University of Groningen

Essays on Autonomy, Legality and Pluralism in European law

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DOI:
10.33612/diss.111447089

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2020

Link to publication in University of Groningen/UMCG research database

Citation for published version (APA):
Lindeboom, J. (2020). *Essays on Autonomy, Legality and Pluralism in European law*. [Thesis fully internal (DIV), University of Groningen]. University of Groningen. https://doi.org/10.33612/diss.111447089

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1. Introduction

I. Some Peeks at the Cathedral

One of the minor tragedies in legal scholarship is that feeble attempts to completeness will inevitably fall victim to the limitations of time and knowledge. Thus, Claude Monet's paintings of the façade of the Rouen Cathedral have provided ample inspiration for legal scholarship wishing to emphasise that it is only offering *one view* of the cathedral, out of many possible alternatives.[1]

Cliché as it may be, obviously the metaphor is true,[2] and any possible contributions to EU law are no exception.[3] The articles which are bundled in this dissertation centre on the various roles of autonomy, legality and pluralism in the EU legal system.[4] I cannot claim, however, to

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[1] To my knowledge, the 'views of the cathedral' metaphor was introduced to legal scholarship by G. Calabresi and A.D. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089, who attribute the phrase to Harry Wellington (ibid. 1190).

[2] One might think that clichés are clichés *because* they are trivially true or commonplace. But the standard work *On Clichés* finds the sociological essence of clichés in the *supersedure*, rather than the triviality, of meaning by social functions: A.C. Zijderveld, *On Clichés: The Supersedure of Meaning by Function in Modernity* (Routledge 1979).

[3] See e.g. P. Craig, 'Integration, Democracy, and Legitimacy' in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, 2nd edn (Oxford University Press 2011) 28–29; K. Lenaerts and J.A. Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) 753.

[4] In this dissertation, I generally use the term 'legal system' instead of 'legal order', but I consider both terms largely synonymous apart from some possible, and largely personal, connotations. 'System' in the strict sense may be understood as having the properties completeness, closed, and consistent – unlike the looser connotation of 'order'. In this sense, 'system' would be the narrower concept. However, apart from whether any non-trivial formalised system can be both complete, closed and consistent at the same time (which has been seriously questioned since Gödel's proof of the incompleteness theorem), legal systems/orders do not possess these properties in any case, as they interact continuously with their social and normative environments. At most, legal systems *claim* to possess these properties or aspire towards possessing them (eg, J. Bengoetxea, 'Legal System as a Regulative Ideal' in H.-J. Koch and U. Neumann (eds.), *Praktische Vernunft und Rechtsanwendung* (Franz Steiner 1994)). In a weaker sense, 'system' can refer to a set of related elements which has a certain internal structure and can be distinguished from its environment (see e.g., M. van de Kerchove and F. Ost, *Legal System. Between Order and Disorder*, trans I. Stewart (Oxford University Press 1994) 10–12). In this sense, some authors have argued that 'legal system' has a narrower meaning than 'legal order' because it requires a higher degree of

provide even one full view of the cathedral. Instead of providing a comprehensive and systematic analysis of either the autonomy, legality or pluralism of EU law, as others have done before,[5] this dissertation comprises a collection of essays each of which deals with some part of EU law in which autonomy, legality and/or pluralism take centre stage. Hence, while I have tried to provide some different glances at the cathedral of EU law, each of them is more accurately described as a small peek than a full-blown view.

This introduction will connect some of the dots portrayed in the subsequent chapters. To this end, it will provide, firstly, an introduction to the three themes of this dissertation. Secondly, it will give an overview of the subsequent chapters, linking them to the previously described themes. Thirdly, it will offer some general remarks about the methodologies employed in the various chapters in view of legal science more generally.

II. The Themes of this Dissertation

Legality, autonomy and pluralism are, each in themselves, notoriously complex and contested concepts.[6] It would be foolish to pretend to provide an analysis of these themes that is even remotely exhaustive. Further, even non-exhaustive descriptions of these terms will entail almost certainly controversial claims. For that reason, this overview not only does not claim completeness, but also does not claim to do full justice to the philosophical debates surrounding each of the themes. Instead, my main aim is to give a sense in which the following chapters

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internal systematicity (see in the context of EU law e.g. K. Culver and M. Giudice, 'Not a System But an Order' in J. Dickson and P. Eleftheriades (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press 2012). Conversely, in a different way 'legal order' appears to be the narrower concept insofar as, it is my impression, 'order', unlike 'system', connotes a minimum degree of legitimacy. In general jurisprudence, the choice between 'legal system' and 'legal order' appears largely arbitrary and not based on fundamental assumptions. Using 'legal system' are e.g. C.E. Alchourrón and E. Bulygin, *Normative Systems* (Springer 1971); J. Raz, *The Concept of a Legal System*, 2nd edn (Clarendon Press 1980); M. Troper, 'Système juridique et État' (1986) 31 *Archives de philosophie du droit* 29. 'Legal order' is e.g. used by S. Romano, *L'ordre juridique*, trans. L. Francois and P. Gothot (Dalloz 1975).

[5] On autonomy, see R. Barents, *The Autonomy of Community Law* (Kluwer Law International 2004). On pluralism, see e.g. K. Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press 2014).

[6] It would probably go too far to say that they are (all) 'essentially contested concepts' in W.B. Gallie's terminology (see 'Essentially Contested Concepts' (1955–1956) 56 *Proceedings of the Aristotelian Society* 167). At least with regard to 'morality' and 'autonomy', the core meaning of the terms does not seem contested, even though the way in which they are applied in various contexts can be quite diverging.

relate to one or more of the ways in which we understand 'legality', 'autonomy' and 'pluralism' respectively. In other words, the following description is intended to provide a general background picture for the chapters that follow.

A. Three Conceptions of Legality

We can distinguish between at least three conceptions of legality.[7] Perhaps more so than the different conceptions of autonomy and pluralism described below, the term 'legality' is used in ways so different from each other that it might not even make sense of speak of 'conceptions' of the same concept anymore. Perhaps, therefore, the following categorisation is more accurately described as three different *concepts* of legality. With this caveat in mind, which need not concern us much here,[8] let us proceed.

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[7] A fourth idea of legality denotes an aspirational ideal the law should live up to. This understanding of legality is most notably associated with Lon Fuller's eight principles of legality, which he also referred to as the 'internal morality' of law, and connects to certain understandings of the rule of law. It remains somewhat unclear whether Fuller deemed these principles *conceptual* features of law (i.e. what the concept of law *is*), or as a normative ideal of how people *ought to* understand law. Under the former interpretation, which is put forward by L. Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 *New York University Law Review* 1035, Fullerian legality would provide a certain understanding of the 'property of being law'. By contrast, Schauer advanced a understanding of Fuller's theory of legality based on the second interpretation: see e.g. F. Schauer, 'Law as a Malleable Artifact' in L. Burazin, K.E. Himma and C. Roversi (eds.), *Law as an Artifact* (Oxford University Press 2018). Others, notably Joseph Raz and John Gardner, have interpreted Fuller's criteria as an aspirational, moral ideal. See J. Raz, 'The Rule of Law and its Virtue' in *The Authority of Law* (Clarendon Press 1979); J. Gardner, 'The Legality of Law' and 'The Supposed Formality of the Rule of Law' in *Law as a Leap of Faith* (Oxford University Press 2012).

[8] I leave this theoretical issue aside not only because it is quite irrelevant for our purposes, but also because it would not only require a detailed analysis of the distinction between concepts and conceptions of concepts, but also of the meaning of the term 'concept' as such. The two most prominent approaches to the term 'concept' in twentieth-century analytic philosophy are the theory of concepts as *definitions*, mainly associated with early twentieth-century philosophy of Frege, the early Wittgenstein, and the logical positivists, and the theory of concepts as *use* which is associated with the later Wittgenstein. See in particular on concepts as definitions e.g. G. Frege, 'Introduction to Logic' in M. Beaney (ed.), *The Frege Reader* (Blackwell 1997) 298; L. Wittgenstein, *Remarks on the Foundation of Mathematics*, trans. G.E.M. Anscombe, G.H. von Wright and R. Rhees (Blackwell 1956) 295; and on concepts as use see generally e.g. L. Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (Blackwell Publishing 1986).

In the most abstract sense, recent contributions in the Anglo-American tradition of general jurisprudence understand 'legality' simply as 'the property of being law'.[9] The legality of some law-like entity turns on whether this entity possesses the characteristics that are essential to the concept 'law'. Consequently, conceptual analysis becomes the main methodology of questions pertaining to legality.[10] This makes the analysis of legality necessarily highly abstract and a-historical, although it does not necessarily deny that 'legality' and 'law' may reference something very different to societies other than ours.[11] In Raz's words:

> '[w]hile the general theory of law is universal, it is also parochial [because] the concept of law is itself a product of a specific culture'.[12]

Notable questions that have preoccupied legal philosophers in the contemporary analytic tradition pertain to the possible connections between law and morality,[13] the interpretative nature of law,[14] and the relationship between law and authority,[15] among others. These

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[9] J.L. Coleman, *The Practice of Principle* (Oxford University Press 2001) 84; S.J. Shapiro, *Legality* (Harvard University Press 2011) 4–7.

[10] See e.g. Shapiro, *Legality* (n. 9) 13–25.

[11] Brian Tamanaha has argued that the 'artificial' nature of law makes a priori conceptual analysis in general jurisprudence a dead end (see e.g. B.Z. Tamanaha, *A Realistic Theory of Law* (Cambridge University Press 2017)). While he is absolutely correct in maintaining that theoretical analysis of law can never be a priori, his conclusions seem to ignore that adherents of conceptual analysis have long recognised that it is *our* concept of law that is being studied (see the next note and accompanying text). For more sustained criticism of conceptual analysis, see L. Murphy, 'Concepts of Law' (2005) 30 *Australian Journal of Legal Philosophy* 1; D. Priel, 'Jurisprudence and Necessity' (2007) 20 *Canadian Journal of Law and Jurisprudence* 173; A. Marmor, 'Farewell to Conceptual Analysis (in Jurisprudence)' in S. Sciaraffa and W.J. Waluchow (eds.), *Philosophical Foundations of the Nature of Law* (Oxford University Press 2013).

[12] J. Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 92, 95.

[13] E.g. H.L.A. Hart, 'Positivism and the Separation between Law and Morals' (1958) 71 *Harvard Law Review* 593. On the subsequent debate between inclusive and exclusive legal positivism, see e.g. W.J. Waluchow, *Inclusive Legal Positivism* (Clarendon Press 1994); S.J. Shapiro, 'The "Hart–Dworkin" Debate: A Short Guide for the Perplexed' in A. Ripstein (ed.), *Ronald Dworkin* (Cambridge University Press 2007).

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

[15] E.g. J. Raz, 'Authority, Law, and Morality' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995); S.J. Shapiro, 'Hart's Way Out' in J.L. Coleman (ed.), *Hart's Postscript: Essays on the Postscript to* The Concept of Law (Oxford University Press 2001).

theoretical programmes and their conception of legality are also relevant to international and European law specifically. An important dimension of the question whether international law is really 'law' centres on whether international law possesses the same analytical structure and systematicity as domestic law, and *which* similarities and dissimilarities between the two are salient for the concept of law.[16] The comparison between domestic legal systems and the EU legal system has, recently, also received attention in the philosophical literature,[17] and the first two chapters of this dissertation aim to contribute to this discussion.[18]

According to a very different conception, which traces back to Kant's moral philosophy, legality refers to morally unconcerned compliance with the law.[19] This Kantian conception juxtaposes legality with morality.[20] In practical terms, the Kantian conception of legality points at the law's ethical agnosticism: in the eyes of the law, the ethical virtue or vice of actions become irrelevant once these actions comply with the law's prescriptions.[21] In other words, the law is perfectly fine with the 'bad man' complying with its requirements even if he does so without any normative endorsement but out of pure self-interest.[22] In this sense, 'legality' is very different from 'morality'[23] as commitment to morality cannot go without normative

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[16] See e.g. H.L.A. Hart, *The Concept of Law*, 3rd edn (Oxford University Press 2012) ch. 10; J. Waldron, 'International Law: "A Relatively Small and Unimportant" Part of Jurisprudence?' in L. Duarte d'Almeida, J. Edwards and A. Dolcetti (eds.), *Reading H.L.A. Hart's* The Concept of Law (Hart Publishing 2013); M. Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2010) 21 *European Journal of International Law* 967.

[17] See in particular J. Dickson, 'How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations Between, Legal Systems in the European Union' (2008) 2 *Problema* 9; J. Dickson, 'Directives in EU Legal Systems: Whose Norms Are They Anyway?' (2011) 17 *European Law Journal* 190; P. Eleftheriadis, 'Pluralism and Integrity' (2010) 23 *Ratio Juris* 365.

[18] See 'Why EU Law Claims Supremacy', Chapter 2; and 'Legality and Autonomy of EU Law: You'd Better Believe It', Chapter 3.

[19] I. Kant, *Metaphysical Elements of Justice. Part I of the Metaphysics of Morals*, 2nd ed., trans. J. Ladd (Hackett Publishing 1999) 19.

[20] Ibid.: 'The agreement of an action with the law of duty is its *legality* [Gesetzmässigkeit] *(legalitas)*; the agreement of the *maxim* of the action with the law is its *morality* [Sittlichkeit] *(moralitas)*' (emphasis in original).

[21] For a magnificent exposition, see A. Somek, *The Legal Relation: Legal Theory after Legal Positivism* (Cambridge University Press 2017) ch. 2.

[22] O.W. Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

[23] It should be noted that 'morality' refers here to the first-order moral facts of 'critical morality' or in the terminology of Matthew Kramer, 'morality *tout court*' (see M.H. Kramer, *Moral Realism as a Moral Doctrine* (Wiley-Blackwell 2009) 12–14, in contrast to the contingent *mores* (or 'positive morality') of a certain society or

endorsement of its prescriptions.[24] While the Kantian conception of legality is perhaps less comprehensive and ambitious than Anglo-American legality, as it only denotes *one* aspect of the nature of law, it remains a highly peculiar and interesting feature of what law requires of its subjects. Furthermore, the Kantian legality of law – in the sense of its disinterest in the *motives* of its subjects to comply with legal norms – arguably has a distinct moral merit itself. By remaining largely agnostic to the ethical virtue of the actions of individuals insofar as they are legal, the law may promote morally sound results. The functioning of the acquisition of EU citizenship provides an interesting example of this moral virtue of legality in the context of EU law.[25]

Finally, in constitutional and administrative law of many legal systems, 'legality' is itself a general principle of positive law.[26] While its content tends to vary slightly across legal systems, its core meaning is that state action ought to have a basis in constitutional law. In Germany, for example, Article 20(3) of the *Grundgesetz* stipulates that executive authority must be exercised in accordance with statutory law and the Basic Law. In the United Kingdom, a functionally similar role is occupied by the *ultra vires* doctrine in judicial review.[27] In most jurisdictions, the principle of legality is deeply infused with considerations of political legitimacy and sovereignty. This general principle of law is, in a way, the positive equivalent of Kantian legality: legitimate state action requires (only) compliance with law.[28]

group. Obviously, one can follow the contingent *mores* of out of pure self-interest in the same way as Holmes' bad man follows the law.

[24] The distinction between following legal norms and following moral norms also has deeper connections to the normativity of law and morality respectively. It can be argued that morality is necessarily 'robustly' or 'full-bloodedly' normative, i.e. provides *real* reasons for its subjects, while law only possesses a 'formal' normativity, i.e. its provides criteria of correctness and is in this sense more akin to rules of games. See e.g. D. Enoch, 'Is General Jurisprudence Interesting?' in D. Plunkett, S.J. Shapiro and K. Toh (eds.), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press 2019).

[25] See 'Pluralism Through its Denial: The Success of EU Citizenship', Chapter 7; and 'Breaking Chinese Law – Making European One: The Story of *Chen*, Or: Two Winners, Two Losers, Two Truths', Chapter 8.

[26] For an overview, see J. Schwarze, *European Administrative Law* (Sweet & Maxwell 2006) 212–260.

[27] On the place of the *ultra vires* doctrine in UK constitutional law, see e.g. M. Elliott, 'The *Ultra Vires* Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58 *Cambridge Law Journal* 129. For discussion, see e.g., P. Craig, *Administrative Law*, 7th edn (Sweet & Maxwell 2012) 4–16.

[28] On how this positive law conception of legality should be distinguished from the idea of the rule of law, see G. Palombella, 'Beyond Legality – Before Democracy: Rule of Law Caveats in the EU Two Level Systems' in C. Closa and D. Kochenov (eds.), *Rule of Law Oversight in the European Union* (Cambridge University Press 2016).

In EU law, the ECJ's construal of the rule of law plays a similar function, where according to the ECJ it entails that all measures of secondary law must be in conformity with the Treaties.[29] More specifically, the principle of conferral limits the powers of the EU to those expressly or implicitly conferred to it.[30] One of the most consequential implications of the EU principle of legality has been the longstanding discussion on the limited degree of direct effect of directives pursuant the constraints of Article 288 TFEU.[31] The CJEU's case-law on the hermeneutic content of Article 288 TFEU and its implications for the effects of unimplemented directives is almost entirely a corollary of the difficult relationship between *effet utile* – a cornerstone of EU law[32] – and the perceived constraints of legality.[33]

All three conceptions of legality provide an abstract reflection upon the law. Anglo-American legality focuses on *what law is*, employing the method of conceptual analysis. Kantian legality focuses on *what law requires of its subjects*, by contrasting law with morality. Legality as a principle of positive law focuses on *what is lawful for the state to do*, connecting legality to legitimacy. Notwithstanding diverging vocabulary and levels of abstraction, as well as important distinctions of substance, these conceptions of legality are profoundly interconnected. Two very different examples may illustrate this. In the case law on 'incidental effects' of directives,[34] 'triangular situations',[35] and *Mangold* case law,[36] the Court stretches

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[29] *Parti écologiste 'Les Verts' v European Parliament*, 294/83, EU:C:1986:166, para. 22. For critical engagement with the ECJ's conception of the rule of law, and arguing that this conception amounts to legality rather than the rule of law, see D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34 *Yearbook of European Law* 74.

[30] Arts. 4 and 5 TEU.

[31] 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions', Chapter 5.

[32] See generally S. Seyr, *Der* effet utile *in der Rechtsprechung des EUGH* (Duncker & Humblot 2008).

[33] 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions', Chapter 5.

[34] *CIA Security International SA v Signalson SA and Securitel SPRL*, C-194/94, EU:C:1996:172; *Unilever Italia SpA v Central Food SpA*, C-443/98, EU:C:2000:496.

[35] E.g. *Fratelli Costanzo SpA v Comune di Milano*, 103/88, EU:C:1989:256; and *World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others*, C-435/97, EU:C:1999:418; and *R on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions*, C-201/02, EU:C:2004:12.

[36] *Werner Mangold v Rüdiger Helm*, C-144/04, EU:C:2005:709; *Seda Kücükdeveci v Swedex GmbH & Co. KG*, C-555/07, EU:C:2010:21; *Association de médiation sociale v Union locale des syndicats CGT and Others*, C-176/12, EU:C:2014:2; *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, C-

the direct effect of directives as much as possible within the boundaries of the EU principle of legality.[37] In the *Chen* case,[38] the Court acknowledges Catherine Zhu's residence right in the UK without regard to the ethical virtue or vice of her mother's actions.[39] These two examples seem to have very little, if anything, in common. Perceiving these two examples through the lens of legality in the sense of (Kantian) compliance with the law, however, shows us in both cases the legal reasoning involves a partly substitution of ad hoc practical reasoning for morally unconcerned compliance with the law:[40] it does not matter to Catherine Zhu's rights how she acquired EU citizenship, and it does not matter to the horizontal invocability of directives how *inconvenient* are the negative repercussions for the other private party. This practical implication of Kantian legality – pervasive in legal reasoning – tells us a lot about the nature of law and legal reasoning as such.

B. Two Conceptions of Autonomy

Autonomy indicates a sense of self-determination and independence from outside influence. Numerous conceptions of autonomy can be traced in philosophy, sociology and ethics,[41] the specifics of which need not concern us here. As applied to EU law, the autonomy of the EU legal system references, first of all, a kind of formal self-referentiality which is typical of legal systems.[42] In this thin sense, legal systems are autonomous because their normative content

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441/14, EU:C:2016:278; *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, C-414/16, EU:C:2018:257.

[37] See further 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions', Chapter 5.

[38] *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, C-200/02, EU:C:2004:639.

[39] See further, 'Breaking Chinese Law – Making European One: The Story of *Chen*, Or: Two Winners, Two Losers, Two Truths', Chapter 8.

[40] In this regard, see also Frederick Schauer's important work on 'legal formalism' as a substitution for all-things-considered reasoning (in which moral reasoning would take an important role), e.g. F. Schauer, 'Formalism' (1988) 97 *Yale Law Journal* 509.

[41] For a brief overview, see J. Christman, 'Autonomy in Moral and Political Philosophy', *Stanford Encyclopedia of Philosophy* (2015).

[42] See 'Why EU Law Claims Supremacy', Chapter 2.

claims to be immune to outside interference. The content of the law is determined by the law itself, i.e. the legal system is normatively closed.[43]

Formal autonomy should not be conflated with autonomy of substance.[44] The *substance* of law is never autonomous. This is already apparent from the fact that legal norms refer to terms whose meaning derives in part from ordinary language use.[45] Further, many legal norms have a deliberately vague moral content – 'reasonable', 'fair', 'due process', and so on – and only become determinate through application in concrete cases. As a result, by interpreting legal norms, courts and other legal actors shape and develop the law in accordance with extra-legal informants, including but not limited to morality.[46] The manner in which legal systems, contrary to autonomous systems of norms such as games, is *not* autonomous, but at the centre of society, was magnificently described by Joseph Raz in *Practical Reason and Norms*.[47]

Notwithstanding the apparent substantive influence by and interaction with other normative and social systems, autonomy does play a role in the substance of law. Once concepts are within the ambit of the legal norms, they acquire a specific *legal* meaning which

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[43] E.g. N. Luhmann, 'The Unity of the Legal System' in G. Teubner (ed.), *Autopoietic Law: A New Approach to New and Society* (de Gruyter 1988).

[44] See also 'Why EU Law Claims Supremacy', Chapter 2.

[45] I say 'in part' because it is deeply controversial whether the legal meaning of a concept equals the 'ordinary meaning' of that concept in language. Textualist positions in legal interpretation would answer this question in the affirmative. For useful overviews of the main positions, see J.F. Manning, 'What Divides Textualists from Purposivists?' (2006) 106 *Columbia Law Review* 70; and R.H. Fallon, 'The Meaning of Legal "Meaning" and its Implications for Theories of Legal Interpretation' (2015) 82 *University of Chicago Law Review* 1235. For an extensive analysis of the use of ordinary meaning, see T.R. Lee and S.C. Mouritsen, 'Judging Ordinary Meaning' (2018) 127 *Yale Law Journal* 788.

[46] This account of legal reasoning relies mainly on Raz' account of legal reasoning. See J. Raz, 'On the Autonomy of Legal Reasoning' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995); J. Raz, 'Incorporation by Law' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009).

[47] J. Raz, *Practical Reason and Norms* (Clarendon Press 1975). Comparison between legal systems and games (and similar artificial normative systems) only became widespread after H.L.A. Hart's *The Concept of Law* (Clarendon Press 1961). One of reasons why comparing law to games might be uncomfortable for legal and political philosophers is that is degrades law to an artificial system that not necessarily generates anything more than 'formal' normativity. For a helpful analysis on the ways in which law and games are more similar than, for instance, law and morality, see M.N. Berman, 'Of Law and Other Artificial Normative Systems' in D. Plunkett, S.J. Shapiro and K. Toh (eds.), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press 2019).

resists hermeneutic influence from external informants. In EU law, this becomes clear in the way in which individual concepts are given an 'EU law meaning' that is autonomous from the meaning of corresponding concepts in national law.[48] The autonomy of EU law concepts is the practical corollary of the *formal* self-referentiality of the EU legal system, and aims to guard its efficacy and self-determination.

Juxtaposing the formal autonomy and substantive openness of legal systems reveals a lot about the functioning of law. While the majority of the chapters in this dissertation centre on the characteristics of law, the role of morality in legal reasoning takes centre stage in Chapter 6. This chapter argues in favour of anti-Archimedeanism in relation to moral facts: the idea that the normative content of moral claims cannot be analysed from an external, metaethical, viewpoint.[49] This argument relies strongly on the idea that moral reasoning is autonomous both substantively and formally. One cannot criticise moral claims without engaging in moral justification oneself.[50] In other words, morality contains its own internal standards of justification and criticism.[51] I realise that these claims are deeply controversial, especially from the vantage point of J.L. Mackie's famous moral error theory,[52] and the rise of evolutionary ethics.[53] Notwithstanding this more sophisticated metaethical debate, however, there is at least one obvious manner in which morality is autonomous in contrast to law. The fact that legal rules, doctrines or even entire legal systems can be morally reprehensible is abundantly shown in many jurisdictions.[54] Legal norms can legally require us to do both good and evil, while

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[48] To give two examples, see *Deborah Lawrie-Blum v Land Baden-Württemberg*, 66/85, EU:C:1986:284, para. 16, on the term 'worker' in the sense of Art. 45 TFEU; and *Klaus Höfner and Fritz Elser v Macrotron GmbH*, C-41/90, EU:C:1991:161, paras. 21–23, on the term 'undertaking' in the sense of Art. 101 TFEU.

[49] Unlike philosophers such as Ronald Dworkin and, possibly to a lesser extent, Matthew Kramer, I do not believe that metaethics as such is a useless inquiry. There are many useful questions that can be asked about the metaphysical nature of moral claims that are at least in part independent from one's first-order moral beliefs. For example, Alan Gibbard is a metaethical expressivist, and in terms of normative ethics he is a utilitarian (see A. Gibbard, *Wise Choices, Apt Feelings* (Harvard University Press 1990). But a commitment to metaethicsal expressivism does not *force* one to be a utilitarian, nor the other way around.

[50] This is most illuminatingly argued by Matthew Kramer in *Moral Realism* (n. 23).

[51] T. Nagel, *Mortal Questions* (Cambridge University Press 1979) 142.

[52] J.L. Mackie, *Ethics: Inventing Right and Wrong* (Penguin 1990).

[53] See further 'In Search of Foundations: Ethics and Metaethics in Constitutional Adjudiciation', Chapter 6, with further references.

[54] See also 'In Search of Foundations: Ethics and Metaethics in Constitutional Adjudication', Chapter 6. In the context of EU law, see also D. Kochenov, G. de Búrca and A.T. Williams (eds.), *Europe's Justice Deficit* (Hart

moral norms can only require us to do good.[55] In this sense, morality is autonomous from external normative appraisal in a way that law is not.[56]

C. Between One and Many Conceptions of Legal Pluralism

Legal pluralism is in vogue. In the age of increasing globalisation and the prevalence of transnational legal arrangements, state-centred accounts of law – both theoretical and practical – seem horribly out of date. It is almost commonplace to presuppose some form of constitutional pluralism in analysing the legal, constitutional and political structure of the European legal space.[57]

Pluralism, however, started quite differently, namely as a legal-anthropological response to allegedly statist preoccupations of legal theory.[58] Theories of law, said the pluralists, were overly focused on the law of the state, not recognising the wide variety of normative, law-like systems that play a role in human life.[59] Normative systems including custom, indigenous law, and other forms of 'unofficial law' quite frequently take the shape of unions of primary and secondary norms. These findings obscure H.L.A. Hart's thesis that such a union is central to what he called 'law' (but by which he allegedly mainly referred to municipal law), since either

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Publishing 2015). Even natural lawyers such as John Finnis do not deny the artificiality of legal systems as opposed to the morality, even though he insists that neither the positing nor the recognition of legal sources can be understood without reference to moral principles. See e.g. J. Finnis, 'On the Incoherence of Legal Positivism' (2000) 75 *Notre Dame Law Review* 1611; J. Finnis, 'The Truth in Legal Positivism' in *Philosophy of Law: Collected Essays Volume IV* (Oxford University Press 2011); J. Finnis, *Natural Law and Natural Rights*, 2nd edn (Oxford University Press 2011) ch. 1.

[55] G.F. Puchta, *Cursus der Institutionen*, vol. 1 (Breitkopf & Härtl 1841) 9, cited in Somek, *The Legal Relation* (n. 21) 108.

[56] Some philosophers have argued against this universalistic conception of morality, according to which moral facts trump other normative facts. See for instance, B. Williams, *Ethics and the Limits of Philosophy* (Routledge 2011).

[57] For a critical appraisal of the ostensible obviousness of constitutional pluralism, see J. Baquero Cruz, 'Another Look at Constitutional Pluralism in the European Union' (2016) 22 *European Law Journal* 356.

[58] For an early reflection, see J. Griffiths, 'What Is Legal Pluralism?' (1986) 18 *Journal of Legal Pluralism and Unofficial Law* 1.

[59] For an overview, see W. Twining, 'Normative and Legal Pluralism: A Global Perspective' (2010) 20 *Duke Journal of Comparative & International Law* 473.

his account is deeply overinclusive, or all kinds of things are ‘law’ including the rules of sports organisations, universities, companies, and other bureaucratic organisations.[60]

It should be noted that legal philosophers are not entirely left without ammunition in their response to these early pluralist critiques.[61] Clearly, however, legal pluralism and early twentieth-century sociological jurisprudence as its predecessor,[62] are right to point out that there are many normative systems that are important to people’s lives, and it is not necessarily state law that guides their behaviour most consequentially.[63]

From the mid-1990s pluralism made its way into European legal scholarship, with Neil MacCormick paving the way.[64] The *Maastricht* judgment[65] of the German Bundesverfassungsgericht quashed the hopes of a romantic idealisation of the CJEU’s case law on the unconditional supremacy of EU law over national law by showing how each legal system continues to claim supremacy for itself.[66] Since this supremacy claim only applies *within* the system, it would be mistaken to conceive of descriptive pluralism as a plurality of competing ‘monisms’.[67] MacCormick’s account of Europe’s constitutional pluralism may not deviate

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[60] E.g. B.Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001) 137–142. Others have observed this before, e.g. J. Raz, *Practical Reason and Norms* (Clarendon Press 1975) ch. 5.

[61] See e.g. Raz, *Practical Reason and Norms* (n. 60) 150–151.

[62] See for an overview, B.Z. Tamanaha, ‘The Third Pillar of Jurisprudence: Social Legal Theory’ (2015) 56 *William & Mary Law Review* 2235.

[63] See also ‘Why EU Law Claims Supremacy’, Chapter 2.

[64] See even before the *Maastricht* judgment, N. MacCormick, ‘Beyond the Sovereign State’ (1993) 56 *Modern Law Review* 1.

[65] BVerfGE 89, 155, 2 BvR 2134, 2159/92 (*Maastricht*).

[66] N. MacCormick, ‘The *Maastricht-Urteil*: Sovereignty Now’ (1995) 1 *European Law Journal* 259.

[67] I believe this mistake has caused much unnecessary confusion in constitutional pluralism and EU legal theory. P. Eleftheriades, ‘Pluralism and Integrity’ (2010) 23 *Ratio Juris* 365, for instance, claims that the ECJ in *Costa/ENEL* took the view of EU-centred monism. As I try to show in Chapter 3, this is mistaken because the ECJ never claimed that the national legal systems are *subsumed* under the EU legal system. This view would inevitably imply that national laws conflicting with EU law are *invalid* in virtue of EU law, a position which the ECJ has always rejected. Eleftheriades then makes a second mistake by interpreting MacCormick’s pluralism as a theory of competing monisms: ‘MacCormick's pluralism advises the courts to maintain two inconsistent monisms, EU monism and national monism and accordingly two inconsistent hierarchies’ (371). Since legal systems only claim supremacy over competing normative systems within their own jurisdiction, however, there is nothing in MacCormick’s pluralism that ‘denies the premise [=absence of hierarchy between legal systems] on which it was based’ (371).

much – and is certainly not inconsistent with – Hart and Raz's theories of law.[68] It did initiate, however, widespread interest in applying pluralist theories of law to the European legal sphere. The varieties of legal and constitutional pluralisms that have been put forward in the past two decades are perhaps best described as a semantic minefield.[69] Even the term 'constitutional pluralism' itself, and how it ought to be distinguished from other types of legal and global pluralism, is not obvious. It is submitted that all these perspectives are not necessarily helpful in better understanding the mechanisms and structure of the relationship between national, EU and ECHR law.

In an attempt to reduce matters to their simplest dimension, I suggest in Chapter 2 that varieties of constitutional pluralism can only be of two types: descriptive or normative.[70] Descriptive pluralism is fully in line with contemporary, Anglo-American legal theory and contains little that would trouble proponents of the latter.[71] It is quite uncontroversial that H.L.A. Hart – contra Kelsen – recognised the duality – and *plurality* – of legal systems across the global legal world.[72] The salient questions remain largely the same before and after the rise of pluralism: are there helpful demarcation criteria between 'legal' and 'non-legal' normative systems, how do legal systems behave and interact with their environments, can legal systems be subsumed under hierarchically superior legal systems, and so on.[73]

Normative variants of constitutional pluralism claim, in one way or the other, that the normative conflicts between overlapping legal systems must be solved, or at least that there are

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[68] See 'Why EU Law Claims Supremacy', Chapter 2; N.W. Barber, 'Legal Pluralism and the European Union' (2006) 12 *European Law Journal* 306; G. Letsas, 'Harmonic Law' in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press 2012).

[69] Jaklic maps five main strands of constitutional pluralism in the EU. In addition to Neil MacCormick's anti-monistic conception of pluralism, he identifies epistemic (e.g. Neil Walker), substantive (e.g. J.H.H. Weiler), interpretive and participative (e.g. Miguel Poiares Maduro) and institutional (e.g. Mattias Kumm) variants. See Jaklic, *Constitutional Pluralism* (n. 5). Walker himself distinguishes in turn explanatory, normative and epistemic pluralism in N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317.

[70] This is a simple consequence of the fact that a law of excluded middle applies to the descriptive–normative distinction.

[71] See esp. G. Letsas, 'Harmonic Law' in J. Dickson and P. Eleftheriades (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press 2012). See also C. Mac Amhlaigh, 'Does Legal Theory Have a Pluralism Problem?' in P. Schiff Berman (ed.), *The Oxford Handbook of Legal Pluralism* (Oxford University Press 2019).

[72] See N. Barber, 'Legal Pluralism and the European Union' (n. 68).

[73] See also 'Legality and Autonomy of EU Law: You'd Better Believe It', Chapter 3.

normative reasons to solve them.[74] While the second claim is sensible – nobody *likes* to be confronted with two conflicting instructions – the first one certainly is controversial. It remains to be demonstrated that the image of overlapping legal systems which may indeed impose conflicting directives to their subjects were to lack explanatory force.[75] There might well be reasons to conclude that our best understanding of normativity requires it to be uniform and autonomous,[76] although the plurality of different kinds of normative systems (considering not only legal and quasi-legal systems but also ethics, fashion, etiquette, prudence, etc.), makes a strong case for plurality and incommensurability.

Furthermore, it often remains quite obscure how normative variants of constitutional pluralism would avoid collapsing into either positivist or non-positivist theories of law, as I try to show in Chapter 2.[77] This is clearly illustrated by the fact that normative pluralism frequently

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[74] See for instance, A. Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009); M. Kumm, 'The Moral Point of Constitutional Pluralism' in J. Dickson and P. Eleftheriades (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press 2012).

[75] For an attempt to conceptualise the EU legal system as an autonomous legal system that has no necessary normative connection to national legal systems, see 'Legality and Autonomy of EU Law: You'd Better Believe It', Chapter 3. The strongest argument against this position, it seems, is that the distinction between what *is* normatively correct and what people *believe* is normatively correct may well collapse. For a defense of monism along these lines, see A. Somek, 'Kelsen Lives' (2007) 18 *European Journal of International Law* 409; 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).

[76] Ibid. This appears to be Kelsen's philosophical position in relation to his monistic conception of legality. For a brilliant analysis, Somek, 'Kelsen Lives' (n. 75). H.L.A. Hart's provided amusing, but also highly instructive, anecdotal evidence of Kelsen's view. Recalling his debate with Kelsen at the University of California in November 1961, Hart writes: 'our discussion had its entertaining moments […] The second [entertaining moment] was towards the end of our debate, when upon Kelsen emphasizing in stentorian tones, so remarkable in an octogenarian (or in any one), that "Norm was Norm" and not something else, I was so startled that I (literally) fell over backwards in my chair': H.L.A. Hart, 'Kelsen Visited', reprinted in *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 287. One may presume that when Hart writes that he literally fell backwards, he means that he actually fell backwards, unlike in contemporary slang where 'literally' is used whenever someone wishes to emphasise his or her claims, even if this usually implies that 'literally' means 'figuratively'.

[77] See also Letsas, 'Harmonic Law' (n. 71).

resorts, ultimately, to either positivist-based accounts of international law,[78] or Dworkinian variants of legality.[79]

Pluralism in law, therefore, might well be a triviality, and does not add much to existing legal theory in terms of providing an alternative account of what distinguishes law *qua* law. Perhaps a more interesting and less developed role for pluralism is its role in the *informants* of legal reasoning and its normative value for legal interpretation.[80] As noted above, there are many types of normative systems and reasoning. Legal systems, while formally autonomous, continuously interact with extra-legal normative reasons. As I try to show in Chapter 6, it is most likely illusionary to think that such extra-legal normative reasoning can be based on a self-standing metaethical foundation grounding all normative reasoning. When adjudicating morally-laden cases, courts frequently have to take into account both the constitutional identity, common sentiments, *and* universalistic reason.[81] This means that morality (and by extension, normativity as such) is both autonomous and pluralistic. The plurality of moral and other normative sources that informs legal reasoning is possibly a more fruitful field of inquiry than the plurality of legal systems as such.[82]

III. Overview of the Chapters

The subsequent main part of this dissertation comprises three parts and seven chapters. Part I focuses on the abstract foundations of the EU legal system, in particular the autonomy and legality thereof. Part II is about the role of autonomy and legality in two persistent questions of EU substantive law: the question of what is a barrier to trade in EU internal market law, and the extent of the direct effect of directives. Part III, finally, explores aspects of autonomy and pluralism in European jurisprudence, with particular emphasis on the EU citizenship case law. In this sub-section I will introduce these parts and chapters briefly.

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[78] See e.g. MacCormick, *Questioning Sovereignty* (Oxford University Press 1999) ch. 7.

[79] E.g. M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262.

[80] For an exploration in the context of EU law, see e.g. G. Davies, 'Interpretative Pluralism in EU Law' in G. Davies and M. Avbelj (eds.), *Legal Pluralism and EU Law* (Edward Elgar Publishing 2018).

[81] These three sources of moral content are derived from B. Tripkovic, *The Metaethics of Constitutional Adjudication* (Oxford University Press 2017), as discussed in Chapter 6.

[82] For some concluding thoughts on future research, see the conclusion to this dissertation.

Part I

Part I is the most abstract of this collection, and focuses on the theoretical foundations of the EU legal system. It aims to explain and better understand the foundations of EU law by taking a viewpoint from general jurisprudence, in particular the contemporary Anglo-American tradition in legal philosophy.[83] This tradition builds upon the works of John Austin[84] and, in particular, H.L.A. Hart[85] and aims to discover essential and necessary characteristics of law.[86] In applying their insights – whether or not they succeed in their ambitions[87] – my aim is to elucidate some aspects of the EU legal system and of the jurisprudence of the ECJ.

Chapter 2 focuses on the doctrine of supremacy of EU law, as articulated among others in *Costa/ENEL*,[88] *Simmenthal*,[89] and Opinion 2/13 on EU accession to the ECHR.[90] It claims that Opinion 2/13, and the ECJ's case law more broadly, captures a truism about our concept of law, namely that law always claims comprehensive supremacy. According to this theory of legal systems, which is mainly associated with the work of legal philosopher Joseph Raz, legal systems can adopt norms from other normative systems by giving them binding effect without actually *incorporating* them as part of the legal system itself. However, the normative authority of competing normative systems themselves does not extend towards the jurisdiction of the legal system, which claims normative supremacy over all other normative systems. As Chapter

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[83] Some authors prefer to distinguish '(general) jurisprudence' from 'legal theory' and 'legal philosophy', where usually general jurisprudence and legal theory are deemed broader in scope than 'legal philosophy'. I use these terms interchangeably.

[84] J. Austin, *The Province of Jurisprudence Determined* (Hackett Publishing 1998 [1832]).

[85] H.L.A. Hart, *The Concept of Law*, 3rd edn (Oxford University Press 2012).

[86] E.g. Raz, *Between Authority and Interpretation* (n. 12) 91–92; J.L. Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis' (1998) 4 *Legal Theory* 381, 393; J. Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001) 18; S.J. Shapiro, *Legality* (Harvard University Press 2011) 9; J. Gardner, *Law as a Leap of Faith* (Oxford University Press 2012) 270. Whether Hart himself was an 'essentialist' is less likely, see F. Schauer, 'Hart's Anti-Essentialism' in A. Dolcetti, L. Duarte d'Almeida and J. Edwards (eds.), *Reading H.L.A. Hart's* The Concept of Law (Oxford University Press 2013); and see further 'Legality and Autonomy of EU Law: You'd Better Believe It', Chapter 3.

[87] There is extensive debate as to whether legal philosophy should focus (exclusively) on 'essential' or 'necessary' characteristics of law, whether 'law' has a metaphysical 'essence' at all, and implicated questions of the methodology of legal philosophy. See e.g. M. Giudice, *Understanding the Nature of Law* (Edward Elgar Publishing 2015).

[88] *Flaminio Costa v ENEL*, 6/64, EU:C:1964:66,

[89] *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, 106/77, EU:C:1978:49.

[90] Opinion 2/13 on accession of the EU to the ECHR, EU:C:2014:2454.

2 aims to show, this conception of legal systems clarifies the logic of the EU legal system, while posing scepticism about the explanatory force of theories of legal and constitutional pluralism.

Chapter 3 aims to be Chapter's 2 natural complementary. While Chapter 2 takes Opinion 2/13 as its starting point and attempts to theorise the foundations of EU law from that vantage point, Chapter 3 more broadly aims to theorise the relationship between autonomy, legality and effectiveness of the EU legal system. One of legal philosophy's main puzzles – the fact–norm distinction and the is–ought gap – take centre stage. EU law claims to be an autonomous legal system that is robustly normative for not only the ECJ but all Member State administrative authorities. The main argument pervading the EU law's autonomy thesis, however, has always been the argument from effectiveness.[91] Effectiveness is a factual state, which has no independent normative force. In Chapter 2, this puzzle is scrutinised by conceiving the ECJ's autonomy thesis as an *internal recognitional statement* by which the ECJ expresses a normative formulation of an autonomous EU rule of recognition.[92]

Part II

Part II is titled 'Autonomy and Legality in EU Substantive Law' and comprises two chapters on, respectively, the autonomy and interpretation of EU internal market law, and the limits to the direct effect of directives. Combining a doctrinal construction of the ECJ's case law with more abstract, legal-theoretical analysis, these chapters aim to provide a different understanding of these parts of EU substantive law than traditional interpretations of the case law.

The starting point of Chapter 4 is the thesis that questions about the concept of a trade barrier in EU law can only be answered by EU law itself. Thus, the autonomy of EU law implies that difficult conundrums about the relationship between regulatory freedom and the *effet utile* of the internal market, and the competence division between the EU and the Member States, are primarily *interpretive*, rather than 'federal' or 'constitutional' questions. The remainder of

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[91] E.g. *Costa v ENEL*, 6/64, EU:C:1964:66: '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'.

[92] 'Internal recognitional statement' is a term from legal philosopher Kevin Toh. See e.g. K. Toh, 'An Argument Against the Social Fact Thesis (and Some Additional Preliminary Steps Towards a New Conception of Legal Positivism)' (2008) 27 *Law and Philosophy* 445 and see 'Legality and Autonomy of EU Law: You'd Better Believe It', Chapter 3, with further references.

the chapter explores the central hermeneutic question of EU internal market law: what does a 'reasonable' approach to the fundamental freedoms entail in view of the EU internal market's political morality? It concludes that this question fails to find any answers in either the case law definition of a barrier to trade, or the burden and standard of proof and the idea of 'holistic interpretation'. In view of the CJEU's minimalist approach to legal interpretation and judicial style, the overwhelming number of questions about the concept and objectives of the EU internal market remain unanswered.

Chapter 5 centres on the question of direct effect of directives. As the question of direct effect has been declared an infant disease[93] and lacking in relevance,[94] legal scholarship has never been able to provide a watertight analysis of the case-law on the limits to direct effect of directives. These limits are largely the result of the Court's understanding of the principle of legality as a principle of positive law that informs the meaning of Article 288 TFEU and imposes restraints upon the effectiveness of EU law. Chapter 5 provides an overview of the development of the doctrine of direct effect, and an analysis of previous explanations of the Court's vast and confusing jurisprudence. Subsequently, a new doctrinal explanation – which is called the 'normative impact theory' – is introduced in order to reconcile the various strands in the case-law and explain the manner in which the Court has balanced the effectiveness of directives against the constraints of legality.

Part III

Part III of this dissertation centres on issues of morality and pluralism in jurisprudence, with particular emphasis to the EU citizenship case law. It comprises three chapters each of which focuses on a different level of generality and abstraction: the metaethics of moral argument in constitutional adjudication (Chapter 6), the morality of autonomy and pluralism in the acquisition of EU citizenship (Chapter 7), and the latter's practical implication in the landmark case *Zhu and Chen* (Chapter 8). Together, these chapters emphasise the moral importance of pluralism in constitutional adjudication: pluralism in moral and legal reasoning is more likely to result in morally justified outcomes in jurisprudence.

Chapter 6 discusses at a highly abstract level the foundations of moral argument in constitutional adjudication. It takes the shape of a review article of Bosko Tripkovic's highly

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[93] P. Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 *European Law Review* 155.

[94] S. Prechal, 'Does Direct Effect Still Matter?' (2000) 37 *Common Market Law Review* 1047.

stimulating and innovative book *The Metaethics of Constitutional Adjudication*.[95] While that book purports to find credible metaethical foundations for three ideal-types of moral argument in constitutional reasoning, Chapter 6 aims to demonstrate how these ideal-types are crudely reductive and unhelpful in describing both the empirical reality of constitutional reasoning as well as the moral justification of such reasoning. As I try to show among others by reference to the EU citizenship case law, self-standing metaethical ideal-types of moral argument are unlikely to result in morally acceptable jurisprudence. Further, I try to show how attempts to find metaethical support of our moral beliefs in evolutionary dispositions or other contingent attitudes fail to accurately describe the content of moral beliefs. Morality is best regarded as an autonomous system, which contains its own internal standards of justification and criticism.[96] One cannot criticise moral doctrine without engaging in moral justification oneself.[97] While the *system* of morality is autonomous, however, it is at the same time deeply pluralistic since no source of moral belief can claim to be the autonomous source of moral fact.

Moving back from the autonomy of morality to the autonomy of legal systems, Chapter 7 engages with the difficult relationship between autonomy and pluralism in the context of the acquisition of EU citizenship. On the one hand, EU citizenship is an autonomous – though

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[95] B. Tripkovic, *The Metaethics of Constitutional Adjudication* (Oxford University Press 2017). I once encountered in another review article the claim that the difference between British book reviews on the one hand, and American book reviews on the other hand, is that British reviews do their best to engage neutrally with the books they are reviewing, while American reviews mainly pick and choose from the books they are reviewing in order to present their own agendas (K. Toh, 'Some Moving Parts of Jurisprudence' (2009) 88 *Texas Law Review* 1283). I am afraid that although my review of Tripkovic's book is published by an archetypical British journal, it is more American than British at least in this respect.

[96] Here I rely in particular on T. Nagel, *Mortal Questions* (Cambridge University Press 1979) 142; and on Ronald Dworkin's and Matthew Kramer's theories of morality.

[97] See Kramer, *Moral Realism* (n. 23). Kramer refers here to what he calls 'morality *tout court*', i.e. the study of normative ethics into what is *really* morally required, instead of 'positive morality' i.e. the *mores* of a specific society (see n. 23 above). Some programmes in contemporary metaethics maintain that the distinction between 'morality *tout court*' (or critical morality) and positive morality is ultimately unsustainable because the contingent moral attitudes of particular societies is all there is. These would include for example moral relativism and moral error theory. While I will not further elaborate on this metaethical debate here, I submit only that the conceptual distinction between 'critical' and 'positive' morality should be maintained regardless of one's metaethical position towards the former. In other words, the concept of critical morality, i.e. what is morally required, should be distinguished from positive morality, i.e. what (some) people or society thinks is morally required, even though one believes that the notion of critical morality has no 'reference' or that such reference is epistemically inaccessible to us.

derivative[98] – status of the citizens of the Member States. On the other hand, the derivative nature of EU citizenship roots the *acquisition* of that status in the autonomous competence of the Member States in relation to matters of nationality. The result is a remarkable type of pluralism through its denial. The plurality of roads towards becoming an EU citizen are maintained precisely because Member States are unlikely to give up their sovereign right to determine who their nationals are. This pluralism has a deep moral value in itself, as Chapter 7 argues, which resists proposals to harmonise acquisition of EU citizenship.

Finally, Chapter 8 illustrates the practical implication of the interaction between autonomy and pluralism in the context of EU citizenship. In a socio-legal analysis of the background story of the *Chen* case, this chapter shows how one out of many roads towards EU citizenship offered a way out of China and its one-child-policy for Ms Chen and her unborn baby. While mainly focusing on the background story leading up to the *Chen* case – and by doing so taking a critical stance towards conventional annotations and understandings of the case – a postscript to the chapter connects the *Chen* case to the other themes of this dissertation. As this brief addition to the original publication[99] aims to show, various conceptions of legality, autonomy and pluralism join together in the Court's judgment in *Chen*, making Chapter 8 an apt closing of the main part of this dissertation.

IV. Methodology

A. Whose methodology?

It is good scientific practice to elaborate on the methodology of the present work. In legal scholarship, however, this practice is somewhat hampered by the fact that traditional legal scholarship contains very little methodology at all, which obscures the usefulness of elaborating on the 'doctrinal constructivist' methodology that appears typical of legal analysis. Furthermore, methodological poverty supervenes on deeper problems and assumptions. Lack

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[98] It is derivative in the sense that the only way to acquire EU citizenship is to acquire the nationality of one of the Member States of the EU (Art. 20 TFEU). For a detailed analysis, see D. Kochenov, *European Citizenship:* Ius Tractum *of Many Faces* (Hart Publishing 2020) and D. Kochenov, '*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' (2009) 15 *Columbia Journal of European Law* 169.

[99] D. Kochenov and J. Lindeboom, 'Breaking Chinese Law – Making European One: The Story of *Chen*, Or: Two Winners, Two Losers, Two Truths' in F. Nicola and B. Davies (eds.), *EU Law Stories* (Cambridge University Press 2017).

of legal methodology worthy of explication may just be the result of the fact that legal scholarship is not really a science, at least not in the same way that the natural sciences are science. As we are writing our scribbles, any doctrinal theory can be made irrelevant by a single judgment opting for another hermeneutic temptation. Since legal language is inevitably open-textured,[100] indeterminate,[101] and, by the way, no rule determines its own application anyway,[102] there is a range of possible outcomes all of which are prima facie equally defensible. Hence, the products of legal scholarship are neither verifiable nor falsifiable against empirical inputs in any meaningful sense. Legal scholarship is not a science, but rather an 'art' or 'skill' involving rhetoric and persuasion, and concerned with truth only in the sense of getting away with something.[103] All that lawyers can aspire to, practitioners and academic alike, is being 'learned' in expressing the legal opinions we decide for ourselves.[104] This should be obvious to everyone at least since the American legal realist movement shook the legal world by exposing the false prophecies of Langdellian formalism.[105] So why bother about 'scientist talk' of methodology and justification of research results?

I have to apologise, for I agree with hardly anything written in the previous paragraph. It seems to me, however, that this type of scepticism about the scientificness of legal studies is particularly fashionable. If it is fashionable indeed, it is perhaps best described as fashionable nonsense, even though less refined than the one described by Sokal and Bricmont.[106] Current scepticism about legal science is mostly the progeny of the American legal realist movement, and the German *Freirechtsbewegung* before them.[107] Mesmerised by pragmatist philosophy

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[100] B. Bix, 'H.L.A. Hart and the "Open Texture" of Language' in *Law, Language, and Legal Determinacy* (Clarendon Press 1995).

[101] R. Unger, *The Critical Legal Studies Movement. Another Time, a Greater Task* (Verso 2015) 83–90. In international law this is even worse, of course, as Martti Koskenniemi taught us in *From Apology to Utopia* (Oxford University Press 2005).

[102] Wittgenstein, *Philosophical Investigations* (n. 8) § 185.

[103] Following Richard Rorty's famous quote that 'Truth is what your contemporaries let you get away with'. R. Rorty, *Philosophy and the Mirror of Nature* (Princeton University Press 1979) 176.

[104] C. Stolker, 'Ja geleerd zijn jullie wel!' (2003) 15 *Nederlands Juristenblad* 766.

[105] On Langdell's legal science programme, see N. Duxbury, *Patterns of American Jurisprudence* (Clarendon Press 1995) ch. 1.

[106] A. Sokal and J. Bricmont, *Fashionable Nonsense: Postmodern Intellectuals' Abuse of Science* (Picador 1999).

[107] On the influence of the *Freirechtsbewegung* on the American legal realists, see J.E. Herget and S. Wallace, 'The German Free Law Movement as the Source of American Legal Realism' (1987) 73 *Virginia Law Review* 399.

and the modern empiricism,[108] the American legal realists tended to play down legal analysis to a combination of 'transcendental nonsense',[109] 'perpetuated stupidity',[110] and 'medieval theology'.[111] In the 1970s and 1980s, the critical legal studies movement furthered the realist approach to law by claiming that law is so radically indeterminate that it is indistinguishable from politics.[112] Add a fair amount of radical exegesis of Wittgenstein's observations about rule-following to the mix,[113] and we are ready perform the burial rites of practical rationality in legal reasoning.

Obviously, there is a grain of truth in the critique of overly theoretical constructivism in law. Rudolf von Jhering's dream of the *Begriffshimmel* is a useful mirror for legal scholars to remain connected to earth.[114] As Jhering enters the Heaven of Legal Concepts, he is informed by 'a bright figure':

> '"This is the heaven that you, as a theorist, will share".
>
> [Jhering:] Is it only for theorists? Where do the practitioners go?
>
> "They have their own heaven."

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[108] For an overview of the inspirations of the American legal realist movement, see e.g. N. Duxbury, *Patterns of American Jurisprudence* (Oxford University Press 1995) ch. 2.

[109] F. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809.

[110] E.S. Robinson, *Law and the Lawyers* (Macmillan 1935) 31.

[111] T.W. Arnold, 'Apologia for Jurisprudence' (1935) 44 *Yale Law Journal* 729, 737–753. For an overview of further disqualifications, including 'Jovian lawyers mumbling pious principles' and 'uttering solving words', see W.B. Kennedy, 'Functional Nonsense and the Transcendental Approach' (1936) 5 *Fordham Law Review* 272.

[112] Unger, *The Critical Legal Studies Movement* (n. 101).

[113] B. Bix, 'The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory' (1990) 3 *Canadian Journal of Law and Jurisprudence* 107. There is only one thing that I wish to say about the use of Wittgenstein's work in legal theory, and I shall do so by repeating Frederick Schauer's wise words: 'I have no reason to believe I have anything to contribute to the debate [on Wittgenstein's remarks on rules] that has engaged not only Kripke and Wright, but also many others, including G.E.M. Anscombe, G.P. Baker & P.M.S. Hacker, Paul Boghossian, Robert Fogelin, Colin McGinn, and Guy Stock'. F. Schauer, 'Rules and the Rule-Following Argument' (1990) 3 *Canadian Journal of Law and Jurisprudence* 187.

[114] Or, as my promotor prof. Laurence Gormley would put it, 'avoid basket-weaving'. I am not entirely sure whether I have been capable of following his wise advice entirely.

[Jhering:] Do you get many people here?

“Only a few and most of them are from Germany and they have only come here recently”’.[115]

However, there are many forms of nonsense. Recognising fully their brilliant contributions on the guiding function of rules and the sociology of judging,[116] some projects of American legal realism score fairly well on the nonsense scale.[117] Furthermore, their obvious reliance on the fashion of the day – logical positivism and logical empiricism – arguably reflects a kind of methodological nonsense as well.

Scepticism about the scientific character of legal science seems particularly preoccupied with a particularly romantic and outworn image of the determinacy, precision and verifiability of the natural sciences. Notwithstanding persisting problems of verification and falsification – *of course* law is open-ended and usually more than one valid interpretation is possible, that is

[115] R. von Jhering, ‘In the Heaven for Legal Concepts: A Fantasy’ (C.L. Levy trans.) (1985) 58 *Temple Law Quarterly* 799, 802, 803. For some reason, this passage appears to me funnier in the English translation than in the German original. But this might well be because of linguistic or cultural prejudice, or simply lack of linguistic feeling on my part. Alas, the original in German reads:

‘“Das ist der Himmel, dessen Du als Theoretiker jetzt teilhaftig werden wirst”.

Also bloß für Theoretiker? Wohin kommen denn die Praktiker?

“Sie haben ihr eigenes Jenseits”.

Bekommt Ihr viele?

“Nur wenige und diese fast nur aus Deutschland, und von dorther auch erst seit einiger Zeit”’.

R. von Jhering, ‘Im juristischen Begriffshimmel. Ein Phantasiebild’ in *Scherz und Ernst in der Jurisprudenz* (Breitkopf & Hartel 1904) 250, 253.

[116] See ‘Interpreting the EU Internal Market’, Chapter 4.

[117] See for instance J. Frank, *Law and the Modern Mind* (Transaction Publishers 2009 [1930]) applying Freudian psychoanalysis to the process of judicial decision-making.

precisely the point of law's generality[118] – social and natural sciences seem to suffer from largely similar defects.[119] This is most clearly illustrated by twentieth-century discussions on the so-called demarcation criterion, that is the criterion that distinguishes science from non-science and pseudoscience.

B. Science and Legal Science

Verification is the hallmark of science according to the early twentieth-century legal positivists of the Vienna Circle, who considered verifiability through empirical observations as the main or only demarcation criterion.[120] However, strong variants of verificationism were quickly discredited, if not never sustainable in the first place,[121] by the underdetermination of theoretical generalisations by empirical evidence.[122] As Popper, and later Lakatos, emphasised, no number of empirical confirmations can increase the probability of a universal theory.[123] Logical positivism is long dead, even though it has left a legacy behind.[124] More sophisticated empiricist philosophies of science – associated with logical empiricism – centre however on

[118] This is wonderfully illustrated by M. Stone, 'Focusing the Law: What Legal Interpretation Is Not' in A. Marmor (ed.), *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press 1995) 80–84.

[119] I should credit prof. Anne-Ruth Mackor for first introducing me, during a *Philosophy of Science* seminar, to the fact that the defects of legal science are mirrored to significant degree in all other sciences as well. Truth be said, I proceeded by writing a paper on how law is not a science because legal propositions cannot be verified, of which I can only hope it will never be recovered from any repository.

[120] A.J. Ayer, *Language, Truth, and Logic* (Penguin 2001 [1936]). Verificationism can be described as the thesis that sentences or thoughts are only meaningful or intelligible when they can be verified or falsified (B. Stroud, 'Verificationism' in J. Dancy and E. Sosa (eds.), *A Companion to Epistemology* (Blackwell Publishing 1992) 518).

[121] Ayer acknowledged this in *Language, Truth, and Logic* (n. 120) 18–20.

[122] K. Stanford, 'Underdetermination of Scientific Theory', *Stanford Encyclopedia of Philosophy* (2017), at https://plato.stanford.edu/entries/scientific-underdetermination/.

[123] K.R. Popper, *The Logic of Scientific Discovery* (Basic Books 1959) 363–377.

[124] J. Passmore, 'Logical Positivism' in P. Edwards (ed.). *The Encyclopedia of Philosophy*, vol. 5 (Macmillan 1967) 57: 'Logical positivism… is dead, or as dead as a philosophical movement ever becomes. But it has left a legacy behind'.

weaker notions of (probabilistic) confirmation[125] and prediction,[126] and even they are vulnerable to objections to their assumptions[127] and relativist concerns about the force of confirmation.[128] Meanwhile, Popper's falsifiability criterion as an alternative to logical empiricism,[129] proved unduly restrictive both sociologically and philosophically. Scientists rarely specify the conditions under which their theories or hypotheses ought to be refuted, and scientific theories are typically resilient to singular experiments even if the latter falsify them.[130]

Following the collapse of verification and falsification as acceptable criteria for demarcating science from non-science, post-Popperian philosophy of science has largely focused on lowering expectations.[131] Following Kuhn's socio-historical analysis of scientific

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[125] The champions of modern logicism empicirism and confirmation theory being Carl Hempel and Rudolf Carnap. Landmark contributions include C.G. Hempel, 'Studies in the Logic of Confirmation' (1945) 54 *Mind* 1; C.G. Hempel, *Fundamentals of Concept Formation in Empirical Science* (University of Chicago Press 1952) and R. Carnap, *Logical Foundations of Probability*, 2nd edn (University of Chicago Press 1962).

[126] E.g. W.C. Salmon, 'Rational Prediction' (1981) 32 *British Journal for the Philosophy of Science* 115.

[127] Most famously, W.V.O. Quine, 'Two Dogmas of Empiricism' (1951) 60 *Philosophical Review* 20, attacking the analytic–synthetic distinction.

[128] T. Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press 2012).

[129] Popper, *The Logic* (n. 123) chs. 5 and 6.

[130] I. Lakatos, 'Falsification and the Methodology of Scientific Research Programmes', reprinted in I. Lakatos, *The Methodology of Scientific Research Programmes*, ed. J. Worrall and G. Currie (Cambridge University Press 1978). This critique of Popper led Lakatos to develop his theory of scientific research programmes. These research programmes can be extended for several centuries and typically comprise a 'hard core' set of hypotheses, a protective set of auxiliary hypotheses, and a positive heuristic specifying the methodology which is used to solve puzzles within the research programme. This conception of scientific activity explains why scientific programmes are usually not given up because of incidental anomalies in the available data. Rather, research programmes can either be progressive – when it continues to make predictions and puzzle-solving hypotheses – or degenerating – when the hard core of assumptions is affected by a lack of scientific progress.

[131] P. Feyerabend, *Against Method* (New Left Books 1975) notoriously contended that 'anything goes' in science and advocated what he called 'epistemological anarchism'. The deconstruction of verificationism and falsificationism does not mean, however, there is nothing that separates science from pseudoscience. even though helpful criteria would rather focus on scientific *activity* and *attitude* rather than the resulting content. Suggestions of factors which may contribute to the scientific character of particular social institutional *activity* may include, for instance, simplicity (e.g. P.R. Thagard, *Computational Philosophy of Science* (MIT Press 1988)), tentativeness (e.g. M. Ruse, 'Creation-Science Is Not Science' (1982) 7 *Science, Technology, and Human Values* 72), and a critical, 'scientific', attitude. For instance, Paul Thagard proposed a demarcation criterion that combines Lakatos' notion of progressiveness over a long period of time with a community of practitioners that attempts to solve

paradigm change, which has relativised and historicised the enterprise of science, science is described as mere puzzle-solving activity taking place in historically defined 'paradigms'[132] or 'research programmes'.[133] In terms of content of scientific activity, pragmatism reigns. Thus, speaking with W.V.O. Quine, 'systematization of our sensory intake is the very business that science itself is engaged in'.[134]

Systematising the available legal materials, including rules, principles and doctrines, however, is precisely what traditional legal science has always claimed to be. The sceptics about legal science – who are usually lawyers rather than scientists or philosophers of science – seem to have forgotten that contemporary philosophy of science has moved the methodological quality of natural and social sciences far more towards the model of traditional legal science than often acknowledged. Once the expectations of how science is supposed to be demarcated are lowered, the nature of legal science becomes less burdened by unproductive standards.

C. Pluralistic Legal Science and Methodology

Legal science itself is clearly a pluralist activity. Appealing again to Monet's views of the cathedral, doctrinal constructivism provides direct knowledge of the law itself,[135] but it is only one view on the behaviour of law as a social and normative system. One recent taxonomy distinguishes between normativist legal science, realistic legal science, argumentativist legal dogmatics, realistic-technological legal dogmatics, and critical legal dogmatics.[136] This variety reflects deeper controversy about what legal facts actually are. Many discussions about law, legal systems and legal interpretation ultimately boil down to the relationship between the posited legal materials that are identifiable as social facts, and some moral principles or beliefs that are deemed part of the law as well. A kind of reflective equilibrium is necessary to find answers to difficult legal questions. However, there are many questions that can be asked about

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remaining problems in theory, shows concern for evaluation of the theory in relation to competing theories, and is not selective in consideration of confirmations and disconformations. See P.R. Thagard, 'Why Astrology Is a Pseudoscience' in P. Asquith and I. Hacking (eds.), *Proceedings of the Philosophy of Science Association*, vol. 1 (Philosophy of Science Association 1978) 223.

[132] Kuhn, *The Structure of Scientific Revolutions* (n. 128).

[133] Lakatos, 'Falsification and the Methodology of Scientific Research Programmes' (n. 130).

[134] W.V.O. Quine, *From Stimulus to Science* (Harvard University Press 1995) 15.

[135] See Somek, *The Legal Relation* (n. 21) ch. 2.

[136] Á. Núñez Vaquero, 'Five Models of Legal Science' (2013) 19 *Revus* 53.

the available legal materials, and the choice for a particular framework of analysis depends on numerous factors. Systematising the available legal materials – taking consistency and coherence as guiding forces – is a method well-suited where the law is messy or obscure (or both). Where positive law leads to apparent injustices or inefficiencies, external appraisal is more apt, taking morality or economics as a benchmark. Consequently, there is no generalisable hierarchy of usefulness, suitability or methodological purity for the numerous methods that one can apply in studying law. As legal systems are at the centre of society, only an accumulation of methodologies can provide a full picture of their meaning and functioning. In other words, a full view of the cathedral can only result from a combination of 'internal' approaches to law, including doctrinal approaches but also theoretical ones, and 'external' approaches, including socio-legal studies, economic analysis of law, and moral evaluation.

In this dissertation, I aim to provide at least a number of different and hopefully complimentary perspectives on the different roles of autonomy, legality and pluralism in EU law. These range from general jurisprudence and philosophy of law,[137] metaethical theorising[138] and American legal realism,[139] to doctrinal constructivism,[140] external moral appraisal of the law,[141] and socio-legal and historical analysis.[142] As noted above, the choice for certain methodologies is at least in part a function of the topic itself and the existing literature. Where the constitutionalisation of EU law has been abundantly analysed before,[143] a view from legal philosophy can perhaps add more to current understandings than yet another

[137] 'Why EU Law Claims Supremacy', Chapter 2; and 'Legality and Autonomy of EU Law: You'd Better Believe It', Chapter 3.

[138] 'In Search of Foundations: Ethics and Metaethics in Constitutional Adjudication', Chapter 6.

[139] 'Interpreting the EU Internal Market', Chapter 4.

[140] 'Interpreting the EU Internal Market', Chapter 4; and 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions', Chapter 5.

[141] 'Pluralism Through Its Denial: The Success of EU Citizenship', Chapter 7.

[142] 'Breaking Chinese Law – Making European One: The Story of *Chen*, Or: Two Winners, Two Losers, Two Truths', Chapter 8.

[143] E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1; M. Cappelletti, M. Seccombe and J.H.H. Weiler, *Integration Through Law* (de Gruyter 1986); J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403; M. Poiares Maduro and M. Wind (eds.), *The Transformation of Europe: Twenty-Five Years On* (Cambridge University Press 2017).

view from supranational constitutionalism.[144] As the case law on free movement of goods has been scrutinised magnificently from a doctrinal perspective,[145] a more distanced vantage point discussing the (in)determinacy and mechanisms of interpretation may be more apt.[146] Doctrinal constructivism might, however, be very useful with a view to the jurisprudence on direct effect of directives.[147] Hence, the proper methodology is at least in part highly dependent on the subject-matter at hand. On the other hand, it is also significantly a matter of personal preference. A sensible contribution to legal knowledge requires not only skill and knowledge, but also a fair degree or 'good sense', another manner in which legal science is very similar to the natural sciences.[148]

Ranging from the macro-level to the micro-level, this collection may hopefully contribute, though marginally, to our understanding of how autonomy, legality and pluralism operate in the EU legal system, both in the abstract as well as in the concrete.

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[144] See 'Why EU Law Claims Supremacy', Chapter 2; and 'Legality and Autonomy of EU Law: You'd Better Believe It', Chapter 3.

[145] See e.g. L.W. Gormley, *EU Law of Free Movement of Goods and Customs Union* (Oxford University Press 2009); N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2013); R. Schütze, *From International to Federal Market: The Changing Structure of European Law* (Oxford University Press 2017).

[146] See 'Interpreting the EU Internal Market', Chapter 4.

[147] See A. von Bogdandy and J. Bast, *Principles of European Constitutional Law* (Hart Publishing 2009) 356–357: 'The biggest hurdle still to be overcome by legal doctrine is to come up with clear criteria for demarcating the boundary between a (not recognised) horizontal direct effect and a (recognised) indirect imposition of burdens in triangular situations'; and M. Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 *Common Market Law Review* 931, 963: 'it hardly seems so painful, being forced to acknowledge that the search for a theoretically respectable, watertight descriptive account of the fractured, fumbling case law on the direct effect of Directives is a task fit only for masochists'. See 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions', Chapter 5.

[148] As physicist Pierre Duhem observed, '[p]ure logic is not the only rule for our judgements; certain opinions which do not fall under the hammer of the principle of contradiction are in any case perfectly unreasonable. These motives which do not proceed from logic and yet direct our choices, these "reasons which reason does not know" and which speak to the ample "mind of finesse" but not to the "geometric mind", constitute what is appropriate called good sense'. P. Duhem, *The Aim and Structure of Physical* Theory, trans. P.P. Wiener (Atheneum 1962 [1904–1905]) 217, 247, cited in D. Gillies, 'The Duhem Thesis and the Quine Thesis' reprinted in M. Curd, J.A. Cover and C. Pincock (eds.), *Philosophy of Science: The Central Issues*, 2nd edn (W.W. Norton & Company 2013) 278.

PART I: FOUNDATIONS OF THE EU LEGAL SYSTEM