissioner JM Read, *Magna Carta for Refugees* (UN Department of Public Information 1951).

[53] See N Soguk, *States and Stranger* (Minnesota UP 1999) chapter 4; and E Tendayi Achiume, 'Race, Refugees, and International Law' in C Costello, M Foster and J McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 43.

[54] See SE Davies, 'Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol' (2007) IJRL 703, 715–726.

[55] See A Betts, G Loescher and J Milner, *UNHCR* (2nd edn, Routledge 2012) chapter 2.

[56] On the early years, see E Denza, *The Intergovernmental Pillars of the European Union* (OUP 2002) chapter 3.

[57] See JC Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) HarvIntlLJ 129, 144–56; and BS Chimni, 'The Geopolitics of Refugee Studies' (1998) Journal of Refugee Studies 350.

[58] See D FitzGerald, *Refuge beyond Reach* (OUP 2019) chapter 9.

European Asylum System established a *cordon sanitaire*, which allowed the Germany and France, among others, to outsource responsibilities to the States at the external border.

Under the current Multiannual Financial Framework (MFF), more than ten billion (!) euros are available to support neighbouring states in the areas of asylum, migration, and border management in the context or pre-accession assistance and development cooperation.[59] Morocco is a prominent partner, which receives an awful lot of money, together with political sweeteners such as a soft diplomatic stance of some governments on the status of the Western Sahara. Cooperation with Turkey, not least in the context of the EU-Turkey Statement, follows a similar script, as does the – controversial - cooperation with the Libyan coast guard.[60] Most recently, the EU institutions have invested quite some political - and financial - capital to cooperate with the Tunisian government.[61]

This brings me to one last example. Some readers be familiar with the *N.D. & N.T.* judgment of the Strasbourg Court, which famously accepted the Spanish practice of hot returns of those entering irregularly. The Grand Chamber found blanket refusal, without even a rudimentary procedure, to comply with the ECHR, although Spain arguably violates the higher standards in the Asylum Procedures Directive.[62] I'm not concerned with these legal details, however. Instead, the facts of the case deserve our attention.

The judgment describes the hypocrisy of European asylum policy bluntly. Spain does allow any third country national to apply for asylum at border crossing points in accordance with EU legislation. In practice, however, hardly anyone from sub-Sahara Africa will benefit from that possibility. Why? The Moroccan police engages in racial profiling: only Arabs, especially Syrians, will be allowed to proceed towards the Spanish border crossing point, where they can apply for asylum.[63] Senegalese and Nigerians, by contrast, will usually be prevented from doing so. They have no other option than to climb fences, which the Moroccans will not usually allow either. If they manage to cross the fence, Spain will engage in "hot return" without rudimentary screening.

Observers have noticed a general mismatch between domestic legislation and international cooperation for some time. The EU has adopted reasonably generous domestic rules, which look good on paper. At the same time, it engages Morocco and other third states as a doorman to prevent potential applicants from using these guarantees in practice. Progressive protection standards and sophisticated procedural safeguards in the

[59] See D Thym, *European Migration Law* cit.191-195.

[60] For an overview, see the contributions to F Ippolito, G Borzoni and F Casolari (eds), *Bilateral Relations in the Mediterranean* (Elgar 2020); and D Thym *European Migration Law* cit. chapter 18.

[61] See Commission Press Release IP/23/3887, Mémorandum d'entente sur un partenariat stratégique et global (16 July 2023).

[62] On the latter, see Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), arts 6 and 8, as interpreted by the CJEU in *Valstybės sienos apsaugos tarnyba* cit. paras 58-67; and case C-36/20 PPU *Ministerio Fiscal (Authority likely to receive an application for international protection)* ECLI:EU:C:2020:495.

[63] See ECtHR [GC] *N.D. & N.T. v Spain* App n. 8675/15 and 8697/15 [13 February 2020] paras 155, 163, 218.

Qualification Directive and the Asylum Procedures Regulation coincide with the proliferation of non-arrival policies and externalised migration control in cooperation with third states.[64] Events during 2015/16 can be presented as a temporary collapse of the externalisation architecture,[65] which was rebuilt even stronger in the years thereafter.

Disagreement over how to reform the Dublin system arguably increases the appetite for externalisation, which helps avoiding politically toxic disputes about intra-European responsibility-sharing and solidarity. Member States disagree quite fundamentally about how to reform asylum legislation, but they can agree to cooperate with third states to reduce the numbers of arrivals as a lowest common denominator. That may explain why the externalisation agenda has been flourishing over the past years at a time of political stalemate about internal policy reform. It may be no coincidence that the Memorandum of understanding with Tunisia, mentioned previously, was negotiated in parallel to the asylum legislation. That made it easier for Southern States, notably Italy, to accept mandatory border procedures, albeit for a limited number of persons, despite meagre solidarity. More legal pathways by means of resettlement or humanitarian visas can be a counter-balance, provided that the volumes involved are more than a humanitarian fig leave (something they have not usually been so far).[66]

An emphasis on international cooperation has several advantages for governments. Firstly, it allows them to leave their (internal) commitment to refugee protection untouched. The public discourse usually focuses on domestic events and gives a moral premium to physical presence,[67] while being less concerned with restrictive migration policies abroad. Successive Italian and Spanish governments have cooperated with Libya and Morocco below the threshold of extensive public scrutiny, before populist politicians, such as the former Italian interior minister Matteo Salvini, propagated more radical - and visible - measures, such as port closures. They are more extreme than the previous practice, which had conflicted with the public commitment to human rights nevertheless.

Secondly, externalisation has tangible legal advantages. Support for third states will not usually fall foul of EU migration law: access to the asylum procedure presupposes presence on the territory, or at the external borders;[68] the prohibition of refoulement does not apply extra-territorially, for instance with regard to humanitarian visas;[69] and financial, operational, and logistical support given to third states will not usually cross the

[64] See S Lavenex, '"Failing Forward" Towards Which Europe?' (2018) JComMarSt 1195, 1199–4201.

[65] See M den Heijer, J Rijpma and T Spijkerboer, 'Coercion, Prohibition, and Great Expectations' (2016) CMLRev 607, 618–623.

[66] See S Kneebone and A Macklin, 'Resettlement' in C Costello, M Foster and J McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 1080, 1090–1095.

[67] See L Bosniak, 'Being Here. Ethical Territoriality and the Rights of Immigrants' (2007) Theoretical Inquiries in Law 389.

[68] See art. 3 Directive 2013/32 cit.

[69] See ECtHR [GC] *M.N. and others v Belgium* App n. 3599/18 [5 May 2020] paras 124–126.

jurisdictional hurdle under art. 1 ECHR (notwithstanding the attempts of critical academics to promote the notion of functional jurisdiction[70]).[71] Critical observers speak of "hyper-formalism"[72] or "legal black holes"[73], which States exploit to circumvent liberal values in line with the criticism of "organised hypocrisy". In doing so, rhetorical emphasis on migrant smuggling and the prevention of the loss of life at sea in the public discourse lends the externalisation agenda an aura of humanitarian ambition.[74]

V. Conclusion

EU integration is often presented as a value-driven process, especially in academic circles. Debates about migration law and policy sustain the impression that supranational law is primarily about advancing the legal position of migrants, mirroring Union citizenship. Our assessment of the EU Treaties and secondary legislation paints to a nuanced picture: instances of migration law "taming" domestic politics coexist with measures "rescuing" the nation-state by means of advancing control imperatives. This combination of protective and restrictive elements has defined the evolution of European migration law from the beginning. Primary law supports that outcome by means of open-ended objectives for lawmaking, which essentially entrust the EU institutions with deciding how open or closed the external borders shall be. The legislature benefits from a principled discretion, within the confines of human rights. With regard to the latter, the Charter reaffirms pre-existing guarantees under the European Convention and adds some additional safeguards, notably in the field of procedures.

There is a plethora of legislative instruments on diverse aspects ranging from visas and border controls over asylum and economic migration to long-term residence and return. These directives and regulations habitually go beyond the level of protection under human rights law by laying down individual statutory rights to be admitted under the conditions decided upon in the legislative process. Numerous Court judgments censure state practices on that basis by meticulously applying legislative standards without the need for dynamic interpretation. At the same time, European migration law advances state interests. The historic example of the original choice for Schengen and the evolution of the supranational rulebook ever since contributed to the spread of novel forms of migration control throughout the Union. A defining feature has been the move beyond the

[70] Cf. V Moreno-Lax, 'The Architecture of Functional Jurisdiction. Unpacking Contactless Control - On Public Powers, *S.S. and Others v Italy*, and the "Operational Model"' (2020) German Law Journal 385.

[71] For uncertainties regarding the Charter, see S Law, 'Humanitarian Admission and the Charter of Fundamental Rights' in MC Foblets and L Leboeuf (eds), *Humanitarian Admission to Europe* (Nomos/Hart 2020) 77, 97–109.

[72] D Ghezelbash, 'Hyper-Legalism and Obfuscation. How States Evade Their International Obligations Towards Refugees' (2020) AmJCompL 479.

[73] I Mann, 'Maritime Legal Black Holes' (2018) 29 EJIL 347.

[74] See R Dickson, *Migration Law, Policy and Human Rights. The Impact of Crisis in Europe* (Routledge 2022) chapter 8.

external border. Visa requirements and carrier sanctions, as well as cooperation with third states, effectively establish a "border abroad".

Anyone reading the newspaper learns about the dire state of asylum law and policies. "Pushback" practices are widespread. For our purposes, they reaffirm that supranational legislation contains important protective elements, which some Member States are violating openly. It would be one-sided, however, to present the EU's asylum *acquis* primarily as a bulwark against restrictive national policies. The history of refugee law and supranational harmonisation presents us with a sequence of half-hearted commitments. States sign up to human rights with much fanfare, while circumventing in practice. Cooperation with third states illustrates that the element of "organised hypocrisy" continues. EU institutions have introduced relatively liberal domestic asylum legislation. At the same time, they actively support third states financially and otherwise to indirectly reduce the number of arrivals. Such externalisation practices exploit the territorial underpinning of international human rights and refugee law, thus reiterating our conclusion about the mixed credentials of European migration law.

ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

Edited by Enzo Cannizzaro, Marco Fisicaro, Nicola Napoletano *and* Aurora Rasi

LONG-ARM COLLECTIVE SOVEREIGNTY THROUGH THE EU: THE EU GLOBAL HUMAN RIGHTS SANCTIONS REGIME TRANSCENDING THE LIMITS OF THE FIGHT AGAINST IMPUNITY

CHARLOTTE BEAUCILLON*

ABSTRACT: The EU Global Human Rights Sanctions Regime was adopted by the European Union in December 2020, following in the footsteps of its allies and some of its own Member States. Initiated across the Atlantic in response to the murder of Russian lawyer Sergei Magnitsky, these thematic international sanctions can now target anyone associated with the most serious human rights violations. Presented as key levers in the international fight against impunity, these instruments lie at the confluence of foreign policy and criminal justice. The EU Global Human Rights Sanctions Regime is therefore a privileged observation point for studying the evolution of practice in areas that are traditionally closely associated with State sovereignty. More specifically, the analysis, carried out within the framework of both EU external action law and public international law, shows how the EU Global Human Rights Sanctions Regime enables the Union and its Member States to grasp some

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The present *Article* partly updates and further develops some of the research results published in two French-language contributions on the restrictive measures regime in question: C Beaucillon, 'Lutte conte l'impunité ou alternative à la justice? A propos des mesures restrictives de l'Union européenne en réaction aux violations graves des droits de l'homme' (2021) RTDH 551; C Beaucillon, 'Projection normative et optimisation du droit international: la fin et les moyens des mesures restrictives de l'Union européenne en réaction aux violations graves des droits de l'homme' (2021) Revue des Affaires européennes 611.

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international situations which would fall outside their single competences and jurisdictions. This in turn illustrates a form of enhanced, collective and long-armed sovereignty, exercised on the international stage by the EU and its members in the service of their values and strategic interests.

KEYWORDS: EU external action – Common Foreign and Security Policy – EU values – human rights – international criminal law – competence.

I. INTRODUCTION

On 7 December 2020, the European Union adopted a new regime of restrictive measures to respond to serious human rights violations and abuses,[1] also referred to in practice as the EU global human rights sanctions regime. These instruments are part of the now well-known practice of the European Union to adopt non-military coercive measures designed to compel their target – third States and/or their nationals – to change conduct that the Union alleges is contrary to international law.2 From this perspective, the European Union's restrictive measures are one of the most effective and widely used contemporary instruments for projecting its normative power on the international scene.3 In doing so, the European Union intends to contribute to the respect, enforcement and even progressive development of international law,4 by promoting a specific normative vision of international law through its own interpretations and qualifications.

The EU global human rights sanctions regime adds up to the 37 other regimes of restrictive measures in force in January 2024.[5] Of these, 34 are aimed at third countries and three are formulated in a thematic or horizontal manner. The measures adopted in response to international terrorism,[6] adopted at the turn of the millennium under the impulsion of the UN Security Council,[7] were for a long time the only thematic or horizontal measures of the European Union. This targeting technique, until then mainly used by

[1] Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures in response to serious violations and serious harm to human rights; Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures in response to serious violations and serious harm to human rights.

[2] C Beaucillon, *Les mesures restrictives de l'Union européenne* (Bruylant 2014) 712; C Beaucillon, 'The European Union Position and Practice with regard to Unilateral and Extraterritorial Sanctions' in C Beaucillon (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing 2021) 110-129.

[3] I Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) JComMarSt 235-258, 235.

[4] As commended by arts 3(5), 21(1) and 2 TEU.

[5] For an overview: EU Sanctions Map, www.sanctionsmap.eu.

[6] Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism. On the loss of the territorial character of restrictive measures against international terrorism and the emergence of the first horizontal regime of restrictive measures, see C Beaucillon, *Les mesures restrictives de l'Union européenne* cit. 448 and the bibliographical references cited.

[7] See Security Council, Resolution 1267 of 15 October 1999, UN Doc S/RES/1267(1999) and Resolution 1373 of 28 September 2001, UN Doc S/RES/1373(2001).

the United States in a unilateral context,[8] was adopted by the European Union on the occasion of measures taken in 2018 in response to the proliferation of chemical weapons[9] and in 2019 in response to cyber-attacks targeting the Union and its members.[10] These restrictive measures belong to the category of so-called targeted measures, since they are based on the identification of persons or entities on whom various types of restrictions are imposed, such as travel or transit bans, or freezes of funds and assets. The specificity of so-called thematic or horizontal restrictive measures regimes, however, is that they do not formally target a State, but focus on the activities to which the measures respond. In this respect, the European Union's restrictive measures regime on serious human rights violations stands out as an example/a very special instrument. Indeed, the political objective is thus shifted from the stigmatisation of the third state formally targeted by international sanctions, to the highlighting of values and interests these instruments are intended to promote on the international scene.

The procedure for adopting such targeted restrictive measures is the same, whether they are formally taken against a state or are instead designed horizontally through a thematic scope. First, a Council decision is unanimously[11] adopted under the Common Foreign and Security Policy (CFSP), on the basis of art. 29 of the Treaty on European Union (TEU). Second, this decision is followed by a European regulation based on art. 215 of the Treaty on the Functioning of the European Union (TFEU), which is adopted by the Council at a qualified majority on the High Representative for Foreign Affairs and Security Policy and the Commission. The restrictive measures adopted on 7 December 2020 follow the same procedural pattern.[12]

The political context of the adoption by the European Union of measures to respond to serious human rights violations or abuses deserves to be recalled here.

First of all, the European Union joined an international dynamic initiated several years earlier. The United States was the first to take such measures, based on the *Russia*

[8] C Portela, 'Horizontal Sanctions Regimes: Targeted Sanctions Reconfigured?' in C Beaucillon (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions* cit. 441-457.

[9] Council Decision 2018/1544 of 15 October 2018 on restrictive measures to combat the proliferation and use of chemical weapons.

[10] Council Decision 2019/797 of 17 May 2019 on restrictive measures against cyber attacks that threaten the Union or its Member States.

[11] Art. 31 TEU introduces the conditions for "constructive abstention" through which an EU Member State can refrain from voting the measures at the CFSP level without hindering their collective implementation through art. 215 TFEU. In such a case, the Member State is however not bound to implement the restrictive measures where their national competences are at stake, as in the field of arms trade for instance. Recourse to constructive abstention remains exceptional. On the recent practice in the context of the restrictive measures against Russia, see: E Bartoloni, 'Simple Abstention and Constructive Abstention in the Context of International Economic Sanctions: Two Too Similar Sides of the Same Coin?' (2022) European Papers www.europeanpapers.eu 1121-1131.

[12] Council Decision (CFSP) 2020/1999 and Regulation (EU) 2020/1998 cit.

and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act[13] of 2012, which responded to the torture and murder of Moscow lawyer Sergei Magnitsky. The scope of the US measures was then expanded in the *Global Magnitsky Human Rights Accountability Act*[14] of 2016. Subsequently, several states joined this US initiative by adopting similar national legislation: Estonia in 2016,[15] Canada[16] and Lithuania[17] in 2017, Latvia in 2018,[18] and the UK in 2018[19] and 2020.[20] The presence of some EU Member States in this list calls for comment. The position of the three Baltic States is undoubtedly explained by the trigger for the adoption of the EU global human rights sanctions regime. The position of the United Kingdom is particular, insofar as London, which adopted its own legislation in the context of the Brexit, had largely supported the adoption by the European Union of new regimes of horizontal restrictive measures based on the American model.[21]

Secondly, the adoption by the European Union of its own global human rights sanctions regime seems to be a response to some of the criticisms it has received, mainly from across the Atlantic, regarding its lack of commitment to the defence of human rights and, more particularly, democracy, both within the European Union and in the implementation of its development policy.[22] The political importance of these various criticisms is commensurate with the place of these principles in the construction of Europe: the promotion of human rights and democracy are among the founding values of the Union.[23]

It follows from these considerations that the EU's restrictive measures in response to serious human rights violations are part of the contemporary dynamics of the EU's external action in favour of the effective implementation of international law. More specifically, and as this *Article* is a contribution to the exploration of the issue of EU Member States' sovereignty under international law,[24] the specificities of the design and implementation of the regime of human rights restrictive measures lead to wonder whether, through the Council of the European Union, the Member States are exercising a form of "collective

13 United States, Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act [14 December 2012].

14 *Ibid*. 114-328.

15 Estonia, Amendment to Obligation to Leave and Prohibition on Entry Act [8 December 2016].

16 Canada, Justice for victims of corpus foreign officials act (Sergei Magnitsky Law) SOR/2017-233 [3 November 2017].

17 Lithuania, Amendment art. 133 to Law No IX-2206 on the Legal Status of Aliens [16 November 2017].

18 Latvia, Attachment to the Law of Sanctions [8 February 2018].

19 United Kingdom, Sanctions and Anti Money-Laundering Act (SAMLA) [23 May 2018].

20 United Kingdom, Global Human Rights Sanctions Regulations (Reg 680/2020) [6 July 2020].

21 C Portela, 'Horizontal Sanctions Regimes' cit.

22 C Beaucillon, 'Lutte contre l'impunité ou alternative à la justice? A propos des mesures restrictives de l'Union européenne en réaction aux violations graves des droits de l'homme' (2021) RTDH 551-571.

23 Art. 2 TEU.

24 The author wishes to thank the organizers of the European Papers – Jean Monnet Network Conference in the context of which this contribution has been conceived: "Are the EU Member States still Sovereign States under International Law?" (15-16 December 2022) Sapienza University of Rome.

sovereignty".[25] Since these measures are adopted in response to the violation of certain rules and principles of international law as defined in customary and conventional international law (*e.g.* international crimes), it is possible to question the consequences of this new Council practice for the interpretation and implementation of such essential norms of public international law.

Indeed, this sheds a new light on EU Member States' sovereignty: are we in practice witnessing a collective exercise of their sovereignty by the Member States of the European Union within the Council? What consequences can be drawn from this for the collective implementation of public international law? This question will be dealt with in terms of normative considerations, through the detailed analysis of the specific international rules (and the interpretation thereof), that the EU and its Member States intend to promote on the international scene in order to fight against the impunity for serious human rights violations (section II). Conversely, the serious human rights violations covered by the restrictive measures regime at issue correspond, for the vast majority of them, to (international) criminal offenses. This raises the question of the territorial and/or personal jurisdiction (or lack thereof) of the EU and its Member States to punish such acts, and places in a singular perspective the recurrent question of the punitive nature and purpose restrictive measures. Returning to the question of collective sovereignty, would this mean that EU restrictive measures are used, in a way, so as to go beyond the traditional European vision of (criminal) sovereignty of the Member States, allowing for an alignment with US practice, including extraterritoriality? This question will be dealt with in terms of powers and competences considerations, and will be anchored in an in-depth analysis of the nature, purpose and effective reach of the restrictive measures designed to fight against impunity of serious human rights violations (section III).

II. The normative positioning of the Union: a new space for the collective exercise of sovereignty

II.1. Human rights and criminal law, a source of inspiration and legitimacy

Art. 1 of the CFSP Decision and art. 2 of the EU Regulation adopting the EU global human rights restrictive measures at issue are formulated in almost identical terms as regards the violations and breaches to which these measures are intended to respond. It should

[25] This term was used by the sole arbitrator Max Huber in the Island of Palmas case (Netherlands, USA), 4 April 1928, Reports of international arbitral awards, vol. II, p. 838: "Sovereignty in the relations between States signifies independence. [...] The special cases of the composite State, of collective sovereignty, etc., do not fall to be considered here and do not, for that matter, throw any doubt upon the principle which has just been enunciated" (emphasis added).

be noted here that these instruments do not qualify these violations and breaches, an exercise to which this analysis will refer.

First, the Decision and the Regulation refer to international crimes – genocide and crimes against humanity – and then to material elements of international crimes – torture, slavery, extrajudicial executions, enforced disappearances and arbitrary arrest or detention.[26] Torture and slavery also involve the violation of peremptory norms of public international law, as does genocide. The offenses on this first list are not specified in any way and appear to be capable of triggering inclusion on the target list by a single finding of the Council.

Next comes a non-exhaustive list of human rights violations or abuses considered to be "widespread, systematic or otherwise serious in relation to the objectives of the Common Foreign and Security Policy".[27] It includes trafficking in human beings, sexual violence, but also violations of freedom of assembly and association, freedom of opinion and expression, and freedom of religion or conscience. In this rather heterogeneous list, a distinction should however be made between criminal activities and violations of civil and political rights, some of which – freedom of assembly, freedom of opinion – are the cornerstone of the political conditionality of the partnership agreements concluded by the European Union with third countries. This mixing of genres seems justified by the introduction, in the criteria for assessing the seriousness of the violation of the rights in question, of subjective elements that are external to the norms governing the protection of these rights, but that are instead linked to the European Union's objectives in the conduct of its external relations.

From the point of view of EU law, on the one hand, the initiative may seem logical in view of the objective of coherence in external action, which is binding on the institutions of the European Union.[28] From an international law perspective, on the other hand, it would be difficult to accept that the seriousness of violations likely to trigger the adoption of restrictive measures could depend solely on a subjective interpretation of the EU, in the light of the objectives of its external action policy.

The following paragraph provides a welcome clarification at this point: in applying (the decision and the regulation), account should be taken of “customary international law and widely recognized instruments of international law".[29] This is followed by another illustrative list of twelve international conventions, combining the 1948 International Convention on the Prevention and Punishment of the Crime of Genocide, the 1989 United Nations General Assembly Convention on the Rights of the Child, and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms adopted by

[26] Art. 1(1)(a)-(c) of Council Decision (CFSP) 2020/1999 cit.; art. 2(1)(a)-(c) of Regulation (EU) 2020/1998 cit.
[27] Art. 1(1)(d) of Council Decision (CFSP) 2020/1999 cit.; art. 2(1)(d) of Regulation (EU) 2020/1998 cit.
[28] Art. 21(3) TEU.
[29] Art. 1(2) of Concil Decision (CFSP) 2020/1999 cit.; art. 2(2) of Regulation (EU) 2020/1998 cit.

the Council of Europe. A comparison of these three texts suffices to raise several questions concerning the scope of the instruments in question.

First, while the chapeau of the paragraph begins with a reference to customary international law, the juxtaposition of "widely recognized instruments" hardly seems capable of producing the same effect. This can be dealt with in terms of both material and formal considerations.

In terms of substance, these legal catalogues and their interpretation are far from identical. For instance, it is true that the European Convention for the Protection of Human Rights and Fundamental Freedoms enshrines rights that are sometimes similar to those of the 1966 International Covenant on Civil and Political Rights. Despite convergence in the purpose of the instruments, differences persist not only in the interpretation of the rights enshrined, but also in the formulation of the legal issues at stake. This is blatantly illustrated by the international and European human rights litigation concerning the first type of horizontal sanctions imposed by the European Union at the instigation of the UN Security Council, targeting international terrorism and particularly Al-Qaeda and associated persons. In particular, the *Sayadi and Vinck v Belgium* cases before the UN Human Rights Committee,[30] and the *Nada v Switzerland* case before the ECtHR[31] illustrate the impossibility of equating the Covenant and the Convention in situations where different individuals are listed as targets of the same regime of measures. It is possible to close this part of the discussion by recalling the strong criticism directed at the General Court of the European Union following the judgment delivered in 2005 in the *Kadi I* case, because of an interpretation of the concept of *jus cogens* that was considered too "European" – and therefore not reflecting the state of positive international law.[32]

In terms of formal considerations, it is impossible for the European Union to claim to contribute to the observance of treaty-based norms by a State which is not a party to it, by virtue of the principle of the relative effect of treaties.[33] However, it is possible to wonder about the implications of this indistinct reference to a set of "widely recognized instruments", a methodology which seems to suggest that the European Union could use them as a source of inspiration regardless of their scope – *ratione materiae*, but also *personae*, *loci* or *temporis*. Let us trust that the European Union will refrain from experiments, which

[30] United Nations Human Rights Committee Findings No. 1472/2006 of 28 October 2008 submitted by Nabil Sayadi and Patricia Vinck.

[31] ECtHR *Nada v Switzerland* App n. 10593/08 [12 September 2012]. See in particular F Finck, 'L'application des sanctions individuelles du Conseil de sécurité des Nations unies devant la Cour européenne des droits de l'homme' (2013) RTDH 457-476.

[32] Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* ECLI:EU:T:2005:332. See in particular: C Eckes, 'Judicial Review of European Anti-Terrorism Measures: The Yusuf and Kadi Judgments of the Court of First Instance' (2008) ELJ 84-86; R Schütze, 'On "Middle Ground": The European Community and Public International Law' (EUI Working Papers 13-2007) 19-23.

[33] Art. 34 of the Vienna Convention on the Law of Treaties between States (1969); and between States and International Organisations (1986).

would take the form of restrictive measures seeking to make international norms enforceable beyond their scope. Such a practice could go far beyond the main accepted models of extraterritorial application of human rights, which rely alternatively on control over specific territories or specific persons.[34] Moreover, this would not be in keeping with the letter of the European Union's 2018 Guidelines on restrictive measures, which, while not binding, clearly express the objectives of not resorting to extraterritorial measures and more generally of respecting international law.[35] This, in turn, will help raise the question of whether or not EU restrictive measures practice is at a tipping point (see below, section III).

Secondly, within the sole category of international instruments that actually reflect rules of customary international law, a further distinction must be made as to the scope of the norms in question. It concerns the difference between *erga omnes* norms, which are in principle binding on all subjects of the international community, and *jus cogens* norms, which not only have an *erga omnes* scope, but also belong to the category of peremptory norms that are not subject to derogation under international law. This belonging to what is now considered to be the emerging expression of a substantive international public order is justified by the extreme gravity of the acts in question, such as the commission of the crime of genocide. Yet, in the logic of restrictive measures just outlined, not all violations whose mere finding is sufficient to trigger listing – unlike those requiring verification of the gravity criterion – correspond to violations of peremptory norms of international law. Moreover, while any norm of *jus cogens* certainly has an *erga omnes* scope, the converse is not true. This inevitably raises the question of the legitimacy and, above all, the standing of the European Union in public international law, which I shall address below.

Thirdly, it is probably important to recall that, as sources of public international law, international custom and treaties – within the limits of their relative effect – are primarily binding on States and international organisations. The immediate submission of private persons to public international law – through the direct creation of rights and obligations originating in the international order[36] – has been recognized in more or less perennial contexts, and unquestionably participates in the emergence of the private person among the subjects of the international order. However, the opposability of the instruments listed above to private persons undoubtedly varies according to the instrument and the norm considered.

Finally, the question remains as to who, as the perpetrator of the violations exposed, is likely to be included in the Union's lists. The CFSP Decision and the EU Regulation offer a most ambiguous answer. They apply to "legal persons, entities or bodies", which include "state actors", "actors exercising effective control or authority over a territory", or "other

[34] M Milanovic, *Extraterritorial application of Human Rights Treaties* (Oxford University Press 2011) 304.

[35] General Secretariat of the Council of the European Union, Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, Document 5664/18 of 4 May 2018 (spec. paras 9, 51 and 52).

[36] Esp. in the fields of international criminal law and international human rights.

non-state actors", but subject, the Regulation adds, to taking into account the objectives of the EU's external action or the gravity of the acts in question. The first of the terms used seems sufficiently vague to include states, which seems to be confirmed by the textual reference to the notion of territorial control. Alternatively, the notion of state actor could refer to the official functions performed by potential individual targets, similar to the irrelevance of the official capacity of persons prosecuted under the Statute of the International Criminal Court. It would be difficult, however, in the state of public international law, to extend the scope of this provision beyond the settings in which it operates. The vagueness of the personal scope of restrictive measures continues with the mention of other non-State actors, whose designation seems to be subject to stricter conditions regarding the verification of the seriousness of the human rights violation in question. Yet the political objective of combating impunity and deterritorializing a thematic regime seemed to imply precisely the designation of private persons, natural or legal, as targets of the measures.

It is clear from the above that the instruments underpinning the EU global human rights sanctions regime offer an extremely broad framework for action and considerable discretion to the Council in designating the targets of the measures. The many questions raised above will have to be examined *in concreto* by the Council, which will gradually build up its administrative practice, before the latter is submitted to the control of the Court of Justice of the Union. It is therefore to be hoped that this new system of restrictive measures will provide an opportunity for the EU judiciary to continue to build up its case law on the interpretation of Union law and its scope in the light of the relevant rules of conventional and customary international law to which the European Union's action is subject.[37]

II.2. NORMATIVE INTERPRETATION AND HYBRIDIZATION WITHIN THE COUNCIL PRACTICE

While listings under the EU global human rights sanctions regime initiated at a rather slow pace, they have recently accelerated. On 2 March 2021, four Russian nationals, all in official positions, were placed on the EU lists in response to the detention of Alexei Navalny.[38] On 22 March 2021, several natural and legal persons of Russian, Chinese, North Korean, Libyan and South Sudanese nationality were in turn placed on the European lists.[39] On 13 December 2021, four other natural and legal persons were included in this list. These are the Wagner group, its founding member, and two natural persons involved

[37] For now, the only action for annulment relating to this restrictive measures regime has been declared inadmissible: case T-75/22 *Prigozhin v Council*, Order of the General Court of 7 September 2022.

[38] Council Decision (CFSP) 2021/372 of 2 March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures in response to serious violations and serious breaches of human rights.

[39] Council Decision (CFSP) 2021/481 of 22 March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures in response to serious violations and serious breaches of human rights.

in the command and control of the group's actions.[40] While no listings were decided in 2022, they have accelerated in 2023 with five waves in February,[41] March,[42] June,[43] July[44] and September,[45] with a total of 62 new natural and legal persons added on the list, in relation to the situations in Afghanistan, the Central African Republic, Iran, Myanmar, Russia, Sudan, Syria and Ukraine. This regime of restrictive measures thus appears a "catch-all" instrument, allowing the targeting of persons with varied profiles. In particular, it should be noted that the European Union targets Chinese nationals exclusively through cross-cutting regimes, and that recent Afghan designations are linked to gender-based violence imposed by the Taliban regime when back in power. In parallel to the designations made under the EU global human rights sanctions regime, Central Africa, Iran, Libya, Myanmar, North Korea, Russia, South Sudan, Sudan and Syria, are also subject to EU restrictive measures regimes with a state focus.

With the exception of the Libyan militia, the persons listed perform or have performed official functions for their State of nationality or have an organic link with it. The reference instruments which alleged violation justifies inclusion in the European lists are not specified. Instead, the various offences in which the persons concerned are allegedly involved are listed, without reference to the distinctions analysed above. A textual analysis of the reasons for listing the 88 persons and entities currently targeted reveals the following elements. The Council is responding to the commission of various criminal acts: arbitrary detentions, large-scale surveillance programmes, torture and degrading treatment, forced labour, indoctrination of populations, violation of religious freedom, extrajudicial, summary or arbitrary executions, killings and murders, massive use of sexual violence or specific wiring of LGBTIQ+ or related populations, extrajudicial, summary or arbitrary executions and killings. These elements of crimes, to use the specific terminology of contemporary international criminal law, have the particularity of being specifically directed against opposition gatherings or the population more generally. It is thus possible to conclude, in the absence of further public information, that the Council and its Member States are responding to violations of human rights that could also, under

[40] Council Implementing Regulation (EU) 2021/2195 of 13 December 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses.

[41] Council Decision (CFSP) 2023/433 of 25 February 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses.

[42] Council Decision (CFSP) 2023/501 of 7 March 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses.

[43] Council Decision (CFSP) 2023/1099 of 5 June 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses.

[44] Council Decision (CFSP) 2023/1500 of 20 July 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses6; Council Decision (CFSP) 2023/1504 of 20 July 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses.

[45] Council Decision (CFSP) 2023/1716 of 8 September 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses.

specific instruments of international and/or domestic law, fall within the scope of criminal law. Importantly, some of these acts require, by virtue of the scale of their perpetration and the number of their victims, recourse to organisational means of a State nature or scope. This explains the presence of State entities or bodies in the list of targets of the measures, despite the cross-cutting or deterritorialized nature of the sanctions regime in question. The classification of the acts targeted among behaviours that could come under the heading of atrocities or mass crimes only reinforces the questions about the consequences to be drawn from these new sanctions practice of the European Union.

Be it as it may, it is certainly impossible, in the absence of express references to customary international law or treaty law in the public practice of the designations under the EU global human rights sanctions regime, to conclude that the restrictive measures illustrate the interpretation by the Council or the Member States of these sources of international law. However, the implicit qualifications made by the Council when it considers that a specific situation falls within the regime of restrictive measures relating to serious human rights violations, reflect the position of the 27 EU Member States, deciding unanimously within the Council, on behaviours that do not meet the requirements of international standards governing human rights and criminal offenses.

III. "Supplementing" criminal repression? A new space to overcome the limits of jurisdiction

III.1. Foreign policy v. criminal repression: the nature and purpose of the measures involved

EU restrictive measures in response to serious human rights violations or abuses are administrative measures with the dual aim of compelling their targets to change their behaviour and deterring others from engaging in similar behaviour. They are therefore similar, albeit from a different angle, with the restrictive measures against terrorism, which share this dual objective of combating and preventing.

Their adoption with the specific aim of combating impunity can only raise questions about the nature of restrictive measures and, more generally, of international sanctions. Indeed, even if the function of these measures is meant to be preventive,[46] their effects may be broadly punitive.[47] More specifically on the repressive dimension of such measures, it will suffice here to recall the criteria generally used to distinguish criminal from administrative sanctions: the authority of the decision, the purpose of the measure

[46] *E.g.* General Secretariat of the Council of the European Union, Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy cit.

[47] A Hofer, 'Creating and Contesting Hierarchy: The Punitive Effect of Sanctions in a Horizontal System' (September 2020) Revista CIDOB d'Afers Internacionals 15-37.

and its effects. In this respect, while it is certain that restrictive measures are not the result of a sentence pronounced by a judge, their purpose and effects can, like the measures adopted by the United Nations Security Council, be compared in some cases to criminal sanctions.[48]

Far from being a theoretical question, the nature of the measures has significant implications for their legal regime.

The present analysis of EU restrictive measures in response to serious human rights violations or abuses has revealed that they have been aimed at responding to violations of both civil and political rights and international criminal law.[49] While, unlike the US Magnitsky laws, the issue of corruption does not formally appear, it may well be captured in broader criminal patterns, or in the context of what are considered particularly serious violations of civil and political rights.[50] Thus, the criminal tinge of conduct that might justify listing is certain.

As for the consequences of such a listing, they essentially take the form of funds freezing and prohibitions from entry into or transit through the territory of the Member States of the Union. Although they do not in themselves have consequences equivalent to those of a criminal sanction, judicial review of the enforcement of these bans has already highlighted the seriousness of the infringements, *inter alia*, of the right to property, the right to come and go and in rare cases the right to liberty, as well as the reputation of the persons listed.[51]

Such reputational damage is likely to be heightened in the context of the present restrictive measures, since the reason for their adoption is linked to specific, often criminal, conduct. From the perspective of reputational damage to listed persons, the Council's rigor in assessing the violations in question and their threshold of seriousness, sensitive issues developed above, is likely to play a key role in practice.

It is also important to recall that the European Union's restrictive measures in response to serious human rights violations and abuses were conceived, in the political

[48] In this sense, see A Miron, 'Les "sanctions ciblées" du Conseil de sécurité de Nations unies, réflexions sur la qualification juridique des listes du Conseil de sécurité' (2009) Revue du marché commun de l'Union européenne 357; L Nava, *Les sanctions internationales unilatérales dites "horizontales" à l'épreuve des garanties individuelles - pratique de l'Union européenne et des Etats-Unis* (Masters thesis, dir. Pr. Charlotte Beaucillon, defended in sept. 2020, University of Paris 1 Panthéon-Sorbonne) 11-13; A Hofer, 'Creating and Contesting Hierarchy' cit..

[49] See section II of this *Article*.

[50] On the possible application to certain acts of corruption, see C Portela, 'Horizontal Sanctions Regimes' cit. 441-457.

[51] See ECtHR *Nada v Switzerland* App n. 10593/08 [12 September 2012]; joined cases C-402/05 and C-415/05 *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union, Commission of the European Communities* ECLI:EU:C:2008:461 (known as Kadi I); joined cases C-584/10 C-593/10 and C-595/10 *European Commission, Council of the European Union and United Kingdom of Great Britain and Northern Ireland v Yassin Abdullah Kadi* ECLI:EU:C:2013:518 (known as Kadi II); case C-45/15 *Safa Nicu Sepahan Co. v Council of the European Union* ECLI:EU:C:2017:402.

discourses accompanying the drafting of the EU global human rights sanctions regime, as an *additional and supplementary* instrument to criminal law, with the same objective of combating impunity:

> "[...] Rules are rules', as the (Dutch) saying goes. But only if breaking the rules has consequences. That's true in the school playground, and it's true in the arena of international law. That's why the Netherlands, as a champion of international law, always works to stress the importance of accountability. After all, a norm can only stand if violators of that norm are punished. Of course, this is why we have international criminal law. And why international criminal courts and tribunals are so important. But around the world, people are still falling victim to human rights violations on a daily basis. Human rights, which lie at the core of Europe, require a multifaceted approach. And we see human rights sanctions as a necessary additional instrument. To supplement the criminal law [...]".[52]

From the point of view of the regime applicable to these "additional and supplementary" restrictive measures, significant differences from the regime for criminal proceedings must be highlighted. The burden of proof is reversed, since it is up to the targets of the measures to demonstrate to the Council or the Court that they should not be included in the European lists. As a result, the presumption of innocence does not apply in this case, which explains the increased potential for infringement of the fundamental rights of the persons targeted.

Indeed, the American practice of placing on the Magnitsky lists persons who had already been convicted of criminal offenses raises the question of respect for the principle of *non bis in idem*, which requires that the same act should not be punished twice.

On its side, the European Union develops a practice of doubling the listing of certain individuals on the basis of two separate restrictive measures regimes. This was highlighted, for example, in the case of a person targeted both under the restrictive measures regime against Syria and under the thematic regime to combat the proliferation of chemical weapons.[53]

This raises the question of whether the targets of the measures can hope to obtain their removal from the European lists without any legal recourse. Yet, the very mechanism of international sanctions lies in the promise that the sanctions will be lifted if the targets change their behaviour.[54] The same is true for EU restrictive measures responding to human rights violations, which are supposed to share this incentive function.

[52] 'Closing Remarks by the Minister of Foreign Affairs at a Meeting on the EU Global Human Rights Sanctions Regime' (20 November 2018) and currently withdrawn from the website of the Dutch Ministry for Foreign Affairs. This speech is however mentioned in the Ministry's 'Human Rights Report 2018' (August 2019). Only selected fractions of the speech are now published on the website of the Universal Rights think tank www.universal-rights.org.

[53] C Portela, 'Horizontal Sanctions Regimes' cit.

[54] *Ibid*.

However, the CFSP Decision and the EU Regulation at stake do not specify what behaviour is expected from the targets of the EU restrictive measures in question.[55]

Finally, the American measures adopted on the basis of the Magnitsky legislation emphasize a conservatory function – which the European measures ignore as the law stands – illustrated by the objective of lifting the measures in the event of new criminal proceedings against the targets. This silence of the European acts on the articulation with criminal proceedings seems to contradict the often stated objective of giving priority to legal proceedings.[56]

Some political scientists have seen in this evolution the emergence of a European form of "soft international criminal law".[57] Some other law academics have more recently demonstrated that the EU global human rights sanctions regime is no longer to be considered a mere foreign policy tool but should be aligned on principles governing criminal justice measures.[58] It stems for the above that the EU global human rights sanctions are instruments of a new kind, designed to draw new consequences from serious human rights violations, and intended to complement the legal remedies already available through human rights litigation and criminal prosecution. This raises the question of the added value, in the eyes of the Council and the EU Member States, of these restrictive measures aimed at combatting impunity for serious human rights violations.

III.2. Overcoming the limits of jurisdiction and extending the reach of the measures

The theory of jurisdiction governs, in public international law, the conditions under which a State is competent to deal with a specific situation. In this respect, the two generally accepted connecting factors are the territorial link and the personal link of a State with a specific situation. Thus, a State (or a group of States, meeting within an international organisation, for example) may have jurisdiction over a situation which takes place in its territory or which concerns one of its nationals. This is the mechanism on which the system of freezing funds and financial assets in the context of the implementation of the European Union's restrictive measures is based: only funds located on the territory of the Union and its Member States will be subject to the execution of EU freezing measures.[59]

In addition to these considerations, the European Union's restrictive measures in response to serious human rights violations are based on references to certain criminal offenses, such as the crime of genocide or trafficking in migrants. This incursion of

[55] *Ibid*.

[56] See *e.g*. European Parliament Resolution 2019/2610(RSP) of 14 March 2019 on the human rights situation in Kazakhstan.

[57] C Portela, 'A Blacklist is (almost) Born, Building a Resilient EU Human Rights Sanctions Regime' (17 March 2020) European Union Institute for Security Studies 6.

[58] A Moiseienko, 'Crime and Sanctions: Beyond Sanctions as a Foreign Policy Tool' (21 June 2023) ANU College of Law Research Paper n. 23.4, forthcoming in the German Law Journal.

[59] See *e.g*. Council Decision (CFSP) 2020/1999 cit. and Regulation (EU) 2020/1998 cit.

international criminal law into the logic of restrictive measures seems to be a source of confusion. In what capacity is the European Union dealing with these serious human rights violations? Is it acting within the framework of international responsibility of States and international organisations, or within that of international criminal law? In short, what legal interests does it defend here?

From the point of view of the international law of responsibility of States and international organizations, the question of the defence of universal interests is one of the thorniest. It will suffice to recall here that the distinction between crimes and torts, initially favoured in the work of the International Law Commission responsible for the codification of the law of responsibility, has been abandoned in favour of taking into account violations of peremptory norms of international law.[60] In this regard, the international law of responsibility as codified by the International Law Commission recognizes a right of action for responsibility of States and international organizations not (subjectively) injured by the breach in question, on the basis of the interest of the international community in seeing the peremptory norms respected.[61] Nothing is less certain, however, with regard to the countermeasures adopted by these non-injured States or organizations, whose contested practice is limited to American and European measures[62] and which codification has in the end been reserved by the International Law Commission.

In addition to the law of international State or IO responsibility, the European Union's restrictive measures in response to serious human rights violations need to be analysed from the perspective of individual responsibility. Indeed, they cover a wide range of human rights violations, from international crimes that meet *jus cogens* standards – *e.g.* genocide, torture – to violations that do not necessarily carry a criminal label – *e.g.* the violation of freedom of association. At least some of these restrictive measures are therefore part of a rationale for combating impunity for crimes that should be criminally punished. If one reserves the above-discussed question of the articulation of these administrative measures with the criminal proceedings that would be necessary in this matter, in particular from the point of view of the procedural and substantive guarantees provided by criminal proceedings, the fact remains that the question of the legal basis for the competence to adopt measures of individual scope in reaction to alleged criminal offenses has not been clarified.

Does the violation of *jus cogens* necessarily entail a form of universal repressive jurisdiction? And do all the human rights violations to which the European Union wishes to respond consist of violations of peremptory norms of international law? The answer to both questions is no.

[60] Arts 40 and 41 of International Law Commission, Articles on the International Responsibility of States, UN Doc A/56/10: Report of the International Law Commission to the General Assembly on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001).

[61] *Ibid*. art. 48.

[62] See, in general, *ibid*. art. 54 and, in particular, para. 6 of its commentaries.

Beyond the crime of genocide and crimes against humanity, for which some authors claim that international custom requires States to exercise universal jurisdiction for law enforcement purposes,[63] it is important to recall that universal jurisdiction for law enforcement purposes is only mobilized in cases defined restrictively by certain specific national legislations, whose often limited scope has been criticized.[64] In particular, it is significant that in the *Arrest Warrant* case, Belgium argued that there was a territorial link – a very small one – between the acts of the Minister of Foreign Affairs of the Democratic Republic of Congo and the exercise of universal jurisdiction, which was allegedly based on the fact that "the complaints at the origin of the arrest warrant came from twelve persons, all of whom were resident in Belgium, five of whom were of Belgian nationality".[65]

Under the regime of EU restrictive measures for serious human rights violations, the majority of cases would fall outside the reach of universal jurisdiction. Likewise, the vast majority of human rights violations to which the European Union would have to react on the basis of its EU global human rights sanctions regime would not fall within the jurisdiction of the courts of the Member States of the Union.

It stems from the above, that the effect of these restrictive measures, like the American Magnitsky legislation, is to allow the Union and its Member States to extend their normative influence to situations that do not fall within their competence, *i.e*. their jurisdiction, or even their sovereignty. The descriptions sometimes used to show the power of normative projection of these instruments – "deterritorialized" restrictive measures applying to "transnational" situations – combined with the undoubtedly noble and politically irreproachable objectives of combating impunity, should not obscure their ambiguous legal scope. Indeed, it is clear from the foregoing that these restrictive measures make it possible to short-circuit altogether both the logics of the international theory of titles of jurisdiction and that of international criminal jurisdiction. Firstly, they set aside the limits that the titles of jurisdiction impose on States (and, consequently, of the international organisations through which they act), by targeting situations that present neither a personal, nor a territorial connection with the Union or its members. Secondly, they render obsolete the limits imposed by the rules on the jurisdiction of national and supranational criminal and civil courts.

Returning to our general discussion of the sovereignty under international law of EU Member States, the present case study on restrictive measures adopted by the EU in response to serious human rights violations, calls for several conclusions.

First, this case shows that the European Union serves as a privileged space for its Member States to exercise a form of collective normative sovereignty. Indeed, the EU

[63] In this sense: E David, *Eléments de droit pénal international et européen* (2nd edn, Bruylant 2018) 720.

[64] A Lagerwall, 'Que reste-t-il de la compétence universelle au regard de certaines évolutions législatives récentes' (2009) AFDI 743-773.

[65] ICJ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [14 February 2002] para. 15.

restrictive measures in response to serious human rights violations refer to a highly heterogeneous catalogue of international instruments, from which the Council of the EU has formally selected those standards that are particularly relevant to EU action in the international fight against impunity. This use of international human rights law and international criminal law as a simple source of inspiration gives the Council the necessary margin for manoeuvre it needs to put forward its normative priorities. These depend neither on a substantive hierarchy between the norms in question (which could derive from the reference to *jus cogens* norms), nor on a disciplinary approach to international law (which could not only derive from the distinction between human rights law and criminal law, but also from the distinction between rights which must be guaranteed in all situations, and rights that can suffer derogations under certain conditions). Rather, the normative priorities of the Council and EU Member States reflect the political objectives that guide EU's external action in general, and the fight against impunity in particular. They are based on a kind of hybridization of reference standards, irrespective of their international legal source or nature; an exercise whose legal method raises questions, but which probably has derived its political legitimacy from the noble cause pursued by the measures.

Second, the adoption at the EU level of restrictive measures to fight against the impunity for serious human rights violations provides the Member States with the means to transcend the limits of their national sovereignties and jurisdiction. As some political declarations reveal, these restrictive measures have been designed so as to complement the legal remedies available to challenge serious human rights violation, mainly human rights litigation and criminal prosecution. This very particular positioning of restrictive measures in response to serious human rights violations opens up a new interstitial space for developing the collective exercise of Member States' sovereignty within the EU. Going beyond the limits (geographical, personal, material and temporal) of the positive legal regimes governing the international protection of human rights and the repression of international crimes, the restrictive measures in question make it possible to target situations which hitherto fell outside the competence of the Member States and the Union. They thus reveal the exercise of a new form of long-arm collective sovereignty by Member States united within the EU.

The Member States of the European Union are therefore not only still individually sovereign under international law, but they have also found within the Union the conditions for exercising an enhanced form of collective sovereignty, designed to further extend the reach of both their influence and power of deterrence, to counter impunity for serious human rights violations on the international stage.

ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

Edited by Enzo Cannizzaro, Marco Fisicaro, Nicola Napoletano *and* Aurora Rasi

THE EU AND ITS MEMBER STATES AT WAR IN UKRAINE? COLLECTIVE SELF-DEFENCE, NEUTRALITY AND PARTY STATUS IN THE RUSSO-UKRAINE WAR

ALEXANDRA HOFER*

ABSTRACT: To assist Ukraine in defending itself against Russian aggression, the EU invoked the European Peace Facility to "finance the provision of [...] military equipment and platforms designed to deliver lethal force for defensive purposes". It marks the first time that the EU is funding the provision of lethal equipment to a third state. In October 2022, the EU announced the creation of EUMAM Ukraine to train Ukrainian Armed Forces to use the weapons EU Member States have provided. Since February 2022, the EU's military aid and assistance has only increased. EU Member States are also providing military aid and assistance bilaterally, including training Ukrainian soldiers. In so doing, they are aligning their assistance with "like-minded" partners and NATO Member States, particularly the United States of America, the United Kingdom and Canada. This *Article* will assess the supply of military aid and equipment to Ukraine as well as the training of UAF through the lens of international law. One wonders whether the EU's military aid and assistance amounts to collective self-defence, even if none of the supporting actors have invoked art. 51 UN Charter. The argument could be made that the EU and its Member States are breaching neutrality law in supplying lethal aid to Ukraine, albeit it has been argued that neutrality law is no longer relevant in the post charter era. The question also arises whether these actors have become parties to the conflict, even if supporting states and the EU frequently assert that they are not co-belligerents.

KEYWORDS: European Union Peace Facility – military aid and assistance – neutrality law – collective self-defence – party status – Russian aggression against Ukraine.

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I. Introduction

When Russia launched a full-scale invasion against Ukraine on 24 February 2022, and consequently not only violated art. 2(4) UN Charter but also committed an act of aggression, the EU did not have an army that it could send to Ukraine to help it defend itself. Instead, alongside the United States of America (US), the United Kingdom (UK), Canada and other allies, it adopted "massive and unprecedented" economic sanctions[1] and announced that it would "finance the provision of equipment and supplies to the Ukrainian Armed Forces, including - for the first time - lethal equipment".[2] The latter is being carried out through the European Peace Facility (EPF), an "off budget" mechanism that was adopted in March 2021. The war in Ukraine marks the first time that the EU finances the delivery of such weaponry to a third state involved in an international armed conflict. Since February 2022, the EU's military aid and assistance has only increased, and so has the EPF's budget. At the time of writing, the EU has committed €5.6 billion in military aid and €24.26 billion in financial aid.[3] Moreover, in October 2022 the EU instituted the EU Miliary Assistance Mission to Ukraine (EUMAM UA), which is tasked to train Ukrainian Armed Forces so that they can continue their fight against Russian forces.[4] Short of using force, the EU is using the means at its disposal in an unprecedented manner to assist Ukraine's exercise of self-defence. As mentioned, the EU is not alone in assisting Ukraine in this manner, and many EU states are providing additional bilateral aid and assistance to Ukraine.

Concerns have been voiced that sanctions, sending weapons, training troops, etc., are only adding fuel to the fire and that the focus should be on reaching a negotiated settlement. Speaking at the UNGA Emergency Special Session in February 2023, the Ukrainian delegate asserted that: "the calls for ceasing the delivery of weapons and ammunition to Ukraine are badly misplaced. It is perfectly legitimate to help a nation that has been attacked and is justifiably defending itself. It is an act in defence of the Charter of the United Nations".[5] While it may be legitimate and morally justifiable to defend the UN Charter, what are the legal implications? Ukraine's statement, and many declarations from the EU and its Member States, justify the military aid and assistance by invoking the language of collective

[1] European Council, *The EU sanctions against Russia explained* www.consilium.europa.eu. For a discussion on the EU's massive and targeted sanctions see A Hofer, 'The EU's "Massive and Targeted" Sanctions in Response to Russian Aggression, a Contradiction in Terms' (2023) CYELS (first view) 1.

[2] Council of the EU, Press Release, 'EU Adopts new Set of Measures to Respond to Russia's Military Aggression Against Ukraine' (28 February 2022) www.consilium.europa.eu; Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment and platforms, designed to deliver lethal force.

[3] Statista Research Department, 'Total Bilateral Aid Commitments to Ukraine between January 24, 2022 and May 31, 2023, by Type and Country or Organization' (18 July 2023) www.statista.com.

[4] A Tidey, 'EU Countries Agree to Train Ukrainian Soldiers as Part of New Mission' (17 October 2022) Euronews www.euronews.com.

[5] General Assembly, 11th Emergency Special Session, 17th Plenary Meeting (22 February 2023) UN Doc A/ES-11/PV.17, 5.

self-defence. But does this mean that, through the EPF and EUMAM UA, the EU is assisting Ukraine in collective self-defence under art. 51, and consequently that the EU is indirectly using force against Russia, even if it has no army of its own? If this would be the case, has the EU unwittingly acquired party status? Yet, supporting states appear very wary of being engaged in a conflict with Russia and do not want to be co-belligerents alongside Ukraine. Amongst this debate, neutrality appears to be lost in the background, however it is relevant for states that have refrained from assisting Ukraine, either by abstaining from sending military aid and equipment or by refusing to implement sanctions against Russia.

As reported in *New York Times*: "Germany and France, like the United States, want to calibrate the weapons Ukraine gets, to prevent escalation and direct attacks on Russia".[6] There are weapons that Ukraine has reportedly requested but that states are unlikely to provide, *inter alia* "out of fear that they could hit Russia".[7] While Ukraine has requested long-range missiles, the US initially did not want to transfer weapons to Ukraine that would enable them to attack Russia on its territory. Yet, an overview of the weapons provided to Ukraine demonstrates this policy has shifted as some of the material could ostensibly be used on Russian territory[8] and Member States appear to be willing to send longer-range weapons.[9] On 9 December, it was reported that the Pentagon gave Ukraine the green light to strike inside Russian territory,[10] yet it appears the issue is still subject to debate.[11] If this were to happen, the concern is that Russia would "go beyond attempting to target [the weapons] on Ukrainian territory, try to hit the supply convoys themselves and perhaps the NATO countries on the Ukrainian periphery" that serve as transfer points for supplies from the US[12] or elsewhere.

Since the war began, states and international organisations have discussed the assistance they are willing to provide Ukraine while being careful to reiterate that they are not party to the conflict. For instance, NATO Secretary General Stoltenberg indicated that, in spite of Ukraine's request, the Alliance would not implement a no-fly zone as this would bring them in direct conflict with Russia.[13] This is the fine line that States have been walking: although they want to assist Ukraine, they want to avoid becoming, or being seen as, a party

[6] S Erlanger and L Jakes, 'U.S. and NATO Scramble to Arm Ukraine and Refill Their Own Arsenals' (26 Nov 2022) New York Times www.nytimes.com.

[7] *Ibid*.

[8] Al Jazeera, 'Which Weapons might the US Send to Ukraine?' (13 March 2022) www.aljazeera.com.

[9] O Moody, 'With New Tanks and Jets Ukraine can Win the War' (2 September 2022) The Times www.thetimes.co.uk.

[10] M Evans and M Bennetts, 'Pentagon gives Ukraine Green Light for Drone Strikes inside Russia' (9 December 2022) The Times www.thetimes.co.uk.

[11] P McLeary and L Hudson, 'The Air Force Wants to Send its Reaper Drones to Ukraine: The Pentagon's not so Sure' (12 September 2022) Politico www.politico.com.

[12] K DeYoung, 'Russia Warns U.S. to Stop Arming Ukraine' (15 April 2022) The Washington Post www.washingtonpost.com.

[13] NATO, Press conference by NATO Secretary General Jens Stoltenberg previewing the extraordinary Summit of NATO Heads of State and Government (23 March 2022) www.nato.int.

in the conflict. Nonetheless, according to Russia, various states and the EU have already reached party status.

These different positions will be reviewed in the first section of this *Article*, which collects information on the support that has been provided by Ukraine and the justifications evoked. It does not only focus on the EU, but also on the individual positions of its Member States, as well as the positions adopted by the US, the UK and Canada. Including non-Member States provides a point of comparison, particularly as the US and the UK are two of Ukraine's biggest supporters. As we shall see, although the EU presents a common front, its Member States are divided and compromise is often necessary. This is achieved by allowing states to "opt out" or to constructively abstain from funding lethal military equipment or from training Ukrainian Armed Forces. There is an apparent tension between responding to an act of aggression while remaining below the threshold of using force and becoming a belligerent in the conflict. Whereas the EU, its Member States and NATO allies want to assist Ukraine in collective self-defence, they want to avoid a direct confrontation with Russia. Neutrality law is relevant to this discussion, but EU Member States have adopted differing positions on the matter. Permanently neutral states (Ireland, Malta and Austria) are doing their best to remain militarily neutral. On the other hand, some EU Member States appear to flout neutrality altogether, even going as far as shaming states who have adopted a neutral position in the conflict.

The first section of this *Article* will also consider Russia's reaction. If Russia does not react, either by physically responding or making a clear statement, this could provide insight on the relevance of neutrality law and on the question of which thresholds need to be met to consider force is being used or a state/international organisation has become party to the conflict. The first section will also assess the positions of states that have decided to not lend support to Ukraine: do they invoke legal arguments? Or are they acting out of political considerations?

This brings us to one of the limits of this study, which is to untangle the legal from the political.[14] This may be an exercise in futility, as the law is deeply political, particularly when the stakes are so high. States' national preferences depend on their historical trajectory, their geographic proximity to Russia and their bilateral relations with Russia. Still, it is interesting to consider how, or to what extent, states justify their conduct in *legal* terms. Furthermore, if Russia does not react to the support provided to Ukraine this may be because it does not want a *direct* conflict with NATO and is therefore exercising political restraint.

Another one of this study's limits is the difficulty to quantify the extent of the military aid and equipment that has been provided to Ukraine. This is also because of the number of countries involved; after all, the EU alone encompasses 27 Member States that have diverse approaches. This *Article* relies on the dataset created by the Kiel Institute, which tracks the financial, military, and humanitarian donations that have been given. It also

[14] See also M Piątkowski, 'The Saga of the Polish MiG-29: The Laws on Neutrality and the Law of Air Warfare' (3 October 2022) Opinio Juris opiniojuris.org.

draws from official information provided by states, reports, and news items. Moreover, events are moving fast, and the level of assistance provided shifts. For example, as this *Article* was reaching its conclusion in September 2023, the US gave Denmark and the Netherlands permission to provide Ukraine with F-16 jets once Ukrainian pilots have been trained to fly them. The author has done her best to provide a broad overview, but this does not exclude that there may be gaps.

The legal analysis is found in the section thereafter, which addresses three inter-related questions identified above: collective self-defence under *jus as bellum*, neutrality law, and party status under international humanitarian law. Under international law, these issues are treated differently; different conditions need to be met in each case. Self-defence is a matter of *jus ad bellum*, whereas party status falls under international humanitarian law. Neutrality law is generally treated as a distinct area of international law. However, these different issues are closely related in that the *facts* that establish the one can also be used to establish another.[15] For instance, if states engage in indirect use of force to assist another state in collective self-defence by providing weapons and training the third state's armed forces, the supporting states are clearly not neutral. Breaches of neutrality do not lead to party status, however, as argued, systemic and substantial breaches of neutrality can lead to party status. Or the facts that establish that force has been used can lead to the determination that a state is party to a conflict.[16] Thus, even though the questions addressed are distinct they are inter-related and there is need for a coherent overview of the military aid and assistance that has been provided.

II. Aid and assistance provided to Ukraine since February 2022

II.1. The European Union and its Member States

Under the EPF, which was adopted by the Council in March 2021,[17] the EU has been financing the EU Member States' provision of lethal weapons to Ukraine for defensive purposes since February 2022.[18] When the EU announced further measures under the EPF in February 2023, Josep Borrell, the High Representative of the Union for Foreign Affairs

[15] MN Schmitt and WC Biggerstaff, 'Aid and Assistance as a "Use of Force" Under the *Jus ad Bellum*' (2023) International Law Studies 186, 193, fn 29.

[16] R van Steenberghe, 'Military Assistance to Ukraine: Enquiring the Need for Any Legal Justification under International Law' (2023) Journal of Conflict and Security Law 231, 235 quoting *Tadic*.

[17] Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528.

[18] Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment and platforms, designed to deliver lethal force; see also Council Decision (CFSP) 2022/339 of 28 February 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces, which is on the delivery of non-lethal assistance.

and Security Policy, proclaimed: "Ukraine should get all the necessary military equipment and training it needs to defend its territory and its people from Russia's war of aggression. […] we will continue supporting Ukraine for as long as it takes and as long as it is needed".[19] By May 2023 (the latest Council decision at the time of writing), the EU had committed €5.6 billion in military equipment and assistance to Ukraine.[20] This includes the €2 billion that the EU pledged to reimburse Member States donating ammunition to Ukraine. When the EU first decided to provide ammunition, Borrell claimed this demonstrated the "EU's united resolve and determination to continue supporting Ukraine's legitimate right of self-defence against the brutal Russian aggressor".[21]

The war in Ukraine marks the first time the EU contributes to providing such military equipment to a third state.[22] Before, it provided non-lethal assistance to state armed forces in sub-Saharan Africa, the Western Balkans, and Eastern Europe.[23] The EPF is an off-budget mechanism (meaning its financing is outside of the general EU budget) and decisions on how the funding is allocated are under the control of individual EU Member States. Importantly, under art. 56(3) EPF, Member States "retain discretion over the arms transfer decision-making process"; meaning they "remain responsible for carrying out their own risk assessment", which is independent from the assessment carried out by the European External Action Service.[24] As the EU funds the material it can attach its own conditions to the beneficiaries, in addition to those attached by the exporting state.[25] Furthermore, "the EU member state from which the transfer of the equipment originates retains its full prerogative to authorize (or deny) the export".[26] Due to the Council's prominent role in the EPF, it has been designed in such a way that Member States maintain "strict control".[27]

[19] Council of the EU, Press release, 'Ukraine: Council Agrees on Further Military Support under the European Peace Facility' (2 February 2023) www.consilium.europa.eu.

[20] Council of the EU, Press release, 'EU Joint Procurement of Ammunition and Missiles for Ukraine: Council Agrees €1 billion Support under the European Peace Facility' (5 May 2023) www.consilium.europa.eu.

[21] Council of the EU, Press release, 'Ammunition for Ukraine: Council agrees €1 billion Support Under the European Peace Facility' (13 April 2023) www.consilium.europa.eu.

[22] Council of the EU, Press release, 'EU Adopts New Set of Measures to Respond to Russia's Military Aggression against Ukraine' (28 February 2022) www.consilium.europa.eu.

[23] G Maletta and L Héau, 'Funding Arms Transfers Through the European Peace Facility: Preventing Risks of Diversion and Misuse' (June 2022) Sipri 4.

[24] *Ibid*. 7; art. 56(3) of Council Decision (CFSP) 2021/509 cit. reads: "Any assistance measures involving the export or transfer of items on the Common Military List of the Union shall respect the principles laid down in Common Position 2008/944/CFSP and shall be without prejudice to the procedure to be followed by Member States regarding such export or transfer in accordance with that Common Position, including in terms of assessment. Furthermore, such assistance measures shall not affect the discretion of Member States regarding policy on the transfer within the Union, and the export of, military equipment".

[25] G Maletta and L Héau, 'Funding Arms Transfers Through the European Peace Facility' cit. 7.

[26] *Ibid*. 6.

[27] F Santopinto and J Maréchal, 'EU Military Assistance under the New European Peace Facility' (16 February 2021) Research Paper Konrad Adenauer Stiftung 13.

The EPF allows the EU to finance but not deliver military assistance to Ukraine, Member States bear responsibility for providing the military equipment. The High Representative's role is to ensure consistency and to coordinate actions financed by the EPF. It makes room for Member States to opt out or to choose how they want to participate. Although Denmark initially "opted out" of the EU's Common Security and Defence Policy, following a referendum on 1 June 2022 it reversed course and is now a participating member state.[28] While decisions must be unanimous, when deciding on transferring lethal military equipment EU Member States can constructively abstain and "allocate corresponding contributions to another EPF assistance measure instead".[29] This gives the EU room to adopt decisions while accommodating member States that are traditionally neutral or that may have other national constraints. For example, three permanently neutral states, Malta, Ireland and Austria, only contribute to the non-lethal assistance.[30] Cyprus is providing financial aid but will not send weapons, citing concerns that this would undermine its own security needs.[31] Hungary also announced it will not provide weapons and will not allow them to be transferred over its territory; as a country that borders Ukraine, it is concerned that the conflict may escalate and spill over into its territory.[32] In general, the EPF generally follows a procurement procedure, but in providing weapons to Ukraine the EU Member States supplied their own armed forces' stocks and then requested reimbursement from the EU.[33] Thus, the ministers of defence of the EU Member States are the implementing actors.[34]

In addition, since 17 October 2022, the EU Military Assistance Mission in support of Ukraine (EUMAM Ukraine) trains the Ukrainian Armed Forces to use the lethal and non-lethal equipment provided by the Member States and funded by the EPF.[35] The current goal is to train 30 000 soldiers by the end of 2023[36] and to "help Ukraine defend its territorial integrity within its internationally recognised border and be able to deter and respond to possible future military offensives by Russia".[37] Before, EU Member States were

[28] S Gargiulo and Reuters, 'Russia's war on Ukraine Prompts Denmark to Vote to Join EU Shared Defense Policy' (1 June 2022) CNN edition.cnn.com.

[29] G Maletta and L Héau, 'Funding Arms Transfers Through the European Peace Facility' cit. 5; Council Decision (CFSP) 2021/509 cit. arts 5(2) and 5(3).

[30] G Maletta and L Héau, 'Funding Arms Transfers Through the European Peace Facility' cit. 5; these countries are not listed in Council Decision (CFSP) 2022/338 cit.; see also N Borg, 'Neutrality Clause Included in EU-Ukraine Security Pledge' (30 June 2023) Times of Malta timesofmalta.com.

[31] N Theodoulou, 'Cyprus Rules Out Sending Weapons to Ukraine (Updated)' (5 April 2022) Cyprus Mail cyprus-mail.com.

[32] Under art. 56(3) of the EPF, Council Decision (CFSP) 2021/509 cit. Member States retain discretion over the transfer of military equipment through their territory.

[33] G Maletta and L Héau, 'Funding Arms Transfers Through the European Peace Facility' cit. 6.

[34] They are identified as such under Council Decision (CFSP) 2022/338 cit. art. 4(4).

[35] Council Decision (CFSP) 2022/1968 of 17 October 2022 on a European Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine); see also Council of the EU, Press release, 'Ukraine: Council Agrees on Further Support under the European Peace Facility' (17 October 2022) www.consilium.europa.eu.

[36] Council of the EU, *Foreign Affairs Council, 24 April 2023* www.consilium.europa.eu.

[37] EU External Action, *EU MAM Ukraine (EUMAM UA)* (31 March 2023) www.eeas.europa.eu.

training UAF individually.[38] Announcing the effort, Borrell proclaimed: "Today we step up our support to Ukraine to defend itself from Russia's illegal aggression. The EU Military Assistance Mission will train the Ukrainian Armed Forces so they can continue their courageous fight. EUMAM is not just a training mission, it is clear proof that the EU will stand by Ukraine for as long as is needed".[39]

This sentiment was reiterated six months later: "[t]his training mission is another proof of our unshaken and determined support to continue together with Ukraine".[40] EUMAM Ukraine is the first time the EU provides operational missions on its own territory, as these generally take place abroad.[41] The EU's role is to finance, coordinate, and synchronise Member States' efforts. Through the mission, EU Member States provide the UAF the training required to use the military equipment that they delivered. At present, 24 Member States are participating, either through training modules or by providing personnel.[42] States that have not provided such aid provide de-mining training, such as Ireland.[43] Austria is contributing to the mission financially but is not providing any military personnel.[44] Hungary constructively abstained when the EU voted on training Ukrainian armed forces.[45]

The EU has justified its support to Ukraine by invoking the language of self-defence. For example, the conclusions of the European Council meeting of 23-24 June 2022 explicitly refers to Ukraine's right of self-defence: "[t]he European Union remains strongly committed to providing further military support to help Ukraine exercise its inherent right of self-defence against the Russian aggression and defend its territorial integrity and sovereignty".[46]

Under the EPF and EUMAM UA, the EU's High Representation plays a coordinating and facilitating role, ensuring consistency between the Member States as they provide

[38] A Brzozowski, 'EU Strikes Political Deal on Ukraine Military Training Mission' (13 October 2022) Euractiv www.euractiv.com.

[39] Council of the EU, Press Release, 'Ukraine: Council Agrees on Further Support under the European Peace Facility' cit.

[40] Informal Foreign Affairs Council (Defence), 'Press Remarks by High Representative Josep Borrell at the Press Conference' (8 March 2023) www.eeas.europa.eu; see also Council of the EU, Press Release 'Ukraine: Council Agrees on Further Military Support under the European Peace Facility' (2 February 2023) www.consilium.europa.eu.

[41] For a commentary under EU law see: A Melzer, 'EU Military Mission Is Coming Home: On the New European Union Military Assistance Mission in Support of Ukraine' (19 October 2022) Verfassungsblog verfassungsblog.de.

[42] As stated on the official website of the EUMAM Ukraine, see www.eeas.europa.eu.

[43] Government of Ireland, Department of Defence, 'Approval for Defence Forces' Participation in the EU Military Assistance Mission in Support of Ukraine' www.gov.ie; Irish Defence Forces, 'Irish Defence Forces Training Assistance to EU Military Assistance Mission in Support of Ukraine (EUMAM UA) - Cyprus' www.military.ie.

[44] Federal Ministry, Republic of Austria, European and International Affairs, 'Eastern Europe' www.bmeia.gv.at.

[45] About Hungary, 'FM: Hungary says no to EU's Ukraine army training mission' (18 October 2022) abouthungary.hu.

[46] European Council Conclusions of 23 and 24 June 2022, para. 6 available at data.consilium.europa.eu.

support to Ukraine. Meanwhile, individual states manage the aid and assistance they provide to Ukraine bilaterally and retain control over how much they want to contribute to Ukraine's defensive actions.

It is beyond the scope of this *Article* to list the entirety of the aid and equipment that has been provided by EU Member States.[47] Nonetheless, it is useful to be aware of which countries have provided the most military and financial aid. According to data collected by the Kiel Institute,[48] Germany is the European country that has pledged the most military aid (€17.1 billion), donating more than the EU institutions (€5.6 billion). The countries that follow are Denmark (3.5), Poland (3), Netherlands (2.48), Sweden (1.47), Finland (1.22), Czech (1.06), Italy (0.66), Slovakia (0.67), Lithuania (0.71), France (0.53), Estonia (0.42).

While states contribute to the EU's mechanisms, they also provide their own bilateral aid. The states that have committed the most bilateral aid in terms of percentage of their GDP are Lithuania (1.4 per cent), Estonia (1.3 per cent), Latvia (1.1 per cent), Denmark (1.1 per cent), Poland (0.7 per cent), Slovakia (0.6 per cent), Netherlands (0.4 per cent), Finland (0.5 per cent) Czech Republic (0.6 per cent) and Bulgaria (0.3 per cent). Thus, though Germany has donated the most military aid this only represents a small percentage of its GDP. In terms of financial aid, the EU institutions are providing the most (€77.1 billion), and are then followed by Norway (3.55), Germany (1.3), Netherlands (0.99), Poland (0.92), France (0.8).[49] Romania and Poland also play a strategically important role in allowing weapons to be transferred through their territory,[50] with Poland "acting as a logistical hub for the transfer of military equipment from other allies into the western part of Ukraine not occupied by Russian forces".[51]

In January 2023, a group of EU countries – Estonia, Poland, Latvia, Lithuania, Czech Republic, the Netherlands and Slovakia – issued a joint statement with the UK, "the Tallin Pledge", whereby they "reaffirm[ed] [their] continued determination and resolve to supporting Ukraine in their heroic resistance against the illegal and unprovoked Russian aggression" and "commit[ed] to collectively pursuing delivery of an unprecedented set of donations".[52]

Although they present a united front through the EU, Member States disagree over what their level of participation should be. Hungary, for example, is an outlier. At the start, when the EU agreed to supply Ukraine with weapons, it stated that it would not allow its territory to be used to transfer weapons to Ukraine given that this would give

[47] A comprehensive overview is available here: C Mills, 'Military Assistance to Ukraine since the Russian Invasion' (14 August 2023) House of Commons Library, Research briefing commonslibrary.parliament.uk.

[48] Kiel Institute, *Ukraine Support Tracker* www.ifw-kiel.de.

[49] After the EU, the top financial contributors are the US (€24.3 billion), Japan (€5.6 billion), the UK (3.9) and Canada (3.6), which all provide more than the EU's top contributor, Germany.

[50] C Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 55.

[51] *Ibid*. referencing A Brzozowski, 'Poland "Key" in Western Weapons Supplies to Ukraine' (1 March 2022) Euractiv www.euractiv.com.

[52] UK Ministry of Defence, 'Joint Statement – The Tallinn Pledge' (19 January 2023) www.gov.uk.

rise to a "direct security threat",[53] ostensibly given its border with Ukraine the conflict could spill into its territory, and because "such deliveries might become targets of hostile military action".[54] In October 2022, Péter Szijjártó, the Hungarian Minister of Foreign Affairs and Trade, explained: "[t]he question of whether shipments or troops linked to the mission may transit Hungarian territory will always be decided on an individual basis",[55] thus indicating a shift. However, Hungary did not vote in favour of training Ukrainian soldiers but, as noted above, "abstained constructively" so as not to obstruct the procedure. Furthermore, speaking at the UNGA's 11th Special Emergency Session, the representative of Hungary stated: "[b]ased on our experience, it has already become quite obvious that measures such as the delivery of weapons or sanctions do not save lives. On the contrary, they contribute to the prolongation and the risk of escalation of this war, and they bring about more suffering".[56]

Cyprus has also refrained from providing military aid, also acting out of security concerns. As mentioned, other EU Member States are permanently neutral, in which during an armed conflict they must abstain from supporting either of the parties in an armed conflict and must treat them equally. This is the case of Ireland, Malta, and Austria which, as we saw above, have refrained from providing lethal equipment through the EPF. On the other hand, Finland and Sweden reversed their neutral status and are participating in providing aid and assistance to Ukraine; they have even gone as far as joining NATO.[57] Germany overturned its long-standing policy of not providing lethal equipment when the war in Ukraine broke out.

The supporting states are adamant that the military assistance provided to Ukraine is essential to uphold international norms, particularly the UN Charter. Speaking on behalf of the Nordic countries (Denmark, Finland, Sweden, Norway, Iceland) the Danish representative stated: "[w]e will not be neutral when asked to stand on the side of the United Nations Charter and on the side of the victims of aggression. As the late Archbishop Desmond Tutu said, 'If you are neutral in situations of injustice, you have chosen the side of the oppressor'".[58]

[53] About Hungary, 'FM: Hungary Maintains Ukraine Arms Delivery Ban' (8 April 2022) abouthungary.hu.

[54] A Brzozowski, 'Poland "Key" in Western Weapons Supplies to Ukraine' cit.

[55] About Hungary, 'FM: Hungary Says No to EU's Ukraine Army Training Mission' (18 October 2022) abouthungary.hu.

[56] General Assembly, 11th Emergency Special Session Verbatim Record, 18th Plenary Meeting (23 February 2023) UN Doc A/ES-11/PV.18, 2. See also About Hungary, 'State Secretary: Brussels has a simplistic view of Hungary's position on war in Ukraine' (27 April 2023) abouthungary.hu: "Hungary opposes steps that would escalate the war, he said, noting that the country does not support weapons deliveries to Ukraine".

[57] Under neutrality law, a permanently neutral state may not join a military alliance; see M Bothe, 'Neutrality' (2015) MPEPIL paras 15-17.

[58] General Assembly, 11th Emergency Special Session Verbatim Record, UN Doc A/ES-11/PV.18, cit. 1.

The French presentation similarly proclaimed: "neutrality is not possible because neutrality would be tantamount to being an accomplice of the aggressor".[59] Czechia: "I would like to appeal to all those who might be tempted today to take a neutral stance or to those who believe that it is not 'their' war: if we do not act now, we are accepting a new international order based on use of brutal force and on colonialism".[60]

Furthermore, states' positions have shifted over time as the conflict drags on. They were initially unwilling to provide Ukraine with weapons that could be used to attack Russia on its territory, their main concern being that this would make them parties to the conflict or that Russia would perceive this as an escalation. For instance, although Poland is one of Ukraine's staunchest supporters (it is considered the main supplier of heavy weaponry[61]), it has been reluctant to equip it with MiG-29 planes because doing so would mean they are party to the conflict.[62] The Czech Republic and Poland were among the first NATO Member States to deliver tanks.[63] However, other countries were more hesitant. The provision of Leopard 2 tanks (which defend specifically against the Russian T-72 tanks that are deployed in Ukraine) was hotly debated, and then in January 2023, after much deliberation,[64] the German government approved of supplying them and allowed other countries to do likewise.[65] Following this announcement, the Netherlands,[66] Denmark, Poland,[67] Finland,[68] Norway,[69] Portugal, Spain and Sweden[70] also committed to sending Leopard 2 tanks.[71]

[59] *Ibid*. 4; see also statement by French President Macron: "I also know that some countries represented here have remained neutral with regard to this war. I want to say to tell them as clearly as possible today that those who wish to take up the cause of the non-aligned by refusing to express themselves clearly are mistaken and bear a historic responsibility" at General Assembly, 77th Session, 4th Plenary Meeting, Official Records, (20 September 2022) UN Doc A/77/PV.4*, 45-46.

[60] General Assembly, 11th Emergency Special Session Verbatim Record, UN Doc A/ES-11/PV.18 cit. 9.

[61] C Mills, 'Military Assistance to Ukraine Since the Russian Invasion' cit. 53.

[62] M Piątkowski, 'The Saga of the Polish MiG-29' cit.

[63] R Gramer, J Detsch, and A MacKinnon, 'The West Finally Starts Rolling Out the Big Guns for Ukraine' (15 April 2022) Foreign Policy foreignpolicy.com; CTV News, '"Better Late than Never": Polish PM Applauds West for Sending Tanks to Ukraine' (27 January 2023) www.ctvnews.ca.

[64] L Baldor and T Copp, 'Defense Chiefs Fail to Resolve Dispute on Tanks for Ukraine' (20 January 2023) AP News apnews.com.

[65] F Jordans, K Griesaber and S Kullab, 'US, Germany to Send Advanced Tanks to Aid Ukraine War Effort' (25 January 2023) AP News apnews.com.

[66] Netherlands Ministry of Defence, Press Release 'Nederland koopt Leopard-2 tanks voor Oekraïne' (20 April 2023) www.defensie.nl.

[67] CTV News, '"Better Late than Never"'cit.; Reuters, 'Poland has Delivered Tanks to Ukraine, Government Announces on War's First Anniversary' (24 February 2023) www.reuters.com.

[68] Finnish Ministry of Defence, Press Release, 'Finland Donates Defence Materiel Assistance to Ukraine Including more of Mine-Clearing Leopard 2 Tanks' (23 March 2023) www.defmin.fi.

[69] The Local, 'Norway to Send Eight Leopard Tanks to Ukraine' (14 February 2023) www.thelocal.no.

[70] Sweden, Ministry of Defence, Press Release, 'Heavy Advanced Weapons to Ukraine in New Support Package' (24 February 2023) www.government.se.

[71] See further C Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit.

Committing long-range missions was also a sensitive issue. In an interview on 3 December 2022 with TF1, Macron reiterated his support for Ukraine. France would continue to send weapons alongside other European countries and the US, but it would not deliver weapons that would allow Ukraine to attack Russia on its own territory.[72] This changed in July 2023, when Macron announced France "[has] decided to deliver new long-range strike missiles to Ukraine", SCALP missiles (also known as Storm Shadow) that have a range of 250 km.[73] In so doing, it joined the UK, which also committed to supplying Ukraine with Storm Shadow missiles in May 2023.[74]

At the time of writing, Ukraine is scheduled to receive F-16 fighter jets, which have been on its "wish list" for a while. After receiving the greenlight from the US, Denmark and the Netherlands have announced they will transfer the fighter jets once the Ukrainians can fly them.[75] Alongside Luxembourg, Norway, Belgium, Portugal, Poland, Romania, Sweden they will train Ukrainian pilots to use F-16s.[76] These countries have joined forces with Canada and the United Kingdom to form a joint coalition to train the Ukrainian Air Force to use F-16s.[77]

II.2. The United States of America, the United Kingdom and Canada

The EU and European countries are not alone in supporting Ukraine through weapons and training. As discussed in this section, two of the main contributors to Ukraine's military efforts are the US and the UK, and Canada is also a significant contributor. The three countries are NATO Member States. Like the EU, NATO is an important organisation through which states express their commitment to assist Ukraine in its exercise in self-defence and coordinate their efforts.[78] Out of 27 EU Member States, only five are currently not part of NATO: Ireland, Austria, Cyprus, Malta, and Sweden. However, Sweden's accession to NATO has been approved.[79] NATO members that are not part of the EU are Turkey, the UK, the US, Albania, Canada, Iceland, Norway, Montenegro, North Macedonia. This section will review the assistance provided by the US, the UK and Canada.

[72] TF1, 'Emmanuel Macron sur TF1: son interview en intégralité' (3 December 2022) www.tf1info.fr.

[73] L Kayali and H van der Burchard, 'France and Germany Pledge more Weapons for Ukraine' (11 July 2023) Politico www.politico.eu; B Gabel, '"A Strong Gesture": French Delivery of SCALP Missiles to Ukraine Marks Shift in Western Strategy' (13 July 2023) France 24 www.france24.com.

[74] C Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 20.

[75] J Lukiv, 'Ukraine War: US Allows Transfer of Danish and Dutch F-16s War Planes to Kyiv' (18 August 2023) BBC www.bbc.com.

[76] US Department of Defense, 'Defense Contact Group Remains Steadfast on Ukraine Support' (25 May 2023) www.defense.gov.

[77] Danish Ministry of Defence, 'Statement on a Joint Coalition on F-16 Training of the Ukrainian Air Force' (11 July 2023) www.fmn.dk.

[78] For an overview of NATO's support to Ukraine, see the NATO, *Relations with Ukraine* www.nato.int.

[79] Although at the time of reviewing the article, Sweden has not yet joined the alliance as Hungary stills needs to ratify Sweden's membership: L Bayer, 'Why is Orbán Blocking Sweden's Entry to Nato – and What Happens Next?' (24 January 2024) The Guardian www.theguardian.com.

The US has been a key player in assisting Ukraine's military operations in self-defence against Russia, not only in terms of the equipment provided but also in coordinating assisting states' efforts. It was already providing military assistance to Ukraine prior to February 2022. In January that year, the US Department of Defense had delivered "Javelin missiles, other anti-armour systems, ammunition and non-lethal equipment", as well as Mi-17 helicopters.[80] Concerned that a Russian attack was imminent, the US Department of State cautioned that: "if Moscow does move forward with its aggression, we are prepared and our Ukrainian partners will be prepared with what they need to defend themselves. That is why we have provided the defensive security assistance that we have to Ukraine".[81]

Since then, US supplies have only increased. In July 2023, the Department of Defense published a three-page list of the aid and assistance that has been committed to Ukraine since 22 February 2023. It includes: Stinger anti-aircraft systems, Javelin and other anti-armour systems, High Mobility Artillery Rocket Systems (HIMARS) and ammunition, 155mm Howitzers, 122mm GRAD rockets, rocket launchers and ammunition, precision guided rockets, one Patriot air defence battery and munitions, National Advanced Surface-to-Air Missile Systems (NASAMS) and munitions, HAWK air defence systems and munitions, as well as RIM-7 and 20 avengers for air defence, high speed anti-radiation missiles, various artillery rounds, mortar systems and unmanned aerial systems, tank ammunition, etc.[82] General Mark Milley explained on 18 July 2023 that the

> "latest security assistance package includes substantial provision of additional artillery munitions, to include HIMARS and air defense weapons, such as Patriot missiles. It also includes a broad range of artillery systems and munitions, anti-armor munitions, precision aerial munitions, demolitions, and various other supplies that are necessary to keep Ukraine in the fight.
> In combination, this training and equipment enables Ukraine to have the capacity and the capability to defend itself. U.S. security assistance to Ukraine now totals over [...] $40 billion...".[83]

The US played a strategically important role in ensuring that Ukraine received Leopard 2 tanks. In an effort to convince Germany to transfer this equipment to Ukraine, President Biden announced that the US would send Abrams tanks in January 2023 in order to help

[80] C Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 27.

[81] US Department of State Press Briefing, 'Remarks by Ned Price, Department Spokesperson' (27 January 2022) www.state.gov.

[82] US Department of Defense, 'Fact Sheet on U.S. Security Assistance to Ukraine' (25 July 2023) media.defense.gov.

[83] US Department of Defense, 'Secretary of Defense Lloyd J. Austin III and Joint Chiefs of Staff Chairman General Mark A. Milley Hold Press Conference Following Virtual Ukraine Defense Contact Group Meeting' (18 July 2023) www.defense.gov.

Ukrainians defend their territory and prepare for a counter-offensive.[84] On the other hand, whereas Ukraine has requested ATCAMs, the Biden administration was reluctant to provide them as this would give Ukrainian forces the ability to strike within Russia – which assisting states do not want to facilitate as they fear this could lead to escalation. The concern appeared to be linked to their party status, as sending such weapons may put them at war with Russia.[85] However, the US government eventually changed its approach and supplied them to Ukraine.[86]

The US also participates in training Ukrainian armed forces. In June 2023, General Milley claimed that the US has trained around 11 000 Ukrainian soldiers.[87] In July, the total number of soldiers trained by states supporting Ukraine was reportedly 63 000.[88] The US is training Ukrainian soldiers to use fighter jets and has announced that it will allow allies to transfer F-16s to Ukrainian forces once they are able to fly them.[89] It is also reported to have provided Ukraine with intelligence that has enabled it to carry out strategic strikes against Russian armed forces.[90]

The US is by far the largest military donor (providing €42.1 billion), with Germany coming in second, and the UK third (€6.6 billion).[91] In terms of financial support, the UK is also the third biggest donor (after the EU and the US). The British government had already begun supplying Ukraine with lethal equipment in January 2022, when there were concerns that Russia would launch an invasion. The then British Defence Secretary, Ben Wallace, specified that this aid would be used for defensive purposes only.[92] Prior to the

[84] LC Baldor, T Copp, and A Madhani, 'Despite Concerns, US to send 31 Abrams Tanks to Ukraine' (25 January 2023) AP News apnews.com; it is anticipated that they will be delivered by fall 2023: US Department of Defense, 'Ukrainians to Get U.S. Tanks by Fall' (21 March 2023) www.defense.gov.

[85] T Wheeldon, 'Why the US Declined to Send Ukraine Long-Range Missiles, Tanks' (22 December 2022) France 24 www.france24.com.

[86] N Bertrand and O Liebermann, 'US Has Provided Ukraine Long-Range ATACMS Missiles, Sources Say' (18 October 2023) CNN edition.cnn.com.

[87] D Vergum, 'Nations Step Up With New Ukraine Military Assistance' (15 June 2023) US Department of Defense www.defense.gov.

[88] J Garamone, 'Ukraine Defense Contact Group Members Remain Unified in Support to Kyiv' (18 July 2023) US Department of Defense www.defense.gov.

[89] E Schmitt, J Ismay, and L McCarthy, 'Allies to Be Allowed to Send F-16s to Ukraine, U.S. Official Says' (17 August 2023) The New York Times www.nytimes.com.

[90] J E Barnes, H Cooper and E Schmit, 'U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say' (4 May 2022) The New York Times www.nytimes.com: "U.S. intelligence support to the Ukrainians has had a decisive effect on the battlefield, confirming targets identified by the Ukrainian military and pointing it to new targets"; K DeYoung, 'An Intellectual Battle Rages: Is the U.S. in a Proxy War with Russia?' (18 April 2023) The Washington Post www.washingtonpost.com.

[91] Per the Kiel Institute, *Ukraine Support Tracker* cit.

[92] "the UK is providing a new security assistance package to increase Ukraine's defensive capabilities [...] Ukraine has every right to defend its borders, and this new package of aid further enhances its ability to do so. Let me be clear, this support is for short-range and clearly defensive weapon capabilities. They are not strategic weapons and pose no threat to Russia. They are to use in self-defence" from UK

conflict, British forces were in Ukrainian territory to train UAF. These troops returned to the UK when the war broke out.

The UK continued to provide Ukraine with support following Russia's aggression, which included next generation light anti-tank weapons, anti-tank javelin missiles, a Starstreak air defence system, missiles, Challenger II main battle tanks,[93] Storm shadow missiles, Harpoon anti-ship missile systems, M270 multiple-launch rocket systems with ammunition, M-109 self-propelled artillery units, drones, AMRAAM rockets, etc.[94] It was the first country to provide Ukraine with long-range missiles.[95] In May 2023, it committed to giving Ukraine long-range attack drones, which have a capability to reach a target within 200 km, and Storm Shadow missiles, which have a range of 250 km.[96] The UK is also hosting a training programme, Operation Interflex, where various supporting countries are also participating.[97] It is reported that more than 11 000 Ukrainian soldiers were trained by the UK in 2022 and the British have committed to training 20 000 more in 2023.[98] The programme includes training Ukrainian fast jet pilots, although at the time of writing the UK is not providing F-16s. Speaking on the aid and assistance donated to Ukraine, then British PM Liz Truss stated in September 2022: "[n]ew weapons from the United Kingdom are arriving in Ukraine [...] We will not rest until Ukraine prevails".[99]

Both the US and the UK play important coordinating roles, alongside Poland. As discussed below (section III.1), they have helped set up the Ukraine Defence Contact Group, the International Donor Coordination Centre, and the International Fund for Ukraine.[100]

Canada is the tenth biggest donor of military equipment, total aid amounting to $CAD 1.8 million (or €1.66 billion),[101] and is also involved in training Ukrainian soldiers. CAF have been involved in training UAF since 2015, which is when Operation UNIFIER was first created.[102] Members of the Canadian Armed Forces are currently training UAF in Poland, the

Parliament, Commons Chamber, 'Ukraine, Volume 707: Debated on Monday 17 January 2022', column62, hansard.parliament.uk quoted in C Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 12.

[93] UK Government, Press Release, 'PM Accelerates Ukraine Support Ahead of Anniversary of Putin's War' (14 January 2023) www.gov.uk.

[94] C Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 10-11 listing the equipment provided, see also *ibid*. 13 ff.

[95] *Ibid*. 11.

[96] *Ibid*. 20.

[97] *Ibid*. 11: these countries are the Netherlands, Canada, Sweden, Finland, Norway, Denmark, Lithuania, New Zealand and Australia.

[98] *Ibid*. 22.

[99] General Assembly, 77th General Debate Verbatim Record, 7th Plenary Meeting (21 September 2022) UN Doc A/77/PV.7, 48.

[100] C Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 7-10.

[101] This is according to Government of Canada, 'Canadian Donations and Military Support to Ukraine' www.canada.ca.

[102] Government of Canada, *Operation UNIFIER* www.canada.ca.

UK and Latvia. In addition to training, they are involved "in various roles such as the provision and coordination of training, national command support, and the facilitation and delivery of military donations to Ukraine".[103] Per the Canadian government's website: "Canada's military contributions, including training, equipment, and transport, have been integral in Ukraine's counter offensive to-date, and [Canada] will continue to provide Ukraine with the support it needs to defend its sovereignty, freedom, and independence".[104]

The intention to remain committed to Ukraine's efforts to defend itself against Russia's invasion is frequently reiterated by supporting states. For instance, in a communiqué issued following a NATO summit in Vilnius on 11 July 2023 NATO Member States announced:

> "We reaffirm our unwavering solidarity with the government and people of Ukraine in the heroic defence of their nation, their land, and our shared values. We fully support Ukraine's inherent right to self-defence as enshrined in Article 51 of the UN Charter. We remain steadfast in our commitment to further step up political and practical support to Ukraine as it continues to defend its independence, sovereignty, and territorial integrity within its internationally recognised borders, and will continue our support for as long as it takes. We welcome efforts of all Allies and partners engaged in providing support to Ukraine".[105]

Also in July 2023, the G7 published a joint declaration of support for Ukraine, affirming they "will stand with Ukraine as it defends itself against Russian aggression, for as long as it takes".[106] The states committed to: "[e]nsuring a sustainable force capable of defending Ukraine now and deterring Russian aggression in the future, through the continued provision of security assistance and modern military equipment [...]; training and training exercises for Ukrainian forces; intelligence sharing and cooperation; support for cyber defense, security, and resilience initiatives".[107]

Having reviewed the military aid and equipment provided by the EU, its Member States and some of their allies, the next section addresses how Russia has responded to these policies.

II.3. Russia's response

In general, Russia appears to be tolerating the support states are providing to Ukraine, while warning these states that the military equipment they send to Ukraine will be seen as "legitimate military targets" and they run the risk of becoming parties to the conflict.

Russia reportedly sent a diplomatic note to the US and other countries supplying military aid and equipment in April 2022, warning them against providing such support which

[103] Government of Canada, 'Canadian Donations and Military Support to Ukraine' cit.
[104] *Ibid*.
[105] The statement is available online: NATO, 'Vilnius Summit Communiqué' (11 July 2023) www.nato.int.
[106] Government UK, 'Joint Declaration of Support for Ukraine' (12 July 2023) assets.publishing.service.gov.uk.
[107] *Ibid*.

Russia would view as a legitimate target.[108] While some of the supplies had apparently been targeted in Ukraine, some raised the question as to whether Russian forces would "try to hit the supply convoys themselves and perhaps the NATO countries on the Ukrainian periphery".[109] Russia continuously warned that it would consider sending long-range missiles to Ukraine as a threat[110] and that it would view states sending these weapons as party to the conflict,[111] which was one of the reasons supporting states were hesitant to send such aid to Ukraine. When it was announced these weapons would be sent in Spring 2023, Russia announced it views them as "legitimate military targets".[112] In March 2022, the Defence Ministry spokesman Igor Konashenkov said that if any country provides airfields for Ukraine's military aviation with subsequent use against the Russian armed forces it "may be regarded as the involvement of these states in an armed conflict".[113]

In May 2022, Vyacheslav Volodin, speaker of the Russian Duma, stated that "Washington is essentially coordinating and developing military operations, thereby directly participating in military actions against our country".[114] This position appears to be shared by the Russian government. In September 2022, Russian Foreign Minister Sergei Lavrov told *Newsweek*:

> "Today, Western states funnel weapons and military hardware into the neo-Nazi regime in Kiev, and train Ukraine's armed forces. NATO and U.S. arms are used to fire at the Russian territory bordering Ukraine, killing civilians there. The Pentagon does not hide the fact of passing on to Kiev intelligence and target designations for strikes. We record the presence of American mercenaries and advisers 'in the battlefield.' The United States, in fact, is teetering on the brink of turning into a party to conflict".[115]

[108] K DeYoung, 'Russia Warns U.S. to Stop Arming Ukraine' (15 April 2022) Washington Post www.washingtonpost.com.

[109] *Ibid*. quoting George Beeb, former director of Russia analysis at the CIA and advisor to Dick Cheney. See also Reuters, 'Russia Targets Ukraine's Missiles as Western-Supplied Weapons Bite' (18 July 2022) www.reuters.com.

[110] Tass, 'Fuss over Arms Deliveries to Kiev Aims to Stretch out Conflict in Ukraine, Putin Says' (5 June 2022) tass.com.

[111] Al Jazeera, 'Russia Warns US not to Provide Longer-Range Missiles to Ukraine' (15 September 2022) www.aljazeera.com.

[112] Reuters, 'Moscow has Made clear it Sees such Weapons Supplied by the West as Legitimate Targets' (4 June 2023) www.reuters.com; T Baker, 'Russia Threatens "Military Response" after UK Gives Long-Range Missiles to Ukraine' (12 May 2023) Sky News news.sky.com.

[113] E Teslova, 'Russia Warns of Providing Airfield for Ukraine's Military Aviation' (6 March 2022) AA www.aa.com.tr.

[114] Reuters, 'Senior Russian Lawmaker says U.S. Directly Involved in Ukraine Fighting' (7 May 2023) www.reuters.com.

[115] T O'Connor, 'Exclusive: Russia's Sergey Lavrov Warns U.S. It Risks Becoming Combatant in Ukraine War' (21 September 2022) Newsweek www.newsweek.com; see also, The Ministry of Foreign Affairs of the Russian Federation, 'Foreign Minister Sergey Lavrov's remarks at a meeting of the UN Security Council on Ukraine, New York, September 22, 2022' mid.ru: "[t]he position of the states that are pumping Ukraine with

Then, when the EU announced EUMAM Ukraine in October 2022, the Russian Ministry of Foreign Affairs said that the EU has become party to the conflict. Spokeswoman Maria Zakharova is reported to have said: "[a]lmost €107 million ($104.6 million) are allocated for this venture. This step goes along with the supply of lethal weapons to the Kyiv regime, qualitatively increases the involvement of the European Union, making it, of course, a party to the conflict".[116]

Commenting on the US' supply of intelligence to Ukraine, Zakharova stated: "[t]he Americans openly admit that they are transferring satellite and other intelligence information to the command of the Armed Forces of Ukraine (VSU) virtually in real time, and that they are taking part in planning combat missions. Is this not complicity? This is a genuine hybrid war".[117]

At a press conference, she commented that the states supplying Ukraine with aid and military equipment have lost their neutral status.[118] She also expressed doubt over NATO's stance that it is not party to the conflict.[119]

During an interview in February 2023, Dimitry Peskov, the spokesman for the Kremlin, reportedly claimed the US, UK and France "are now in the same organization that is de facto fighting with us, is in a state of direct armed confrontation with us, given their weapons in Ukraine".[120] A month prior, he had said: "they have de facto become an indirect party to this conflict, pumping Ukraine with weapons, technologies, and intelligence".[121] Finally, President Vladimir Putin would have expressed a similar position, claiming that in sending "billions of dollars in weapons to Ukraine" countries are "really participating".[122]

weapons and combat equipment and training its armed forces [...] implies the direct involvement of Western countries in the Ukrainian conflict, which is turning them into its party".

[116] E Teslova, 'EU Military Assistance to Ukraine Makes it Party to Conflict: Russia' (20 October 2022) AA www.aa.com.tr; see also E Teslova, 'Russia Says EU Military Assistance Mission to Ukraine Will Make Bloc Party to Conflict' (6 October 2022) AA www.aa.com.tr; The Ministry of Foreign Affairs of the Russian Federation, 'Briefing by Foreign Ministry Spokeswoman Maria Zakharova, Moscow, October 6, 2022' mid.ru: "[i]f the proposed mission is established, the EU's involvement will be upgraded to the status of a party to the conflict".

[117] The Ministry of Foreign Affairs of the Russian Federation, 'Briefing by Foreign Ministry Spokeswoman Maria Zakharova, Moscow, October 6, 2022' mid.ru.

[118] *Ibid*.: "the states that declare their neutrality have in fact lost this status since they are actively supplying weapons or weapons procurement funding and providing political support to these extremist aspirations of the Kiev regime".

[119] *Ibid*.: "NATO leaders' statements to the effect that all arms supplies to Ukraine are bilateral and are not carried out under NATO aegis are just a smokescreen that enables the alliance to insure itself against the need to intervene on behalf of a country that is a mere tool in their confrontation with Russia".

[120] D Brennan, 'NATO De Facto at "War" With Russia in Ukraine, Kremlin Says' (28 February 2023) Newsweek www.newsweek.com.

[121] E Teslova, 'US, NATO "Indirect Party" to Ukraine Conflict with "Obvious" Involvement: Russia' (10 January 2023) AA www.aa.com.tr; see also Reuters, 'Russia is now Fighting NATO in Ukraine, Top Putin Ally Says' (10 January 2023) www.reuters.com; Reuters, 'NATO Countries a Party to Ukraine Conflict - Russia's Patrushev' (27 March 2023) www.reuters.com.

[122] A Hernandez-Morales, 'Putin Accuses NATO of Participating in Ukraine Conflict' (26 February 2023) Politico www.politico.eu.

To summarise, the Russian position is that NATO and EU Member States are not only in violation of neutrality law, but that they are also parties participating in the armed conflict alongside Ukraine.

II.4. Reactions from other States

In addition to the states listed above, Australia, New Zealand, Japan, and others are providing supporting. It is estimated that about fifty states are assisting Ukraine. This means that a large number of countries have abstained from donating military aid and equipment, and some have explicitly committed to neutrality. This is the case of Pakistan,[123] China, India,[124] Saudi Arabia, Brazil, Mexico. The African continent appears to be divided on Ukraine, with many states adopting a position of non-alignment. Part of this position comes from a lack of trust in Western policies, particularly following the aggression against Iraq in 2003 and the NATO-led intervention in Libya in 2011.[125] They also want to be able to mediate peace between Ukraine and Russia as they are concerned about the war's impact on their own countries.

Several African countries – Algeria, Burundi, Central African Republic, Congo, Eritrea, Eswatini, Ethiopia, Guinea, Lesotho, Mali, Mozambique, Namibia, South Africa, Uganda, Togo, Tanzania, Zimbabwe – abstained during the vote on UNGA Resolution ES-11/4 on the "[t]erritorial integrity of Ukraine: defending the principles of the Charter of the United Nations", which was adopted following the referendums in the regions of Donetsk, Kherson, Luhansk and Zaporizhzhia in September 2022. That said, during the explanation of the vote they recalled their support for the UN Charter and its principles.[126]

In general, votes on UNGA resolutions are not a very good indicator of countries' position on neutrality or their view of how the conflict should be addressed. It is entirely possible that states condemn Russia's aggression as well as how Western countries have responded to the war, finding that not enough is done to de-escalate the conflict and resolve it through peaceful means. For example, while Bolivia abstained it still "categorically rejected[ed] any act of aggression" but also criticised states that "speak about de-

[123] S Ali, 'Pakistan to Stay Neutral on Russia-Ukraine Conflict' (21 February 2023) The Nation www.nation.com.pk; R Grim and M Hussain, 'Secret Pakistan Cable Documents U.S. Pressure to Remove Imran Khan' (9 August 2023) The Intercept theintercept.com.

[124] P Shankar, 'What India's Position on Russia-Ukraine War Means for its EU Ties' (9 March 2022) Al Jazeera www.aljazeera.com.

[125] P-S Handy and F Djilo, 'Unpacking Africa's divided stance on the Ukraine war' (12 August 2022) issafrica.org; B Ndiaye, 'Senegal: the "Voice" of Africa in the Russian-Ukrainian Crisis, Three Questions to Babacar Ndiaye' (1 July 2022) Institut Montaigne www.institutmontaigne.org; AFP, 'War in Ukraine strains tries between Africa and West' (27 October 2022) France 24 www.france24.com.

[126] See explanations of the vote in: General Assembly, 11th Emergency Special Session, 14th Plenary Meeting (12 October 2022) UN Doc A/ES-11/PV.14; C Muronzi, 'Is Africa still "Neutral" a Year into the Ukraine War?' (26 February 2023) Al Jazeera www.aljazeera.com.

fending peace while they continue to supply weapons and promote measures that accelerate the violence".[127] Other states equally condemned the aggression but abstained because they found the resolution did not sufficiently focus on mechanisms that would ensure the peaceful resolution of the conflict.[128] Even states that vote in favour did so because they supported the spirit of the Resolution, but believed more could be done to settle the war peacefully. For instance, Bangladesh voted in favour of the resolution, but highlighted: "[w]e believe that antagonism, like war, economic sanctions or countersanctions cannot bring good to any nation. Dialogue, discussion and mediation are the best ways to resolve crises and disputes".[129] Brazil also voted in favour but felt that not enough was done to send a clear message "urging the parties to cease hostilities and engage in peace negotiations".[130]

The explanations of the vote on Resolution ES-11/6 on "Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine" during the debate at the Emergency Special Session on 22 and 23 February 2023 further illustrate that countries' positions on the war in Ukraine are more nuanced than a simple "Yes", "No", or abstention. For example, Thailand voted in favour of the resolution but cautioned:

> "More weapons escalate fighting. More fighting exacerbates human suffering. More sanctions intensify human pain and have never led to regime change. Condemnations bear no positive weight on altering behaviour or conduct. Thailand calls on all parties to step up diplomatic efforts to engage in dialogue to achieve a peaceful negotiated settlement as a way out of the Ukraine conflict. [...] Wars cannot be settled by the deployment of more lethal weapons, not unless total destruction and human casualties are the only objectives and the only option available. Wars can be settled only by engagement and dialogue and by pragmatism [...]".[131]

[127] General Assembly, 11th Emergency Special Session, 14th Plenary Meeting, cit. 18; see also comments made by Bolivian President President Arce Catacora during the General Assembly, 77th General Debate Verbatim Record, 5th Plenary Meeting (20 September 2022) UN Doc A/77/PV.5, 12-13.

[128] See, for example, General Assembly, 11th Emergency Special Session, 14th Plenary Meeting, cit.: China (4: "we stress the need for dialogue and engagement for a political settlement to the crisis in Ukraine"), Pakistan (14: "the highest priority at this moment is the immediate cessation of hostilities and the resumption of a peaceful dialogue through direct negotiations, mediation or other peaceful means to resolve the causes of the conflict and restore peace and security in Ukraine"), India (15: "With that firm resolve to strive for a peaceful solution through dialogue and diplomacy, India decided to abstain"), Thailand (16: "It is the ultimate duty and responsibility of this Organization to restore peace and normalcy of life to the Ukrainians, not through violent means but by diplomatic mechanisms that can only bring practical and lasting peace").

[129] General Assembly, 11th Emergency Special Session, 14th Plenary Meeting, cit. 16.

[130] *Ibid*. 17. Similarly, see Saint Vincent and the Grenadines at *ibid*. 10-11.

[131] General Assembly, 11th Emergency Special Session, 19th Plenary Meeting (23 February 2023) UN Doc A/ES-11/PV.19, 4.

Costa Rica regretted "the approach that has been taken to the conflict, which continues to be a military one. We also deplore the fact that investment in weapons continues to increase…",[132] yet it had nonetheless co-sponsored the Resolution and voted in favour. South Africa expressed similar reservations:

> "Today we consider yet another draft resolution on the war in Ukraine, which comes amid an influx of arms to the region, perpetuating greater acts of violence and increased human suffering. Together with the threat of nuclear war, that makes peace seem less attainable. […] are our ways and actions focused on the maintenance of peace or on creating further divisions that make the attainment of immediate peace less likely?".[133]

As did Egypt, which urged "all parties that are involved directly or indirectly in the crisis to avoid any escalation and refrain from taking any measures that would prolong the crisis or exacerbate it"'[134] China comparably commented: "sending weapons will not bring about peace – adding fuel to the fire will only exacerbate tensions, and prolonging the conflict will only force ordinary people to pay an even greater price. We hereby appeal that diplomacy and negotiation not be abandoned".[135]

Malaysia[136] and South Sudan[137] called for resolving the dispute through peaceful means. Nepal also emphasised "dialogue and diplomacy are the tools for resolving disputes and differences" and called for "the immediate cessation of hostilities and the creation of conditions for dialogue and diplomacy".[138] Indonesia[139] and Lesotho[140] expressed a similar position. Brazil also voted in favour of the resolution because it wanted to express its commitment to the principles of the UN Charter and its desire to a peaceful resolution of the conflict. It called on: "start[ing] peace talks rather than fuel[ing] the conflict. Brazil considers the call for the cessation of hostilities in paragraph 5 as an appeal to both sides to halt violence without preconditions".[141]

[132] General Assembly, 11th Emergency Special Session, 17th Plenary Meeting (22 February 2023) UN Doc A/ES-11/PV.17, 24.

[133] *Ibid*. 4.

[134] *Ibid*. 9.

[135] General Assembly, 11th Emergency Special Session, 18th Plenary Meeting cit. 18.

[136] General Assembly, 11th Emergency Special Session, 19th Plenary Meeting cit. 5.

[137] *Ibid*. 9.

[138] *Ibid*. 3. Nepal found that the draft resolution could have placed more emphasis on diplomacy and negotiation to resolve the dispute, but nonetheless voted in favour.

[139] *Ibid*. 9: "the resolution is missing the call for the two parties in conflict to pursue dialogue and diplomatic means and enter into direct peace negotiations".

[140] *Ibid*. 10: "[t]he manner in which the resolution is framed creates further distance between the warring parties and does not indicate any immediate steps for diplomatic solution or endeavours that would hasten a peaceful settlement of the conflict".

[141] *Ibid*. 5.

Angola abstained because of paragraph 9 of the Resolution, which calls for holding those responsible for war crimes on Ukrainian territory.[142] It explained: "[t]he Republic of Angola defends the notion of accountability for crimes committed by any of the parties. However, we do not think that this is the right time to include such a paragraph in the draft resolution [...] We would like to reiterate that the Republic of Angola is of the opinion that conflict resolution between Russia and Ukraine can be achieved only through dialogue".[143]

Nigeria expressed similar reservations but nonetheless voted in favour.[144]

India and Pakistan both abstained, finding that the resolution did not do enough to promote a genuine peace between the parties.[145] Cuba abstained because it found the Resolution did not sufficiently call for diplomacy and negotiation, and it also did not to support a resolution that would be a potential "legal basis to justify the eventual creation of tribunals for national and international prosecutions".[146] It also accused the US and NATO of adding fuel to the fire by "the increasing flow of arms, aggressive rhetoric and unilateral sanctions".[147]

II.5. Conclusion

A substantial amount of military aid, equipment and support has been provided by the EU, as well as by a number of its Member States bilaterally and by NATO Member States. This assistance has been justified as necessary to help Ukraine defend itself against Russian aggression. It is the first time that the EU is funding the provision of lethal military equipment and training armed forces involved in an international armed conflict on EU territory. This shift in the EU's policy raises a number of questions under public international law, which are addressed in the following section.

III. *Jus ad bellum*, neutrality law, and *jus in bello*: the need for legal coherence

The support provided to Ukraine raises three distinct but inter-related questions under *jus ad bellum*, neutrality law, and international humanitarian law. The first is whether the countries are assisting Ukraine in collective self-defence, which implies that the military aid and assistance they are providing amounts to an indirect use of force against Russia (section III.1). Another question is whether these states are in breach of neutrality law, and consequently whether they could be subjected to Russian countermeasures (section III.2). Finally, the status of supporting states and whether they are parties, or co-belligerents, is equally relevant. This is the issue that seems to concern the supporting states the

[142] *Ibid*. 4-5.
[143] *Ibid*. 5.
[144] *Ibid*. 2.
[145] *Ibid*. 10-11.
[146] *Ibid*. 8.
[147] *Ibid*. 8; see also the Democratic People's Republic of Korea, *ibid*. 11.

most, which appear to limit the extent of their aid and assistance to avoid a direct confrontation with Russia (section III.3). Each of these questions will be addressed in turn below.

III.1. Collective self-defence

It could be said that the states supporting Ukraine are acting in collective self-defence in accordance with art. 51 UN Charter.[148] While they have not officially communicated to the UNSC that they are doing so (as required under art. 51 UNC), the question still arises whether the military aid and assistance they are supplying amounts to a use of force against Russia. One wonders whether these states are engaging in force against Russia *indirectly* by supporting Ukraine's armed forces. An indirect use of force has been defined as: "aid or assistance to another state's use of force, or to an armed group's actions that would qualify as such a use if engaged in by states".[149]

In its judgment in *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice (ICJ) found that:

> "the United States has committed a *prima facie* violation of [the customary international law principle of the non-use of force] by its assistance to the *contras* in Nicaragua. By 'organizing or encouraging the organization of irregular forces or armed bands [...] for incursion into the territory of another State' and 'participating in acts of civil strife [...] in another State', in the terms of General Assembly resolution 2625 (XXV). [...] In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government[...]".[150]

The judgment then reads: "the Court is unable to consider that in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State".[151] In *Armed Activities in Congo*, the ICJ reiterated that a state that provides training and military support to an armed group engaged in an armed conflict with another state breaches the prohibition to use force. The relevant parts of the judgment read: "[...] the training and military support given by Uganda to the ALC, the military wing of the MLC, violates [...] the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda [...]".[152]

[148] A de Hoogh, 'The Elephant in the Room: Invoking and Exercising the Right of Collective Self-Defence in Support of Ukraine against Russian Aggression' (7 March 2022) Opinio Juris opiniojuris.org.

[149] MN Schmitt and WC Biggerstaff, 'Aid and Assistance as a "Use of Force" Under the *Jus ad Bellum*' (2023) International Law Studies 186, 197.

[150] ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [27 June 1986] para. 228.

[151] *Ibid*. para. 230.

[152] ICJ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [19 December 2005] paras 161-163.

In the cases cited, the bench was addressing the issue of a state (the USA/ Uganda) providing weapons and training to armed groups (the *Contras*/ Armée de Libération du Congo) involved in an internal armed conflict with another state (Nicaragua/ Democratic Republic of Congo). As the *Nicaragua* judgment clearly states, the sending of weapons does not per se constitute a use of force. It seems the Court found that a particular level of involvement needs to be met in order for military assistance to constitute a use of force, albeit indirectly. The question is whether this applies to an international conflict between two states, where third states provide support to one of the parties. Considering their contribution to Ukraine, can the supporting states be said to be indirectly using force against Russia?

For some, the analogy with the *Nicaragua* judgment does not hold. For instance, van Steenberghe argues that the ICJ's reasoning is restricted to providing support to an armed group without the territorial state's consent and is tied to the principle of non-intervention.[153] Although the ICJ's assessment was *linked* to the prohibition of intervention this does not exclude the fact that the prohibition to use of force was equally applicable.[154] The Court itself said that *both* prohibitions were at stake.[155] Others find that there is no reason why the ICJ's findings would not be applicable in an international armed conflict.[156] According to the present author, this approach is the more reasonable one. The difference between the conflicts in the *Nicaragua* and *Armed Activities* cases and the Russia-Ukrainian war is primarily the nature of the conflict. As Schmitt and Biggerstaff point out, the prohibition to use force is applicable between states and it is therefore compelling to argue that indirect uses of force can also apply between states.[157]

Clancy is not convinced that the Court's reasoning clearly stipulates that "the supply of arms to a victim of aggression can be considered to constitute the use of force against the aggressor".[158] To the extent that the ICJ was not dealing with that precise issue, it is true that its findings were not clear on that point. Moreover, as noted above, both the *Nicaragua*

[153] R van Steenberghe, 'Military Assistance to Ukraine' cit. 233.

[154] For van Steenberghe, the ICJ's findings "were intrinsically linked to the violation of the principle of non-intervention in the internal affairs of that territorial state due to such support" and cannot be applied to the situation in Ukraine; see *ibid*. 233-234.

[155] *Case Concerning Armed Activities on the Territory of the Congo* cit. para. 164: "acts which breach the principle of non-intervention 'will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations'", quoting *Military and Paramilitary Activities in and against Nicaragua* cit. paras 109-110 and 209.

[156] MN Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force' (7 March 2022) Articles of War lieber.westpoint.edu; see also MN Schmitt and WC Biggerstaff, 'Aid and Assistance as a "Use of Force" Under the *Jus ad Bellum*' cit. 197 ff.; KJ Heller and L Trabucco, 'The Legality of Weapons Transfers to Ukraine Under International Law' (2022) Journal of International Humanitarian Studies 251, 254-255.

[157] MN Schmitt and WC Biggerstaff, 'Aid and Assistance as a "Use of Force" Under the *Jus ad Bellum*' cit. 203-204.

[158] P Clancy, 'Neutral Arms Transfers and the Russian Invasion of Ukraine' (2023) ICLQ 527, 535.

judgment and the *Armed Activities* judgment suggest that the military assistance needs to reach a certain threshold to breach the prohibition to use force. This appears to be confirmed by the UNGA Declaration on Friendly Relations (Resolution 2625). We could also add Resolution 3314 on the Definition of Aggression, wherein art. 3(g) reads: "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State *of such gravity* as to amount to the acts listed above, or *its substantial involvement therein*"[159] (emphasis added).

Contributing to the debate, Schmitt and Biggerstaff suggest that the most compelling criteria is "the nature of the relationship between the aid or assistance provided and the ultimate application of force by the supported State".[160] In other words, it needs to be assessed to what extent the aid or assistance directly contributes to the use of force. They provide a non-exhaustive list of objective factors to identify when states' indirect aid and assistance qualifies as a use of force: intent, timing, causal nexus, nature of the aid and assistance, geopolitical context, and impact.[161] All these elements need to be assessed on a case-by-case basis, and each state's contribution needs to be scrutinised separately. The degree of support states have provided varies and not all of them meet all six criteria.

In the present author's view, there is clearly the intention to assist Ukraine as it defends itself against Russia. States are "purposely and consciously" supplying Ukraine with military aid and assistance to achieve this goal.[162] Writing on the EU's aid through the European Peace Facility, van Steenberghe points out that: "[t]he purpose of those arms deliveries is specific. The aim is not merely to strengthen the general military capacity of a state but to help a state to repel an armed attack".[163] This general logic can be applied to all states providing Ukraine with military aid and assistance. Schmitt and Biggerstaff however find that it is not so clearcut, particularly as assisting states appear to want to limit the consequences of their support.[164] Yet, as has been mentioned, some states' benchmarks have varied and, as the war progress, they have re-evaluated their limits *depending* on Ukraine's needs. Germany eventually agreed to send Leopard 2 tanks, and France shifted its initial position and committed to sending SCALP missiles. States are now training Ukrainian soldiers to pilot F-16s, which they then intend on donating to the UAF. Despite their initial reluctance, the intention to assist Ukraine in self-defence appears to have motivated them to adjust their policies and to commit further military aid and assistance.

[159] General Assembly, Resolution, 'Definition of Aggression', 14 December 1974, UN Doc A/RES/3314(XXIX).

[160] MN Schmitt and WC Biggerstaff, 'Aid and Assistance as a "Use of Force" Under the *Jus ad Bellum*' cit. 205.

[161] *Ibid*. 206 ff.

[162] On "intent" see MN Schmitt and WC Biggerstaff, 'Aid and Assistance as a "Use of Force" Under the *Jus ad Bellum*' cit. 206: "the clearer the intent to meaningfully contribute to a supported State's use of force, the greater the likelihood that States will consider aid or assistance a discrete use of indirect force".

[163] R van Steenberghe, 'Military Assistance to Ukraine' cit. 232.

[164] MN Schmitt and WC Biggerstaff, 'Aid and Assistance as a "Use of Force" Under the *Jus ad Bellum*' cit. 207-208.

For the most part, the timing, which is determined by how "immediate the effects of aid or assistance are felt",[165] is met. States providing aid and assistance are doing so in real time, considering Ukraine's needs on the ground.[166] For example, the US Department of Defense press releases on support provided to Ukraine consistently read: "[t]he United States will continue to work with its Allies and partners to provide Ukraine with capabilities to meet its immediate battlefield needs and longer-term security assistance requirements".[167] Announcing an increase in military aid to Ukraine, former British Defence Secretary Wallace referred to their decisions as "a calibrated response to Russia growing aggression".[168] It is reported that Canadian Minister of Defence "remains in close contact with Ukrainian officials through the Ukraine Defense Contact Group" (UDCG).[169] In fact, the UDCG allows all participating states to be in communication with Ukraine and to coordinate their efforts based on its needs. The group has been described by *Politico* as: "an under-the-radar yet central force in equipping the Ukrainian military with everything from precision rockets to main battle tank. It's also helped [Ukraine] create an ad hoc yet astonishingly modern military that would be capable of outgunning some long-standing NATO members".[170]

The first meeting of the UDCG reportedly took place on 22 April 2022 at the Ramstein Air Base in Germany, and since then regular meetings occur, either in person or virtually. The group contains around 50 countries, including all the NATO Member States. The meetings are generally chaired by US Defense Secretary Lloyd Austin, who steadily convinces hesitant countries to provide additional support.[171] Alongside the US, the UK and Poland play important coordinating roles.[172] The UK, for example, co-established the International Donor Coordination Centre, which supports the UDCG and "field[s] Ukraine's requests for weaponry, coordinate[s] the response of allies and ensure[s] the delivery of equipment into Ukraine",[173] – and the International Fund for Ukraine, which coordinates

[165] *Ibid*. 213.

[166] To quote General Mark Milley: "[o]ur close and ongoing relationship with Ukraine's military leaders has informed our process to provide a tailored timely assistance based on Ukrainian needs. [...] The speed that we have delivered security assistance is without comparison" in US Mission to NATO, 'Ukraine Defense Contact Group: Secretary of Defense Austin and Gen. Milley Press Avail' (15 June 2022) nato.usmission.gov; see also C Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 8: "[w]hile allies are in discussion with Ukrainian officials on potential weapon systems and future requirements, it has been made clear that process is led by the requirements and priorities of the Ukrainian government".

[167] US Department of Defense, 'Biden Administration Announces Additional Security Assistance for Ukraine' (25 July 2023) www.defense.gov.

[168] Oral statement to Parliament, Defence Secretary oral statement on war in Ukraine (16 January 2023) www.gov.uk.

[169] Government of Canada, 'Canadian Donations and Military Support to Ukraine' cit.

[170] L Seligman and P McLeary, 'The Little-Known Group that's Saving Ukraine' (1 May 2023) Politico www.politico.com.

[171] *Ibid*.

[172] C Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 7.

[173] *Ibid*. 8.

the purchase and transport of military equipment to Ukraine.[174] Poland is considered the main donor of the International Donor Coordination Centre and as a logistical "hub".[175] According to a report prepared for the British Parliament, it is the biggest provider of heavy weaponry.[176]

Friction reportedly emerged within the UDCG as countries disagree over the weapons to send to Ukraine. While states were initially reluctant to send Abram and Leopard 2 tanks, they eventually shifted their position. To the participating countries, it has become clear that they "would need to overcome past misgivings about arming Ukraine and commit for the long haul" if Ukraine is to successfully defend itself against Russia.[177] This not only illustrates the intention to assist Ukraine in defending itself, but that this assistance is time sensitive and is considered necessary. According to General Milley in June 2022, the immediate assistance provided had an "exceptional impact on the battlefield".[178] This remained apparent in the Spring 2023 counter-offensive, where the equipment provided was considered essential and was adjusted to Ukraine's needs on the battleground.[179] But the equipment alone is insufficient, which is why UAF requiring training from the supporting countries.[180] Based on these facts, the "causal nexus", or "directness", between the support provided and the action taken in self-defence would also be met. "Impact" is the degree in "which the support in question meaningfully contributes to, and sometimes enables, the supported State's use of force".[181] The argument could thus be made that states enabled Ukraine to carry out the Spring 2023 counteroffensive.

The geopolitical context, meaning the setting in which the assistance occurs and states' motives, also supports the claim that states are engaged in indirect self-defence. There is beyond any doubt a conflictual and hostile relationship between Russia and the EU, NATO, and their Member States, particularly those supplying Ukraine with equipment. Both sides clearly see each other as a threat, this was the case even before 24 February 2022 as demonstrated by the military build-up during the end of 2021 and beginning 2022.[182]

Where states differ significantly is on the nature of the aid and assistance. While some are providing lethal weapons and actively contribute to the training of UAF, other NATO and

[174] *Ibid*. 9.

[175] *Ibid*. 53.

[176] *Ibid*.

[177] L Seligman and P McLeary, 'The Little-Known Group that's Saving Ukraine' cit.

[178] US Mission to NATO, 'Ukraine Defense Contact Group' cit.

[179] B Gabel, '"A Strong Gesture"' cit.

[180] M Schwritz and S Kozliuk, 'Ukrainian Troops Repel Russian Attacks, and Hope Western Arms Turn the Tide' (27 April 2023) New York Times www.nytimes.com.

[181] MN Schmitt and WC Biggerstaff, 'Aid and Assistance as a "Use of Force" Under the *Jus ad Bellum*' cit. 220-221.

[182] J Mersheimer, 'The Darkness Ahead: Where the Ukraine War is Headed' (23 June 2023) mearsheimer.substack.com according to whom "[w]e are now in a war where both sides – Ukraine and the West on one side and Russia on the other – see each other as an existential threat that must be defeated".

EU Member States have limited their support to financing the EUMAM UA and the EPF, or have limited their assistance to humanitarian aid or defensive equipment only. This means that each state's impact on Ukraine's exercise of self-defence also differs. It is not because a state spends the most amount that the impact of that aid is the most significant; rather it depends on type of weapon that is sent. Poland ranks seventh in the Kiel Institute's database[183] and is Ukraine's biggest providers of heavy munition. Financially, France has contributed comparably less military aid, yet in July 2023 it pledged to send SCALP missiles, providing Ukraine with a missile that has a range of 250 km. On the other hand, ammunition is a necessary component to using force against Russian troops.

It should however be noted that sometimes states publicly promise to deliver equipment but are vague about when it will arrive.[184] For example, the US pledged Abram tanks early 2023 but these will only be delivered to Ukraine in fall 2023.[185] This arguably means that the different criteria will not be met. Again, each of the conditions proposed by Schmitt and Biggerstaff can only be assessed on a case-by-case basis.

To the present author, those states whose aid and assistance could amount to an indirect use of force are the US, the UK, and Poland. These states are providing a substantial amount of weapons as well as training on how to use them. They also play an important role in coordinating and facilitating the assistance provided,[186] and the US is reported to have supplied intelligence for targeting. All this together means they would have the biggest role in assisting Ukraine's exercise of self-defence against Russia. Other notable European contributors to Ukraine's war efforts (in terms of weapons provided, training and logistics) are Denmark, Germany, the Netherlands, France, Czechia, and the Balkan States. According to a leaked Pentagon document, "a small contingent of less than a hundred special operations personnel from NATO members France, America, Britain and Latvia were already active in Ukraine".[187] France subsequently denied any troops were in Ukraine.[188] If there are troops on the ground, this has the potentially of amounting to direct interaction between NATO Member States and Russia. Across the Atlantic, Canada plays a significant role as well.

However, none of the states involved have explicitly invoked art. 51 UNC and have not sent an official letter to the UNSC as required under that provision.[189] As argued below (section III.3), this may be because they want to avoid becoming (or being seen as)

[183] This is based on the data provided on 7/09/2023, when the Kiel Institute's database was last accessed.

[184] L Seligman and P McLeary, 'The Little-Known Group that's Saving Ukraine' cit. Canada, for example, lists its military aid as "delivered", Government of Canada, 'Canadian donations and military support to Ukraine' cit.

[185] LC Baldor, T Copp, and A Madhani, 'Despite Concerns, US to Send 31 Abrams Tanks to Ukraine' cit.

[186] According to Mills, 'Military Assistance to Ukraine since the Russian Invasion' cit. 7: "[t]he UK, US and Poland have taken a leading role in coordinating international military assistance to Ukraine".

[187] P Oltermann, 'French Defence Ministry Denies Presence of French Soldiers in Ukraine' (9 April 2023) The Guardian www.theguardian.com.

[188] L Kayali, 'France Denies Military Presence in Ukraine' (9 April 2023) Politico www.politico.eu.

[189] R van Steenberghe, 'Military Assistance to Ukraine' cit. 235, this means that the states concerned do not believe they are acting in collective self-defence.

parties to the conflict.[190] Despite this, they consistently frame their assistance in the terms of self-defence (recall sections II.1 and II.2).

The EU, as an international organisation, is not in the same position as its Member States.[191] This is due to the institutional design of the EPF and EUMAM UA. As discussed, when it comes to the transfer of lethal equipment the EU Member States, as the implementing actors, retain discretion. The EU plays a financial and coordinating role, but states decide for themselves what type of aid and assistance they wish to transfer to Ukraine and are responsible for its delivery. As such, the transfer of weapons and other aid, as well as the training of Ukrainian Armed Forces, are not attributable to the EU under neither art. 6 DARIO, as the conduct is not being carried out by an organ or agent of the EU,[192] nor under art. 7 DARIO, as the organ of the implementing states (such as the ministries of defence) have not been placed at the EU's disposal.[193] For either provision to be applicable, the relevant test would be the "direction and control" the EU and the states have over the conduct in question.[194] It cannot be said that the EU is exercising such effective control over its Member States that they are the organisation's organs. Based on the ICJ's findings, the "mere" funding and coordination would not be sufficient to constitute an indirect use of force. Finally, not all military aid and assistance provided by EU Member States is funded under the EPF; as we saw, some states contribute additional bilateral aid.

Consequently, it does not seem to the present author that the EU is responsible for an indirect use of force against Russia. Its aid and assistance may, however, breach neutrality law, discussed in the following section.

III.2. Different shades of neutrality?

Neutrality is an old area of international law. The last codification was in 1907 at the Hague Peace Conference, which resulted in the adoption of two conventions: the Rights and Duties of Neutral Powers and Persons in Case of War on Land and the Convention concerning the Rights and Duties of Neutral Powers in Naval War.

[190] *Ibid*.

[191] On this issue, see A Rasi, 'Providing Weapons to Ukraine: The First Exercise of Collective Self-Defence by the European Union?' (2024) European Papers (forthcoming).

[192] Art. 6(1) of International Law Commission, *Draft Articles on the Responsibility of International Organizations* (DARIO) reads: "[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization".

[193] Art. 7 *ibid*. reads: "[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct".

[194] International Law Commission, *Draft Articles on the Responsibility of International Organizations, with Commentaries* (2011) Commentary to Article 7, 20, para. 4.

The purpose of the law of neutrality is to prevent a conflict from escalating or extending. Neutrality is the status enjoyed by states that are not party to the armed conflict and it entails both rights and duties.[195] In terms of rights, neutral states shall remain "non adversely affected" by the armed conflict.[196] Neutrality requires that the territory of non-participating states remains inviolable; it cannot be used by states involved in an inter-state conflict.[197] In terms of duties, neutral states shall respect the principles of impartiality and non-participation; the latter requires states "abstain from supporting a party to the conflict"[198] and from "any act that may have an impact on the outcome of the conflict".[199] This can be in the form of transferring war materials, financial support, training troops, supplying intelligence or military advisors, etc.[200] It requires, for instance, that a neutral state does not transfer weapons to a belligerent.[201] It may also not allow its territory to be used by one of the belligerents participating in the conflict, lest a belligerent state uses force against it "in self-defence".[202] Humanitarian assistance, however, is permissible.

While states supporting Ukraine are constantly anxious about crossing a line and becoming party to the conflict (analysed further below in section III.3), for the most part neutrality has not been that much of a concern, save few exceptions. In Ireland, support provided to Ukraine has sparked debate about its consistency with Ireland's historical tradition of neutrality,[203] while Austria remains committed to neutrality.[204] Like Switzerland, Austria has a status of permanent neutrality. Finland, on the other hand, reversed its policy of non-alignment and has accepted that in training Ukrainian troops that it is not a neutral party: "Finnish training for Ukrainian troops indicates that Finnish neutrality is unlikely to return".[205] It also joined NATO in April 2023, marking the end of its military neutrality.

States that have supplied Ukraine with weapons, training, intelligence, or any other form of military aid and assistance are in breach of neutrality law. According to Bothe: "[v]iolations of the law of neutrality occur even where support is given to the victim of aggression, and even when it does not amount to participation in the conflict".[206] The

[195] M Bothe, 'Neutrality, Concept and General Rules' in A Peters and R Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (Oxford University Press) opil.ouplaw.com para. 1.

[196] *Ibid*.

[197] A Clapham, *War* (Oxford University Press 2022) 62.

[198] M Bothe, 'Neutrality, Concept and General Rules' cit. paras 1 and 2.

[199] *Ibid*. para. 36.

[200] *Ibid*.

[201] A Clapham, *War* cit. 72-74.

[202] *Ibid*. 64, quoting the UK Manual; see also M Bothe, 'Neutrality, Concept and General Rules' cit. para. 33.

[203] See, for instance, S Harrison, 'Ukraine: Ireland's Military Neutrality Sparks Public Debate' (9 March 2022) BBC www.bbc.com.

[204] G Cafiero, 'Austria Commits to Neutrality, even as Russia Destroys Ukraine' (15 August 2022) Al Jazeera www.aljazeera.com, noting that Austria remains neutral but "has supported Ukraine with non-lethal weapons, such as donating humanitarian assistance and protective gear".

[205] B Cole, 'Finland Offers to Train Ukraine Soldiers in Winter Warfare Against Russia' (29 November 2022) Newsweek www.newsweek.com.

[206] M Bothe, 'Neutrality, Concept and General Rules' cit. para. 5.

consequence is that they may be subjected to countermeasures adopted by the injured belligerent, in this case Russia. That said, it has been argued that in the era of the UN Charter, neutrality is no longer relevant and is instead an "optional" legal status; this doctrine is known as optional neutrality and has given rise to the position of non-belligerency. A somewhat related argument is that states can aid the victim of aggression without violating neutrality law, which is known as "qualified" or "benevolent" neutrality. As we will see, these different categories (optional neutrality, non-belligerency, and qualified/benevolent neutrality) are closely related.

It has also been suggested that if states supporting Ukraine are in breach of neutrality law, they can invoke a circumstance precluding wrongfulness, namely self-defence which was codified under art. 21 ARSIWA. This pre-supposes that those states are engaging in self-defence under art. 51 UN Charter. Each of these arguments will be reviewed in the proceeding paragraphs.

In general, "[t]he law of neutrality is binary. A State is either a belligerent or neutral; there is no legal middle ground".[207] However, the argument has been made that neutrality has lost its relevance since the adoption of the UN Charter and the prohibition to use force and is now "optional". Upcher summarises this view as follows: "[i]f the unrestricted right to go to war was the foundation of neutrality, and if that right has now been abolished, it may signal vast changes in the creation of neutral status in contemporary international law".[208] The idea is that, subject to the UN Charter, neutrality is now an "optional legal status that States are free to take up or decline as they see fit".[209] States that choose not to be neutral have a position of "non-belligerency", where a distinction is made between "neutral States" that follow the rules of neutrality *stricto sensu* and "non-belligerent parties".[210]

Non-belligerent parties that assist the victim of aggression are engaged in qualified/benevolent neutrality. According to this view, States may provide aid and assistance to the victim of an armed attack, or in this case an act of aggression, without breaching neutrality law.[211] States would be allowed to treat the aggressor and victim state differently, thereby not respecting the principles of impartiality and non-participation. Hathaway and Shapiro explain this view as follows: "[t]he end of impartiality means that states

[207] MN Schmitt, "'Strict" versus "Qualified" Neutrality' (22 March 2023) Articles of War lieber.westpoint.edu.

[208] J Upcher, *Neutrality in Contemporary International Law* (Oxford University Press 2020) 9; but see A Verdebout, *Rewriting Histories of the Use of Force* (Oxford University Press 2021), arguing that contrary to popular belief amongst international lawyers, international law was not indifferent to the use of force prior to 1945.

[209] J Upcher, *Neutrality in Contemporary International Law* cit. 10.

[210] *Ibid*. see also: R van Steenberghe, 'Military Assistance to Ukraine' cit. 239-240; A Clapham, *War* cit. 54 ff.; see also N Ronzitti, 'Italy's Non-Belligerency during the Iraqi War' in M Ragazzi, *International Responsibility Today: Essays in Memory of Oscar Schachter* (Brill 2005).

[211] P Clancy, 'Neutral Arms Transfers and the Russian Invasion of Ukraine' cit. 527: "qualified neutrality would allow neutral States to discriminate in favour of the victim of aggression while retaining their neutral status and fully conforming with their duties as a neutral"; see R van Steenberghe, 'Military Assistance to Ukraine' cit. 240-241; M Piątkowski, 'The Saga of the Polish MiG-29' cit.

are permitted to supply weapons or other support to Ukraine. Doing so violates no legal duty of neutrality [...] if anything, providing assistance to Ukraine *supports* the international legal order by allowing Ukraine to defend itself against a war of aggression".[212]
It is not universally agreed in the literature that these different legal categories are supported by state practice. Upcher rejects the notion that neutrality may be "optional" and that there are statuses such as "non-belligerent" or "non-participating" states. He writes, for instance: "[t]he prohibition of the threat or use of force in international law has had profound effects on the status of neutrality. It has not, however, led to the acceptance of an optional theory of neutrality or of a concept of non-belligerency in international law. [...] Customary international law continues to support the view that neutrality becomes obligatory for States that are not parties to an international armed conflict".[213]

Other commentators have expressed similar views.[214] Some have also voiced scepticism about "qualified neutrality", as they find it is not supported in state practice. This is (or was) the case of Heintschel von Heinegg. Writing in 2007, he found that state practice and *opinio juris* did not support "benevolent neutrality".[215] To the contrary, state practice that lends support to the emergence of qualified neutrality was rather ambiguous. States would stand to gain economically, politically, and ideologically from more relaxed interpretations of neutrality[216] and therefore not be motivated by a legal right. In many instances, they were lucky that the aggrieved belligerent had decided not to retaliate, after all it was not obliged to accept this new status.[217] Quoting Briggs, he maintained that: "'Nonbelligerency' is in reality only a euphemism designed to cover violations of international law in the field of neutral obligations".[218]

Heintschel von Heinegg's position changed entirely with Russia's invasion of Ukraine in 2022, which he held was a "game changer".[219] For him, the fact that the UNSC was

[212] O Hathaway and S Shapiro, 'Supplying Arms to Ukraine is not an Act of War' (12 March 2022) Just Security www.justsecurity.org; on the other hand, China's support to Russia aggression would violate international law because China would assist Russia in committing a grave breach of international law, see O Hathaway and R Goodman (17 March 2022) Just Security www.justsecurity.org; see also A Clapham, *War* cit. 66 ff.

[213] J Upcher, *Neutrality in Contemporary International Law* cit. 37.

[214] M Bothe, 'Neutrality, Concept and General Rules' cit. paras 9-10; see also R van Steenberghe, 'Military Assistance to Ukraine' cit. 239-240.

[215] W Heintschel von Heinegg, 'Benevolent Third States in International Armed Conflicts: the Myth of the Irrelevance of the Law of Neutrality' in *International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein* (Brill 2007); see also: L Ferro and N Verlinden, 'Neutrality during Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties' (2018) Chinese Journal of International Law 15; M Bothe, 'Neutrality, Concept and General Rules' cit.; P Clancy, 'Neutral Arms Transfers and the Russian Invasion of Ukraine' cit. 533-534: "[t]he inescapable conclusion is that qualified neutrality is not a part of contemporary international law", noting that this does not prevent the emergence of such a rule in the future.

[216] W Heintschel von Heinegg, 'Benevolent Third States in International Armed Conflicts' cit. 554.

[217] *Ibid*. 554-5.

[218] *Ibid*. 555 quoting: H W Briggs, 'Neglected Aspects of the Destroyer Deal' (1940) 34 AJIL 569-587, 569.

[219] W Heintschel von Heinegg, 'Neutrality in the War Against Ukraine' (1 March 2022) Articles of War lieber.westpoint.edu.

blocked from adopting an authoritative decision (due to the Russian veto) and that the aggression was universally condemned as unlawful meant that states were allowed to supply Ukraine, the victim of an aggression, with military aid to defend itself without violating neutrality law. It is not clear why he suddenly accepted arguments that he had previously rejected, particularly as he had continuously emphasised that differentiating between belligerents could escalate the conflict, which is exactly what neutrality aspires to prevent. Similarly, while acknowledging that the doctrine is controversial, van Steenberghe finds that benevolent neutrality fits the practice of the states supporting Ukraine and that their behaviour could contribute to the emergency of a new norm.[220]

Of course, any change in international law must be supported by state practice and *opinio juris* and must have widespread acceptance; it should not only be supported by those states engaging in the new conduct. Clancy does not find that states assisting Ukraine have said "they sincerely believed themselves to be acting based on a permissive rule of customary international law" which would contribute to the new rule.[221] In his preliminary assessment, Bartolini nonetheless finds that some states' positions lend support to qualified neutrality.[222] This would be the case of France, the Baltic and Nordic states, the USA, Germany, Greece, Luxembourg, and Romania, which have linked their support to Ukraine with collective self-defence. As of yet, they have not expressly referred to the doctrine of qualified/benevolent neutrality. Although not directly supporting Ukraine, Ghana has stated such aid and assistance is permissible under the UN Charter.

During the UNGA General Debate in September 2022, Belgian Prime Minister Alexander de Croo called upon states to consider: "[w]hat did you do to stop [to stop the war in Ukraine]? What did you do to protect the people of Ukraine? Did you look away, or did you act? In this conflict, there is no room for neutrality".[223] De Croo may be referring to the fact that states have a responsibility to react to a grave breach under international law (as per art. 41 ARSIWA), just as France, the Nordic countries and Czechia have done.[224] Austria, on the other hand, has maintained its status as militarily neutral but not politically neutral.[225] As Ralph Janik notes, this has resulted in a rather inconsistent approach as its tries to strike a balance between expressing solidarity with the EU's position (for

[220] R van Steenberghe, 'Military Assistance to Ukraine' cit. 241; see also, SP Mulligan, 'International Neutrality Law and U.S. Military Assistance to Ukraine' (26 April 2022) Congressional Research Service crsreports.congress.gov.

[221] P Clancy, 'Neutral Arms Transfers and the Russian Invasion of Ukraine' cit. 534.

[222] G Bartolini, 'The Law of Neutrality and the Russian/Ukrainian Conflict: Looking at State Practice' (11 April 2023) EJIL Talk! www.ejiltalk.org.

[223] General Assembly, Belgium, H.E. Mr. Alexander de Croo, Prime Minister (23 September 2022) gadebate.un.org.

[224] Recall *supra* footnotes 58 to 60, and accompanying text.

[225] NJ Kurmayer, 'Neutrality and Support for Ukraine: Austria's Tightrope' (3 February 2023) Euractiv www.euractiv.com.

example by adopting EU restrictive measures against Russia and allowing weapons to be transferred through its territory) while remaining permanently neutral.[226]

That said, as also noted above (section II.4), a large number of states have refrained from supporting either belligerent and have emphasised that the conflict needs to be resolved through peaceful means, even if a vast majority has condemned Russia for acting unlawfully. There needs to be a cessation of hostilities and negotiations between the warring parties without preconditions. Some states have implicitly condemned the sending of arms to Ukraine by stating that more should be done to de-escalate tensions and settle the conflict through peaceful means, while others have done so explicitly. The concern is that the conflict is escalating, with no room being made for a peaceful solution. Whereas neutrality may be politically unpopular in the states supporting Ukraine, this does not mean it is devoid of meaning or that is has become irrelevant to the rest of the world.

The result is that the states providing military aid and assistance as described at the beginning of this section are in breach of neutrality law. This equally applies to the EU, as providing financial support to one of the parties' war efforts constitutes a breach of neutrality law and the EU is the main financial contributor.[227] This may place permanently neutral states that have abstained from funding or providing any military aid and assistance in a rather awkward position, as despite their best efforts they are part of an organisation that has violated neutrality law. That said, it is doubtful that these states would share responsibility to the extent that the funding they made available did not contribute to the breach, they are not listed as the implementing actors of the lethal equipment provided and their funding was not that significant.[228] Matters are a bit more complicated for Austria, which has allowed weapons to be transferred from its territory to Ukraine. Under neutrality law, "armed forces of the parties to the conflict may not enter neutral territory. They may not in any way use this territory for their military operations, or for transit or similar purposes".[229] Whether such a transit through Austrian territory breaches neutrality law therefore depends on whether the EU is a party to the conflict, discussed below.[230]

This means Russia could adopt countermeasures in retaliation. If such countermeasures would affect neutral European states this may result in an unfair outcome.[231] Self-defence could function as a circumstance precluding wrongfulness and preclude the

[226] RRA Janik, 'Current Developments: Austrian Neutrality amid Russia's War on Ukraine' (2023) Austrian Review of International and European Law ssrn.com.

[227] M Bothe, 'Neutrality, Concept and General Rules' cit. para. 36: "*Massive* financial support for a party to the conflict also constitutes non-neutral service" (emphasis added).

[228] Note the word "massive" in *ibid*.

[229] *Ibid*. para. 30.

[230] RRA Janik, 'Current Developments' cit. 6.

[231] Note that countermeasures should not be directed against "third states" not responsible for the breach, per ILC, Articles on Responsibility of States for Internationally Wrongful Acts (2001) art. 49(1).

breaches of neutrality,[232] provided however that those states are actually engaging in collective self-defence.[233] It should be noted that invoking a circumstance precluding wrongfulness would preclude the development of a new customary norm, such as qualified or benevolent neutrality.[234] If, as argued above, the support is found to constitute a use of force, which would include indirect use of force as discussed previously (section III.1),[235] then it falls under art. 51 UN Charter and not art. 21 ARSIWA. The latter only justifies subsidiary breaches that are not the prohibition to use force.[236] If supporting states breach other international obligations when assisting Ukraine in collective self-defence then art. 21 ARSIWA is applicable. As Buchan writes, the latter: "is a secondary rule of international law and precludes State responsibility for ancillary or incidental violations of international law that occur as a result of defensive measures being taken under art. 51 UN Charter, such as breaches of the principles of territorial sovereignty and non-intervention, a treaty of amity, a trade treaty, etc".[237]

Self-defence can only be invoked as a circumstance precluding wrongfulness under the condition that action is being taken under art. 51 UN Charter. This raises the question of whether, under these circumstances, neutrality is even relevant. As van Steenberghe points out, if states are acting in self-defence then neutrality law is no longer applicable "as the assisting state would have become a (co-)belligerent due to its use of force".[238] The next section addresses this question of co-belligerency, or party status. As will be discussed, the question of party status is a vexed one and international law does not contain specific rules that determine when it is achieved.[239]

[232] This argument has been raised in some shorter commentaries: K Ambos, 'Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and thus be Exposed to Countermeasures?' (2 March 2022) EJIL Talk! www.ejiltalk.org; M Milanovic, 'The United States and Allies Sharing Intelligence with Ukraine' (9 May 2022) EJIL Talk! www.ejiltalk.org.

[233] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001), Commentary to arts 21, ~~74,~~ para. 2: "[s]elf-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision"; see further F Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility' (2015) BYIL 90, 94: "[s]elf-defence, in its incidental function as a secondary rule, serves to justify the potential infringement of [ancillary] obligations caused by the use of self-defensive force".

[234] P Clancy, 'Neutral Arms Transfers and the Russian Invasion of Ukraine' cit. 534: "[b]y invoking a circumstance precluding wrongfulness a State acknowledges that a primary rule has been breached and concedes that it was not acting pursuant to a good-faith belief as to the existence of a legal right or obligation".

[235] The implication is that states whose aid does not constitute self-defence would be in breach of neutrality law.

[236] F Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility' cit. 92; P Clancy, 'Neutral Arms Transfers and the Russian Invasion of Ukraine' cit. 534-535.

[237] R Buchan, 'Non-Forcible Measures and the Law of Self-Defence' (2022) ICLQ 1, 5.

[238] R van Steenberghe, 'Military Assistance to Ukraine' cit. 238.

[239] A Wentker, 'At War? Party Status and the War in Ukraine' (2023) LJIL 643, 647.

III.3. Party status

While states, NATO and the EU do not seem to attach that much importance to neutrality, they are deeply concerned about not being considered a party to the conflict.[240] When a state is a party, or a belligerent, then the rules of international humanitarian law apply to it. This means that combatants would enjoy prisoner of war status if captured and that its military personal and objects would be lawful targets.[241]

German foreign minister Annalena Baerbock created quite a stir when she declared: "We are at war against Russia". Germany and EU Member States quickly stepped in to clarify that they are not belligerents.[242] Yet, in March 2023 Josep Borrell similarly stated that "We are in war times".[243] In October 2022, there was a "near miss" between Russian and British forces, where a Russian fighter jet nearly shot down a British spy plane over the Black Sea.[244] When a missile landed in Polish territory and killed two civilians on 15 November 2022, everyone held their breath amidst fears that the strike had originated from Russia, which could potentially drag NATO into the conflict. Ukraine immediately blamed Russia for the incident, while the US was quick to say that the strike had originated from Ukrainian forces and was most likely an accident, thus there was no need to invoke art. 5 of the North Atlantic Treaty. According to the *Wall Street Journal*, the incident displayed the tensions surrounding states' involvement in Ukraine and the potential repercussions. The journal wrote: "[w]hile Kyiv hopes to increase the North Atlantic Treaty Organization's role in combating Russia in Ukraine, Washington and its European allies are determined to avoid steps that could trigger direct conflict between the alliance and Russia".[245] Yet, as we saw above, Russia already considers that NATO, the EU and some individual countries are party to the conflict. There is a clear tension between states' political objective to support Ukraine and this support's potential legal implications.

Some of the EU's decisions suggest it is aware of this issue. For instance, as noted above, EUMAM Ukraine marks the first time the EU is providing training to a third state on its own territory. One could speculate that the reason for this may be because it is also the first time the EU is providing training to a state that borders the EU's territory and that is the victim of aggression, and hence during an ongoing international armed conflict. If the operation was taking place on Ukrainian territory, the risk of direct military

[240] R van Steenberghe, 'Military Assistance to Ukraine' cit. 235.

[241] KJ Heller and L Trabucco, 'The Legality of Weapons Transfers to Ukraine Under International Law' cit. 263.

[242] See Deutsche Welle, 'Germany Says It Is Not a Warring Party in Ukraine' (27 January 2023) www.dw.com.

[243] Informal Foreign Affairs Council (Defence), Press remarks by High Representative Josep Borrell at the press conference (8 March 2023) www.eeas.europa.eu.

[244] B Armbruster, 'Why Aren't we Talking about Russia Almost Downing a UK Spy Plane?' (18 April 2023) Responsible Statecraft responsiblestatecraft.org.

[245] Wall Street Journal, 'Deadly Missile Strike in Poland Exposed Tension between NATO Allies in Ukraine' (3 Dec 2022) www.wsj.com.

confrontation between EU Member States and Russia would be greater. However, under *jus ad bellum*, Russia cannot target forces on German and Polish territory as this would be an unlawful use of force against these states and, inevitably, escalate the conflict. Supporting states have required reassurance from Ukraine that it will not use the aid and assistance provided to attack Russia on its territory as this could bring them in direct confrontation with Russia. This suggests that they believe their support potentially makes them a party to the conflict but that they are cautiously avoiding a spill over or an escalation with Russia. Some media commentators suggest that the EU and NATO are a *de facto* party of the war, but not *de jure* because there have no boots on the ground.[246] In other words, there is not a *direct* confrontation between the EU and NATO members states with Russian armed forces. Jens Stoltenberg, NATO's Secretary General, expressed a similar position in March 2022:

> "[…] NATO is not part of the conflict. We provide support to Ukraine, but we are not part of the conflict. We help Ukraine with upholding their right for self defence which is enshrined in the UN Charter. But NATO will not send troops into Ukraine. We have to understand that it is extremely important to provide support to Ukraine and we are stepping up, but at the same time it is also extremely important to prevent that this conflict becomes a full-fledged war between NATO and Russia".[247]

However, the situation has evolved significantly since then and states' aid to Ukraine has intensified. Some are doing everything they can to support Ukraine short of sending troops.[248] Under international law, when does a state or organisation become party to a conflict?

Somewhat counterintuitively, "[v]iolating neutrality does not necessarily bring an *end* to neutrality" and does not mean that a state has acquired belligerent status.[249] This is confusing because neutrality law distinguishes between neutral states and parties. Would it not make sense that a breach of neutrality law means a state is a belligerent? The fact is that a threshold needs to be met to become party to a conflict. According to Bothe: "[o]nly where a hitherto neutral State participates to a *significant* extent in hostilities is there a change of status".[250] There are debates on what this threshold is and how significant the participation needs to be. As discussed above, to the extent that the military aid and assistance provided to Ukraine is considered a use of force, albeit indirect,

[246] See this discussion DW News, to the Point, 'As the war in Ukraine escalates, will NATO soon be party to the conflict?' www.youtube.com at about 20".

[247] NATO, 'Press Conference, by NATO Secretary General Jens Stoltenberg Previewing the Extraordinary Summit of NATO Heads of State and Government' (23 March 2022) www.nato.int.

[248] Although there have been reports that some states have sent small contingents on Ukrainian territory, see L Kayali, 'France Denies Military Presence in Ukraine' cit.

[249] N Weizmann, 'Associated Forces and Co-Belligerency' (24 February 2015) Just Security www.justsecurity.org; A Wentker, 'At War?' cit. 648.

[250] M Bothe, 'Neutrality, Concept and General Rules' cit. para. 26 emphasis added.

then the argument can be made that these states are party to the conflict. Nonetheless, the majority position finds a state becomes a party when it provides a *direct* contribution to one of the belligerents.

The ICTY's findings in the *Tadic* case carry important weight in this discussion, where the Appeals Chamber stated that an international armed conflict exists when there is "resort to armed force between states".[251] For many, such force needs to be direct and "requires acts of a particular nature or quality".[252] According to Hathaway and Shapiro: "[s]tates would become parties to the international armed conflict between Russia and Ukraine if, and only if, they resort to armed force against Russia".[253] Equipping and financing is not enough, there need to be direct hostilities.[254] If a third state allows a belligerent to use its territory this could be a form of direct participation, but it depends on how the territory is used. If a military operation is launched from a third state's territory (such as Belarus which allows Russia to attack Ukraine through its territory) then this state can be considered a belligerent. With regard to allowing arms to be transferred on a state's territory, or allowing military personal to be trained, it depends on whether these forms of participation are considered sufficient to meet party status.

Wentker proposes two criteria to assess whether states are party to an ongoing international armed conflict. State parties are those that *i)* provide an operational contribution to the hostilities that is directly connected to harm caused to an adversary and *ii)* that is co-ordinated with other co-belligerents.[255] The contribution required in the first element demands "a relationship of 'directness' to harm to the adversary".[256] The level of "directness" can be assessed by asking "whether the acts directly cause harm to the adversary in one step, or form an integral part of co-ordinated military operations that do so".[257] The second element is necessary to argue that the co-parties are involved in the same conflict and are not involved in separate conflict against a common enemy;[258] co-ordination "connects partners' acts such that they intertwine as contributions to one conflict".[259] According to Wentker, if these elements are met "party status is an automatic legal consequence, independent of whether parties intend, know, or accept that consequence".[260] This is consistent with IHL that an armed conflict is established on the basis of facts and not the subjective assessment the parties involved.

[251] ICTY, *Prosecutor v Dusko Tadic*, Appeals Chamber, Decision on the defence Motion for Interlocutory Appeal on Jurisdiction, (2 October 1995), IT-94-1, para. 70.

[252] A Wentker, 'At War?' cit. 649.

[253] O Hathaway and S Shapiro, 'Supplying Arms to Ukraine is not an Act of War' cit.

[254] Also argued by R van Steenberghe, 'Military Assistance to Ukraine' cit. 236.

[255] A Wentker, 'At War?' cit.

[256] *Ibid*. 650.

[257] *Ibid*.

[258] *Ibid*. 650-1.

[259] *Ibid*. 651.

[260] *Ibid*. 651.

Based on these two conditions, providing weapons and training would not make EU Member States and the US party to the conflict as these contributions do not directly harm the Russian adversary; "only the actual use of weapons causes harm to Russia".[261] Heller and Trabucco agree that providing weapons is insufficient to reach belligerency status.[262] Conversely, providing intelligence in real time that assists Ukrainians in targeting is a direct contribution that is co-ordinated with one of the belligerents.[263] It depends, however, on the quality of the information provided and to what extent it assists Ukraine in targeting Russian military objectives.[264]

Nevertheless, it is submitted that the above understanding of "directness" is somewhat narrow. As discussed above, albeit in the context of *jus ad bellum*, there are different degrees of "causal directness". Although there may be a step between the aid and assistance provided and the fighting, this does not mean that there is no proximity. As another commentator notes: "the state that supplies weapons but whose personnel provide advice and assistance in the use of the weapons can also become a party to the conflict".[265] It has also been noted that: "any indirect military engagement that would consist of taking part in the planning and supervision of military operations of another State suffices to establish co-belligerency".[266] This seems to be the case for a number of countries, particularly those not only supplying military equipment and technology, but that are also providing training, logistical support, and who are in close communication with the UAF. The support provided has significantly enhanced Ukraine's ability to fight against Russian forces.

Weizmann offers a different perspective: "the *systematic or substantial* supply of war materials, military troops, or financial support in association, cooperation, assistance or common cause with another belligerent would make it a co-belligerent".[267] In other words, a state becomes a party if there are "systematic or substantial violations of its duties of impartiality and non-participation".[268] As noted, the purpose of neutrality is to prevent a state "from being involved in an ongoing international armed conflict and to

[261] *Ibid*. 653.

[262] KJ Heller and L Trabucco, 'The Legality of Weapons Transfers to Ukraine Under International Law' cit. 265.

[263] A Wentker, 'At War?' cit. 653-4.

[264] A Wentker, 'At War: When Do States Supporting Ukraine or Russia become Parties to the Conflict and What Would that Mean?' (14 March 2022) EJIL: Talk! www.ejiltalk.org; M Milanovic, 'The United States and Allies Sharing Intelligence with Ukraine' (9 May 2022) EJIL Talk! www.ejiltalk.org.

[265] M Krajewski, 'Neither Neutral nor Party to the Conflict? On the Legal Assessment of Arms Supplies to Ukraine' (9 March 2023) Völkenrechtsblog voelkerrechtsblog.org.

[266] J Grignon, '"Cobelligerency", Or When Does a State Become a Party to an Armed Conflict?' (2022) IRSEM Strategic Brief 1, 2, quoted in KJ Heller and L Trabucco, 'The Legality of Weapons Transfers to Ukraine Under International Law' cit. 264.

[267] N Weizmann, 'Associated Forces and Co-Belligerency' cit. emphasis added. This threshold was first provided by C Bradley and J Goldsmith, 'Congressional Authorization and the War on Terrorism' (2005) HarvLRev 2047, 2112.

[268] *Ibid*.

prevent any extension of that conflict".[269] If a state consistently violates neutrality, and does so to the extent that they are sustaining the fighting, it becomes more difficult to deny their involvement in an armed conflict. Wentker, like many others, finds that as neutrality law and party status under *jus in bello* are two distinct areas of international law they are best kept separate.[270] Schmitt has expressed scepticism over the "systematic or substantial violations of neutrality" threshold and stated one should look at the underlying actions, writing that "violations of a neutral's obligations by providing military materiel does not *per se* trigger *co-belligerency* status".[271] However, he acknowledges: "at a certain point, support to a belligerent will make the supporting State a party to the conflict. […] some situations are obvious, such as when a supporting State is involved in joint planning of, and provides assistance essential to, another State's combat operation that would trigger an IAC if conducted alone by the supporting State".[272]

Various states appear to be providing aid and assistance that amounts to "joint planning" and that is "essential" to Ukraine's military operations. Moreover, if force can be used indirectly, why would it not be possible for a state to become a party through indirect participation? Although these questions fall under two separate areas of international law, it is hardly logical that a state would be responsible for using force but not be a party to a conflict. Per *Nicaragua* and *Armed Activities*, providing military equipment and training can constitute indirect use of force when it reaches a certain threshold. To the extent that force is used in an international armed conflict, it is a logical consequence that the state becomes party to the conflict. This is a more holistic and consistent approach to *jus ad bellum* and *jus in bello*.

The fact that states were reluctant to provide Ukraine with weapons that can be used in Russian territory suggests that they are aware that such assistance edges them closer to party status. This is the case of ATACMs, which President Biden declined to send to Ukraine, stating: "[w]e're not looking to go to war with Russia".[273] As we saw, despite similar misgivings,[274] France announced in July 2023 that it will send SCALP/Storm Shadow missiles to Ukraine. From an IHL perspective, does it matter if the weapons and training enable Ukraine to fight Russian armed forces in the exercise of self-defence on Ukrainian territory or Russian territory? The distinction is clearly politically significant as states do not want to be perceived as being at war against Russia.

Despite these concerns, it seems to the present author that the support that has been provided to Ukraine is, when taken as a whole, systemic and substantial. Ukraine is clearly dependant on the aid and assistance provided by the West in military operations

[269] R van Steenberghe, 'Military Assistance to Ukraine' cit. 238.
[270] A Wentker, 'At War?' cit. 648.
[271] MN Schmitt, 'Providing Arms and Materiel to Ukraine' cit.
[272] *Ibid*.
[273] T Wheeldon, 'Why the US Declined to Send Ukraine Long-Range Missiles, Tanks' cit.
[274] TF1, 'Emmanuel Macron sur TF1' cit.

against Russia. Not only are Western states providing Ukraine with lethal weapons, they are also ensuring that UAF are trained to use them and in some cases providing them with intelligence that is used for targeting. In training Ukrainian Armed Forces, they are to become a "NATO-standard fighting force" that demonstrates that "the American way of warfare [...] is superior to [...] the Russian approach".[275] Some supporting states are also deeply implicated in how Ukraine is conducting its counteroffensive and using the donated military aid and equipment. For example, a *New York Times* article recounts how Ukrainian allies are concerned that Ukraine has become "casualty adverse" and their tactics may cause them to "race through precious ammunition supplies".[276] This could suggest that they give military advice to Ukraine on how to combat Russian forces.

Furthermore, to the extent that Ukraine would not be able to sustain the conflict without third party assistance, does it not logically hold that those states are party to the conflict? Western policymakers have continuously and consistently emphasised Ukraine's military efforts are heavily dependent upon the support provided. Underscoring the importance of the West's support, previous British Defence Secretary Ben Wallace claimed in January 2023:

> "President Putin believed the West would get tired, bored and fragment. Ukraine is continuing to fight and, far from fragmenting, the West is accelerating its efforts. [...] [I]f we're to continue helping Ukraine seize the upper hand in the next phase of this conflict, we must accelerate our collective efforts diplomatically, economically and militarily to keep the pressure on Putin. [...] Today's package is an important increase in Ukraine's capabilities. It means they can go from resisting to expelling Russian forces from Ukrainian soil. [...] We believe that in 2023, increased supplies, improved training, and strengthening diplomatic resolve will enable Ukraine to be successful against Russia [...]".[277]

In June 2023, Josep Borrell reaffirmed Member States' "commitment to support Ukraine, doubling down on equipment and training, so that everything is done in order to support the counteroffensive that Ukraine is doing".[278] Regarding the US, as reported by the *Washington Post* in April 2023, leaked documents demonstrated that: "the United States is involved in virtually every aspect of the war, with the exception of U.S. boots on the ground. [...] [T]he administration has given Ukraine more than $40 billion in military and economic aid, along with real-time targeting assistance and sophisticated weapons systems on which it has trained Kyiv's forces".[279]

[275] H Cooper and E Schmitt, 'Ukraine's Western-Trained Brigades Begin to Enter the Fight' (23 June 2023) New York Times www.nytimes.com.

[276] H Cooper, T Gibbons-Neff, E Schmitt and J E Barnes, 'Troop Deaths and Injuries in Ukraine War Near 500,000, U.S. Officials Say' (18 August 2023) New York Times www.nytimes.com.

[277] Oral statement to Parliament, Defence Secretary oral statement on war in Ukraine cit.

[278] EU External Action, 'Foreign Affairs Council: Press Remarks by High Representative Josep Borrell at the Press Conference' (26 June 2023) www.eeas.europa.eu.

[279] K DeYoung, 'An Intellectual Battle Rages' cit.

In discussing the Spring 2023 counteroffensive, US General Milley asserted that the training and military equipment the US has provided "enables Ukraine to have the capacity and the capability to defend itself".[280] US Secretary of Defense Austin Lloyd opined that: "[t]he United States and our allies and partners have moved mountains to provide Ukraine with critical air defense systems, munitions and more".[281] He assured "we're going to do everything we can to make sure that Ukrainians can be a success' and confirmed that the Contact Group 'are determined to support Ukraine's fight for freedom for as long as it takes".[282]

The aid and assistance provided to Ukraine is systemic in the sense that it is a full-fledged policy. It is also substantial; some states supporting Ukraine have depleted their own stockpile and are investing significant sums to purchase more. The commitment to give Ukraine whatever it needs came across when the Biden administration made the controversial decision to send cluster munitions to Ukraine because "they are out of ammunition".[283] In essence: it is either cluster munitions or nothing. While this support has not (at the time of writing) allowed the Ukrainian Armed Forces to make significant advances in its counteroffensive against Russian military,[284] the question is whether Ukraine would be in a position to launch a counteroffensive without the aid provided by its allies.

Summing up, the contribution provided may not be "direct" in the sense that supporting countries have not sent their own forces to combat Russia, but it is a co-ordinated effort that is proximate to the armed conflict and that has significantly enhanced Ukraine's ability to fight back. The statements quoted above send a clear message: without the allies' efforts, Ukraine would not be in a position to defend itself.

The assessment is more complex when it comes to the European Union's party status. As discussed above (section II.1), EU Member States have adopted a differentiated approach; each country supplies Ukraine with the military aid and assistance it determines to be most appropriate, and some countries have refrained from providing lethal aid altogether or to allow weapons to transit their territory. Consequently, it does not seem to the present author that the EU can be considered a party to the conflict. On the other hand, individual states that have provided substantial and systemic aid and assistance may be parties to the conflict, this would be the case of the US, the UK, and Poland.

[280] US Department of Defense, 'Secretary of Defense Lloyd J. Austin III and Joint Chiefs of Staff Chairman General Mark A. Milley Hold Press Conference Following Virtual Ukraine Defense Contact Group Meeting' cit.

[281] *Ibid*.

[282] *Ibid*.; see also US Department of Defense, 'Deputy Pentagon Press Secretary Sabrina Singh Holds a Press Briefing' (17 July 2023) www.defense.gov.

[283] A Shoaib, 'Biden Said he Decided to Send Ukraine Controversial Cluster Bombs because Kyiv is "Running Out of Ammunition"' (8 July 2023) Business Insider www.businessinsider.com.

[284] Wall Street Journal, 'Ukraine Adopts Slow Approach to Counteroffensive: "Our Problem Everywhere Is the Sky"' (18 July 2023) www.wsj.com; D De Luce and P McCausland, 'Is Ukraine's Counteroffensive Failing? Kyiv and Its Supporters Worry about Losing Control of the Narrative' (4 August 2023) NBC News www.nbcnews.com.

To the extent that these states would be engaged in an (indirect) use of force against Russia, it should follow that they are parties to the conflict. It could also be discussed whether other states have achieved this status, such as Germany, France, Denmark, the Netherlands, Canada, Czechia and Balkan countries, due to the nature of the aid and training they are providing, or have committed to provide.[285]

If states are party to the conflict, then this has consequences under *jus in bello*, they would become military targets and if their combatants are captured by Russia forces they would enjoy prisoner of war status. In essence, it would only have practical repercussions if these countries actually send forces to Ukrainian territory. Although Russia may consider that a supporting states' forces are a military target, under *jus ad bellum*, Russia cannot violate the territorial integrity of the states providing support and attack them directly. This would result in a further breach of art. 2(4) UN Charter against the supporting state, particularly if the latter is found to be assisting Ukraine in collective self-defence (even if such aid is indirect).

IV. Conclusion

Though none of the states supplying Ukraine with military aid and assistance has sent a letter invoking art. 51 UN Charter to the UNSC, they frequently frame their support as collective self-defence. While being neutral seems to be the least of their concerns, they are wary of being a party to the conflict. Indeed, states, the EU and NATO are careful to reiterate that they are not party to the conflict. The states that have rallied to support Ukraine and that raise neutrality appear to be caught between, on the one hand, not being neutral, or indifferent, to a grave breach of international law and thus taking action, and, on the other hand, avoiding becoming a *direct* party to the conflict. They do not want to be directly engaged with Russia on the battlefield and do not want to contribute to an act that would enable Ukraine to attack Russia on its territory (for example, by providing long-range missiles). However, as we have seen, these goalposts have progressively changed. As Ukraine's need for assistance increases, so does the support it receives from third states. States that are providing support appear to be walking the fine line between, one the hand, assisting a state in collective self-defence and, on the other hand, not being a party. This fine line becomes a tight rope when they are part of an organisation (such as the EU) that has adopted a different, even contradictory, policy and where Member States do not agree on a coherent approach.

As discussed throughout this *Article*, numerous states have provided substantial military aid and equipment to Ukraine. This not only breaches neutrality law but could also amount to an indirect use of force against Russia (that can be justified under collective self-defence) and result in these states being co-belligerents alongside Ukraine. Whether

[285] For instance, the Netherlands and Denmark have committed to supplying Ukraine with F-16s, J Lukiv, 'Ukraine War' cit.

or not the thresholds of using indirect force and becoming party to the conflict are met can only be assessed on a case-by-case basis. The states that appear to have met these thresholds are the US, the UK, Poland. One could also wonder whether other states, such as Germany, France, Denmark, the Netherlands, Czechia, the Balkan countries, and Canada have also reached this threshold.

Because the military aid and assistance are provided bilaterally, with the EU mainly playing a supporting and coordinating role, this *Article* has not found that the EU is using force against Russia nor that it is party to the conflict, at least at the time of writing. However, the EU and the Member States providing military aid and equipment (except for those donating humanitarian and non-lethal assistance) and significant financial support are in breach of neutrality law.

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