Essays on Autonomy, Legality and Pluralism in European law

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3. Legality and Autonomy of EU Law: You'd Better Believe It

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I. Introduction

Since *Van Gend & Loos* and *Costa v. ENEL*, the ECJ has claimed that the EU Treaties constitute an independent legal system[1] whose justiciable norms are directly effective[2] and have primacy over conflicting national law.[3] National administrative and judicial institutions are obliged to apply these norms.[4] The constitutionalization of the EU Treaties, most notably associated with *Van Gend & Loos*[5] and *Costa v. ENEL*,[6] has been analyzed from the perspective of legal hermeneutics,[7] transformative constitutionalism,[8] and in a recent 'historical turn' in EU legal studies,[9] historical studies.[10] Contributing to these approaches, this article will offer

[1] Recently, Opinion 2/13 on accession of the EU to the ECHR, EU:C:2014:2454, paras. 166–170; Opinion 1/17 on CETA, EU:C:2019:341, paras. 109–111.

[2] E.g. *Criminal proceedings against Daniel Adam Popławski*, C-573/17, EU:C:2019:530.

[3] E.g. *Stefano Melloni v Ministerio Fiscal*, C-399/11, EU:C:2013:107.

[4] E.g. *Stadt Wiener Neustadt v Niederösterreichische Landesregierung*, C-348/15, EU:C:2016:882.

[5] *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v Nederlandse Administratie der Belastingen*, 26/62, EU:C:1963:1.

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

[7] E.g. H. Kutscher, 'Methods of Interpretation as Seen by a Judge at the Court of Justice' in *Reports of a Judicial and Academic Conference held in Luxemburg on 27–28 September 1976*, 29–35; P. Pescatore, '*Van Gend en Loos,* 3 February 1963 – A View from Within' in M. Poiares Maduro and L. Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 6; J.H.H. Weiler, 'Rewriting *Van Gend en Loos*: Towards a Normative Theory of ECJ Hermeneutics' in O. Wiklund (ed.), *Judicial Discretion in European Perspective* (Kluwer Law International 2003).

[8] J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

[9] See e.g. the special issues (2012) 21 *Contemporary European History* 305–505; (2013) 28 *American University International Law Review* 1173–1356; and the edited volume F. Nicola and B. Davies (eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).

[10] See e.g., M. Rasmussen, 'Revolutionizing European law: A History of the *Van Gend & Loos* Judgment' (2014) 12 *International Journal of Constitutional Law* 136; A. Vauchez, 'The Transnational Politics of Judicialization. *Van Gend & Loos* and the Making of EU Polity' (2010) 16 *European Law Journal* 1; A. Arena, 'How European

a rational explanation of the ECJ's foundational case law on the autonomy, direct effect and supremacy of EU law, which tries to remain faithful to EU law's self-understanding and describes it in its own terms.[11] As I shall argue, the logic of this jurisprudence is captured by the vocabulary of contemporary analytical legal theory. In particular, I will draw from H.L.A. Hart's theory of law and recent elaborations of this theory.[12]

Three terms are central to this conceptualization of the ECJ's foundational case law: autonomy, legality and effectiveness. Effectiveness has taken center stage in the ECJ's conceptualization of the EU Treaties as constituting an independent legal system.[13] The notion of effectiveness or *effet utile* has in this regard been associated mainly with teleological or purposive interpretation.[14] Legality on the other hand, has an ambiguous relationship with EU

Law Became Supreme: The Making of *Costa v. ENEL*' (2018) *Jean Monnet Worker Paper* NYU School of Law No. 05/18.

[11] Theoretical accounts of EU law usually apply 'external' vocabularies, mainly those from political science. This is exemplified by characterizations of EU law that rely on concepts such as federalism, supranationalism and intergovernmentalism, multi-level governance, etc. This article tries to avoid 'foreign' vocabulary. I could also say that I am trying to offer a 'pure theory of EU law', but that would be misleading because I am relying mainly on Hartian and post-Hartian legal theory, which rejects Kelsen's metaphysical and methodological commitments to a pure theory of law.

[12] Hart's work is not a particularly fashionable reference frame in contemporary EU legal theory, a socially obligatory reference to *The Concept of Law* aside. Alas, *The Concept of Law* 'is known as much by rumour as by reading', as Leslie Green observes in his introduction to H.L.A. Hart, *The Concept of Law*, 3rd edn (Oxford University Press 2012) xv. For an early application of Hart's theory of law to the EU legal system, see M.L. Jones, 'The Legal Nature of the European Community: A Jurisprudential Analysis using H.L.A. Hart's Model of Law and a Legal System' (1984) 17 *Cornell International Law Journal* 1.

[13] The most extensive analyses of the effectiveness principle in EU law are written in German: see e.g. W. Pühs, *Der Vollzug von Gemeinschaftsrecht. Formen und Grenzen eines effektiven Gemeinschaftsrechtsvollzugs und Überlegungen zu seiner Effektuierung* (Duncker & Humblot 1997); M. Mosiek, Effet utile *und Rechtsgemeinschaft – Zugleich ein Beitrag zur Kompetenzordnung der Europäischen Gemeinschaft* (Lit 2003); S. Seyr, *Der* effet utile *in der Rechtsprechung des EuGH* (Duncker & Humblot 2008); A. von Oettingen, Effet utile *und individuelle Rechte im Recht der Europäischen Union* (Nomos 2010). See also 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) 8 *European Journal of Legal Studies* 18; and Kutscher, 'Methods of Interpretation' (n. 7) 41.

[14] E.g. Kutscher, 'Methods of Interpretation' (n. 7) 29–41; J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Clarendon Press 1993) 250–258; K. Lenaerts and J.A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) 20 *Columbia Journal of European Law* 3, 32.

law. In its thin conception within contemporary Anglo-American legal theory, legality stands for the property of being law.[15] Instead of taking for granted that EU law is indeed 'law' – which does not tell us much about why this would be the case, beyond its semantic labeling[16] – I will try to show what it actually means for EU law to aspire towards being an autonomous legal system.[17] The intertwining of legality and effectiveness in contemporary legal theory is reflected in, and is central to, the ECJ's foundational case law. The resulting conclusion is that EU law is an autonomous legal system not only on the basis of its own rhetoric, but also on our best understanding of the provenance, shaping and maintenance of EU law.

In doing so, I will build on two methodological premises. The first is R.G. Collingwood's theory of re-enactment. Re-enactment refers to the act of enacting the logical content of historical thought in order to bridge the hermeneutic gap between the past and present.[18] Collingwood's re-enactment theory implies that the *logic* of the jurisprudence matters, rather than the psychological attitudes or intentions of the judges.[19] The second is Donald Davidson's theory of radical interpretation, in particular the principle of charity.[20] Radical interpretation aims to interpret linguistic behavior without presupposing prior knowledge about the beliefs of the speaker or the meaning of his utterances, while the charity principle requires utterances to be interpreted as much as possible as communicating true beliefs. The charity principle in

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[15] J.L. Coleman, *The Practice of Principle* (Oxford University Press 2001) 84; S.J. Shapiro, *Legality* (Harvard University Press 2011) 7. This thin conception of legality should be distinguished not only from 'thick' conceptions of legality, which describe a particular aspiration that law ought to live up to (e.g. L. Fuller, *The Morality of Law*, rev. edn (Yale University Press 1970)), but also from Kantian legality, where legality stands for morally unconcerned compliance with the law (I. Kant, *Metaphysical Elements of Justice. Part I of the Metaphysics of Morals*, 2nd edn, trans. J. Ladd (Hackett Publishing) 19).

[16] Some theorists indeed have argued that there are no necessary conceptual characteristics of the term 'law', i.e. that 'law' is simply whatever people conventionally denote as 'law', in particular B.Z. Tamanaha, *A Realistic Theory of Law* (Cambridge University Press 2017).

[17] By 'autonomy' I do not refer to any strict understanding of that term in the sense of epistemic or ontological independence. The autonomy of law, rather, lies in law's normative and communicative self-referentiality.

[18] R.G. Collingwood, *The Idea of History*, rev. ed. (Oxford University Press 1994).

[19] Re-enactment aims to capture the 'logical content' of historical thought, rather than the actual, psychological states of historical figures, since the latter are forever epistemically inaccessible. For analysis of Collingwood's metaphysics and epistemology, see W.H. Dray, *History as Re-enactment* (Clarendon Press 1995); and R.G.P. Peters, *History as Thought and Action: The Philosophies of Croce, Gentile, de Ruggiero and Collingwood* (Imprint Academic 2012) chs. 9 and 10.

[20] D. Davidson, 'Radical Interpretation' reprinted in *Inquiries into Truth and Interpretation*, 2nd edn (Oxford University Press 2001).

radical interpretation entails that we interpret the case law as containing, to the extent possible, true beliefs about the nature of EU law.

This article is structured as follows. Section II will set the scene by questioning the 'common story' of *Van Gend & Loos* and the founding of the EU legal system as an exercise in teleological interpretation. Following Alexander Somek's claim that in constitutionalizing the EU Treaties, 'the Court inferred the legal form of Community law from its content',[21] I will argue that the legal form that the EU Treaties have been understood to possess since *Van Gend & Loos* is that of an independent legal system. I describe this argument as the 'autonomy thesis'. This autonomy thesis is the central object of analysis in the subsequent sections.

Section III explores the relationship between the autonomy thesis and what the ECJ offers as its central rationale, the principle of effectiveness. Effectiveness is a necessary condition of legality but it cannot be the *reason for* legality. To understand the foundational case law, we thus need an internal point of view.

Section IV proceeds accordingly by conceiving *Van Gend & Loos* and *Costa v. ENEL* as *internal* formulations of an EU rule of recognition, and uses the development of general principles of EU law as an example of how the ECJ has tried to 'pitch' the EU legal system towards the national courts.

Rephrasing the autonomy thesis in Hartian vocabulary invites a conceptualization of the two other doctrines central to the ECJ's foundational case law: direct effect and supremacy. Section V reconfigures the salience of supremacy and direct effect as elements of the 'union of primary and secondary rules' that Hart deemed central to the concept of a legal system.

Finally, Section VI takes the perspective of the national courts towards the autonomy thesis by addressing the common objection that EU law is no autonomous legal system because the national courts only recognize its normativity in virtue of their national constitutions. While I cannot prove this objection to be false, I will try to cast sufficient doubt on its conceptual integrity to make the autonomy thesis presumptively correct.

Section VII concludes.

II. From Teleological Interpretation to the Autonomy Thesis

[21] A. Somek, 'Is Legality a Principle of EU Law?' in S. Vogenauer and S. Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 67.

It seems almost a commonplace to perceive the Court's foundational case law on autonomy and direct effect as an example of teleological interpretation.[22] *Van Gend & Loos* remains the paradigmatic case, by inferring autonomy and direct effect from the spirit and general scheme of Treaty. Purposive interpretation of the Treaties and secondary legislation is both hailed as a noble dream, 'well developed [...] and presented to individuals and their judges with such elegance and persuasive power',[23] and despised as a nightmare,[24] no less than a juridical coup d'état.[25] This polarization applies with particular force to what has come to be known as 'meta-teleological interpretation'. First introduced by Lasser,[26] and subsequently used by Poiares Maduro[27] and Conway,[28] the concept of 'meta-teleological interpretation' refers to the interpretation of individual legal norms in light of the purposes of the legal system as a whole.[29] Even if 'meta-teleological' interpretation statistically does not play a major role in the Court's jurisprudence,[30] it has had considerable influence in the Court's landmark judgments.[31]

The hermeneutic critique of the Court's move in *Van Gend & Loos* usually follows the familiar lines of the general debate on the virtues and vices of purposive interpretation. However, in a recent contribution, Alexander Somek denies that *Van Gend & Loos* could count as teleological interpretation. What is important in this regard is that the revolutionary impact of *Van Gend & Loos* was not that Article 12 EEC had direct effect, as Weiler and de Witte had

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[22] See e.g., J. Bengoetxea, *The Legal Reasoning* (n. 14) 250–258; M. de S.-O.-l.'E. Lasser, *Judicial Deliberations* (Oxford University Press 2004) 207; G. Beck, *The Legal Reasoning of the Court of Justice of the European Union* (Hart Publishing 2013) 207–212. See also Šadl, 'Role of *Effet Utile*' (n. 13).

[23] Pescatore, '*Van Gend en Loos*, 3 February 1963 – A View from Within' (n. 7).

[24] Somek, 'Is Legality a Principle of EU Law?' (n. 21) 64–67. For classical critiques see, H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff 1986); G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2014).

[25] A. Stone Sweet, 'The Juridical *Coup d'État* and the Problem of Authority' (2007) 8 *German Law Journal* 915.

[26] Lasser, *Judicial Deliberations* (n. 22) 206–215, 359.

[27] M. Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 *European Journal of Legal Studies* 1.

[28] G. Conway, 'Levels of Generality in the Legal Reasoning of the European Court of Justice' (2008) 14 *European Law Journal* 787.

[29] Lasser, *Judicial Deliberations* (n. 22) 208; Poiares Maduro, 'Interpreting European Law' (n. 27) 12–14.

[30] Seyr, '*Der* effet utile' (n. 13) 270 notes that out of 455 judgments containing *effet utile*- or purpose-based interpretation, more than 63% pertains to the effectiveness of the individual legal norm, rather than that of the EU legal system as a whole.

[31] Šadl, 'Role of *Effet Utile*' (n. 13).

indeed already demonstrated.[32] The key contribution of *Van Gend & Loos* is that the question of whether EU norms have direct effect must solely be answered by EU law itself: *autonomy*, not direct effect as such.[33]

By declaring the irrelevance of the monistic and dualistic systems of incorporation in national constitutional law, the Court emancipated EU law from public international law. The latter lacks a doctrine of 'internal primacy'[34] to this day.[35] Further, in contrast to public international law – under which the Treaty of Rome would be a specific substantive part of the system of international law – *Van Gend & Loos* and *Costa v. ENEL* purport to create an EU legal system that governs its own jurisdiction. The Court thus expressly dissociated the EU legal system from public international law.[36] Somek takes these well-known facts to their logical implication: the 'myth of teleological interpretation' disguises the fact that 'the Court inferred the legal form of Community law from its content'.[37] As I understand his argument, 'legal form' refers to the form of an autonomous legal system, which operates normatively independently from national legal systems and international law.

Somek is right to conclude that teleological interpretation is an unconvincing explanation of the Court's foundational case law. Teleological interpretation is a method of interpretation locating the *content* of individual legal norms – or perhaps sets of legal norms – in their

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[32] As Weiler has pointed out, that result might well have been the same under public international law: Weiler, 'Rewriting *Van Gend en Loos*' (n. 7). See also B. de Witte, 'The Continuous Significance of *Van Gend en Loos*' in Poiares Maduro and Azoulai (eds.), *The Past and Future of EU Law* (n. 7) 11.

[33] Somek, 'Is Legality a Principle of EU Law?' (n. 21) 67; 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); de Witte, 'The Continuous Significance of *Van Gend en Loos*' (n. 32).

[34] This term is used e.g. by de Witte, 'Direct Effect' (n. 33). According to the present article's conceptualization of the autonomy of EU law, the term is misleading. EU law is not, and need not be, 'incorporated' into national legal systems in order to be applied by national courts. These courts can 'grasp' the content of EU norms *directly* insofar as they are 'legal officials' of the EU legal system. See further n. 55–59 and accompanying text, as well as Sections IV and VI.

[35] E.g. T. Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law' (1992) 235 *Collected Courses of the Hague Academy of International Law* 303; J.E. Nijman and A. Nollkaemper, 'Introduction' and A. Peters, 'The Globalization of State Constitutions' both in J.E. Nijman and A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007).

[36] This is why conceptions of EU law as international law are unpersuasive. Cf. e.g. D. Wyatt, 'New Legal Order, or Old?' (1982) 7 *European Law Review* 147; T. Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 *Harvard International Law Journal* 389.

[37] Somek, 'Is Legality a Principle of EU Law?' (n. 21) 67.

purpose. Meta-teleological interpretation shifts focus to the purpose of the entire legal system, but it still concerned with the process of discovering the content of some norm or set of norms.[38]

In stark contrast, the autonomous nature of the EU legal system as inferred from the Treaty's substance in *Van Gend & Loos*, is not an interpretation of any legal norm in particular. It is rather a meta-interpretation[39] of the *genus* to which the Treaty belongs: not a treaty in public international law, but an autonomous legal system. Rather than interpreting any EU norm, the Court appears to take an outsiders' perspective by observing the form of the Treaty of Rome.

The reader may object that what I describe as an observation of the Treaty's form is simply an interpretation of the Treaty as a social construction, and that clearly this construction can be interpreted purposively by looking, for instance, at its peculiar characteristics, such as the preliminary reference procedure.[40] However, this kind of teleological interpretation occurs at an entirely different level than the interpretation of legal norms (purposively or otherwise). Put differently, interpreting the Treaty of Rome as an autonomous legal system is a second-order interpretation of the form of the system of which EU norms are members, rather than a first-order interpretation of those norms themselves.[41] This difference between interpreting the

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[38] I leave aside here the issue of whether we should reserve the term 'interpretation' to a specific process that is triggered by the initial uncertainty about the meaning of some norm (i.e. 'hard cases') or whether all instances of understanding require 'interpretation'.

[39] By 'meta-interpretation' I mean an interpretation of the form of the activity in which interpretation of first-order norms takes place. Meta-interpretation is accordingly distinct from 'meta-teleological interpretation', which is a specific method of interpreting first-order norms. To provide an analogy: interpreting first-order norms of etiquette should be distinguished from interpreting the 'activity' of etiquette as such, e.g. by asking how etiquette is different from other normative rule systems, whether etiquette is conventional, etc.

[40] Whether the Treaty of Rome was sufficiently distinct in substance from other international treaties that it warrants a different conclusion as to their forms is another matter which need not be discussed here.

[41] The distinction between first-order and second-order interpretation as employed here runs roughly parallel with the distinction between the content of a particular legal system (the subject-matter of first-order legal claims), and the general characteristics of a legal system or legal systems in general (the subject-matter of general jurisprudence and legal philosophy). However, some legal philosophers resist the distinction between first-order and second-order interpretation entirely, such as Ronald Dworkin's one-system theory of law and morality. While I cannot scrutinize Dworkin's highly complex work here, I submit that the distinction between first-order and second-order interpretation is sufficiently intuitive to make a prima facie case for distinguishing the logical content of the ECJ's foundational case law from ordinary instances of legal interpretation. It could well be that a full-blown Dworkinian theory of EU law would indeed result in a very different conception of both *Van Gend & Loos* and *Costa v ENEL* as well as the ECJ's conception of the EU legal system generally. However, as I have argued elsewhere, the ECJ's

Treaty's form and interpreting the Treaty's legal norms is visible in the structure of *Van Gend & Loos* itself: only after introducing the doctrine of direct effect as a corollary of autonomy does the Court discuss whether Article 12 EEC possesses direct effect, and to that end it introduces the criteria of sufficient clarity and unconditionality. Both direct effect and supremacy are not – and could not possibly be – inferred from any legal norm.[42]

I will refer to the ECJ's conception of the EU Treaties – introduced in *Van Gend & Loos* and *Costa v. ENEL* and maintained up to Opinions 2/13 and 1/17 – as the 'autonomy thesis'. The autonomy thesis comprises two elements. The first element, already mentioned, is that EU law is a self-referential legal system that cannot be known from an external Archimedean vantage point.[43] In Hartian parlance, EU law has its own rule of recognition.[44] Admittedly, the Court caused confusion in parts of *Costa v. ENEL* by stating that the '[EU] legal system […] on the entry into force of the Treaty, became an integral part of the legal systems of the Member States', which suggests that the EU legal system does not operate autonomously, but somehow becomes 'part of' national legal systems.[45] As Julie Dickson emphasized, however, this conception of the EU legal system's integration 'into' the national legal systems is hard to square with the Court's broader autonomy claims.[46] Imagining the position of the ECJ, Dickson suggests:

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jurisprudence seems ultimately incompatible with Dworkin's theory of law. See, to this end, 'Why EU Law Claims Supremacy', Chapter 2.

[42] This makes it somewhat odd that some scholars have expressed surprise that the doctrines of autonomy and supremacy cannot be found in the Treaty. See recently e.g. Conway, *The Limits of Legal Reasoning* (n. 24) 29–30; T. Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge University Press 2018) 115–131. Even if this were the case, this begs the question why this supremacy rule, as a rule of the Treaty, would have supremacy over the manner in which national constitutional law regulates the incorporation of public international law. No first-order supremacy rule in the EU Treaties could therefore possibly generate the supremacy (or, *mutatis mutandis*, autonomy) of the EU legal system.

[43] See G. Teubner, '"And God Laughed...": Indeterminacy, Self-Reference, and Paradox in Law' in C. Joerges and D. Trubek (eds.), *Critical Legal Thought* (Nomos 1989).

[44] See Section IV below.

[45] See also S. Prechal, *Directives in EC Law* (Oxford University Press 2005) 92–93.

[46] See e.g. J. Dickson, 'Directives in EU Legal Systems: Whose Norms Are They Anyway?' (2011) 17 *European Law Journal* 190, 197–200.

> 'perhaps it is easier to persuade Member States' courts to apply EC law and give it precedence over conflicting national law if you first of all present that EC law to them as, in some sense, part of their own legal heritage, and part of their own legal systems'.[47]

Whatever were the motivational reasons for the Court to present EU law as both autonomous and 'part of' the national legal systems at the same time, the latter appears to have waned in later case law, while the Court's emphasis on the distinctness and autonomy of the EU legal system continues to take center stage in the case law.[48]

The second element of the autonomy thesis pertains to the nature of the rule of recognition. According to Hart, a rule of recognition is practiced by a subset of the members of the community he calls 'legal officials'.[49] Contrary to public international law, the autonomy thesis entails that national administrative and judicial authorities become legal officials of the EU legal system.[50] The EU legal system speaks directly to the national authorities by obliging them to apply EU law.[51] From the perspective of Hartian legal theory, the relationship between *system* and *official* is a more fundamental cornerstone of the legal system than the one between *system* and *individual*, which has been the focus of most scholarship on the constitutionalization of the EU Treaties.[52]

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[47] Ibid.; 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, 36.

[48] See e.g. n. 1. Already before *Van Gend & Loos*, see *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn*, 13/61, EU:C:1962:11, p. 49. See also 'Why EU Law Claims Supremacy', Chapter 2, with further references.

[49] Hart, *The Concept of Law* (n. 12) 90–99.

[50] See Section VI.

[51] As to national courts, see e.g. *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, 106/77, EU:C:1978:49; *R. v Secretary of State for Transport, ex parte: Factortame Ltd and Others*, C-213/89, EU:C:1990:257; and *Jozef Križan and Others v Slovenská inšpekcia životného prostredia*, C-416/10, EU:C:2012:218. As to national administrative authorities, see e.g. *Fratelli Costanzo SpA v Comune di Milano*, 103/88, EU:C:1989:256.

[52] Cf. e.g. J.H.H. Weiler, '*Van Gend en Loos*: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 *International Journal of Constitutional Law* 94. Hart's focus on the relationship between system and official, instead of the one between system and individual, is not only made clear by his analysis of the foundations of the legal system (Hart, *The Concept of Law* (n. 12) ch. 5) but also by his *rejection* of critiques of the legality of international law which are based on the fact that the subjects of international law are states, not individuals (ibid. 216–226).

The first element of the autonomy thesis has been criticized for a lack of constitutional authorization. Creating an autonomous legal system without the express authorization of the Member States, the argument goes, is normatively illegitimate.[53] As I will show in Section IV below, Hartian legal theory sheds a different light on the relationship between polity and legal system by demystifying the latter.

The second element of the autonomy thesis connects to the constitutional and institutional entrenchment of legal officials. Puzzlement at the nature of Hart's concept of legal official, however, predates and transcends the specific case of EU law's autonomy thesis. For Hart, legal officials create a legal system by committing to its rule of recognition. Responding to the apparent circularity and indeterminacy of this reasoning,[54] the genealogy of legal systems presumes that some powerful subset of the members of a community – call them 'proto-officials' – may start regarding themselves as being bound by some set of rules, perhaps even mistakenly or accidentally, and in doing so begin constituting a legal system.[55] Thus the proto-officials of system A can transform into genuine officials of system A, and officials of system B can transform into the proto, then actual officials of system C.

As applied to EU law, circularity and indeterminacy are in any case false problems. The ECJ never communicated with a random subset of the members of the population.[56] The role of national courts as *legal* officials of their national legal systems makes them sufficiently determinable as a *sociological* category of proto-officials of the EU legal system.[57] The

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[53] E.g. Stone Sweet, 'The Juridical *Coup d'État*' (n. 25); Somek, 'Is Legality a Principle of EU Law?' (n. 21).

[54] As to circularity, legal officials such as courts derive their identity as officials from the law. At the same time, they are said to constitute the legal system. Shapiro, *Legality* (n. 15) 39–40, describes this as the chicken-and-egg problem. As to indeterminacy, Hart's theory does not make clear *which* subset of a community's members are supposed to count as *legal* officials as opposed to officials of any other normative system. This relates also to the over-inclusiveness of Hart's theory of legal system: K. Culver and M. Giudice, *Legality's Borders* (Oxford University Press 2010) 10–21.

[55] Hart, *The Concept of Law* (n. 12) 111–123; J. Gardner and T. Macklem, 'Review of Scott J. Shapiro, *Legality*', *Notre Dame Philosophical Reviews* (2011), at https://ndpr.nd.edu/news/legality/. For alternative, though related, solutions to the circularity paradox, see Coleman, *The Practice of Principle* (n. 15) 100–101; K. Greenawalt, 'The Rule of Recognition and the Constitution' (1987) 85 *Michigan Law Review* 621; Culver and Giudice, *Legality's Border* (n. 54) 10–14.

[56] Art. 267 TFEU refers to 'any court or tribunal of a Member State'.

[57] Koen Lenaerts speaks in this regard of 'national judges as the *arm* of EU law (or, put more simply, as "European judges")': K. Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' (2019) 38 *Yearbook of European Law* 1, 4 (emphasis in original). Whether the autonomy thesis and the conception of national courts as 'EU legal

autonomy thesis is anti-institutional in purporting to transform the identity of national courts, while recognizing their current institutional position; an exercise in symbolic power *par excellence*, to use Bourdieu's terminology.[58]

To sum up, the Court's foundational case law on the autonomy, direct effect and supremacy is inaptly described as a teleological interpretation of the legal norms of the EU Treaties. Instead, the autonomy thesis is a thesis about the form that the EU Treaties have created. It states that EU law is identified by its own rule of recognition, and that all Member States authorities are legal officials of the EU legal system.[59]

The remainder of this article will try to flesh out the logic of the autonomy thesis. If the autonomy thesis is not an interpretive statement about the normative substance of EU norms, what kind of statement is it? Can it be explained at all, or should we simply take the Court's case law for granted, whether or not we believe in its legitimacy? In the next section I will start by looking at the Court's effectiveness argument, which takes center stage in the autonomy thesis: that the efficacy of EU law can only be guaranteed if EU law governs its own application, and is directly applied by Member State authorities.

III. From Effectiveness to the Internal Point of View

From *Van Gend & Loos* to Opinion 2/13, the ECJ emphasized the need to ensure the effectiveness of the EU Treaties.[60] The connection between efficacy and legality is widely

officials' has sufficient normative and empirical support, however, is a different question, to which I will return in section VI below.

[58] P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805, 839: 'Symbolic power, in its prophetic, heretical, anti-institutional, subversive mode, must also be realistically adapted to the objective structures of the social world. […] [P]roducing new categories of perception and judgment […] can only succeed if the resulting prophecies, or creative evocations, are also, at least in part, well-founded pre-visions, anticipatory descriptions'.

[59] See further Sections IV and VI. See to a similar extent, Dickson, 'How Many Legal Systems?' (n. 47).

[60] *Van Gend & Loos*, 26/62, EU:C:1963:1: 'the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by articles 169 and 170 to the diligence of the Commission and of the Member States'; Opinion 2/13, EU:C:2014:2454, paras. 188–189 and 197. For analysis, see generally Seyr, '*Der* effet utile' (n. 13); M. Zuleeg, 'Die Wirksamkeit des Europarechts' in N. Colneric et al. (eds.), *Une Communauté de droit* (Berliner Wissenschafts Verlag 2003); J.L. da Cruz Vilaça, 'Le principe de l'effet utile du droit de l'Union dans la jurisprudence da la Cour' in *The Court of Justice and the Construction of Europe* (Springer 2013).

established in legal theory. No 'legal system purport' is law if it is not effectively upheld.[61] But while effectiveness is an empirical measurement, court decisions are interpretations of norms and are therefore normative themselves. The logic of the ECJ's foundational case law must therefore account for both its normative character and the central role of effectiveness.

The relationship between the effectiveness and validity of legal norms is most extensively analyzed in the work of Hans Kelsen. For Kelsen, validity can be equated to existence. In other words, to say that a legal norm is valid is tantamount to saying that it exists, and vice versa.[62] Given that validity is the only quality that legal norms possess, the effectiveness of legal norms must be an extra-legal quality. Statements about the efficacy of legal norms pertain to the actual observance of the legal norms by people.[63]

Consequently, the link between effectiveness and validity is established through the presupposition of the *Grundnorm*.[64] According to Kelsen, this presupposition must be conditional upon the overall effectiveness of the legal system. A legal system that is by and large effective is a condition for presupposing the *Grundnorm*, which validates all other legal norms.[65] However, in order to maintain his epistemic distinction between the factual ('*Sein*') and the normative ('*Sollen*'), Kelsen repeatedly stresses that effectiveness is only a *negative condition* for validity:

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[61] H. Kelsen, *General Theory of Law and State*, trans. A. Wedberg (Harvard University Press 1945) 119; Hart, *The Concept of Law* (n. 12) 116–117; J. Raz, *The Concept of a Legal System*, 2nd edn (Clarendon Press 1980) 202–207; R. Dreier, 'Der Begriff des Rechts' (1986) 39 *Neue Juristische Wochenschrift* 890, 896; R. Alexy, *Begriff und Geltung des Rechts* (Karl Alber 1992) 201. Even Dworkin's anti-positivist conception of law as integrity is grounded in the imperative of interpreting the posited legal materials as much as possible as part of one coherent political morality as expressed in the practice of past judicial decisions. As Dworkin puts it, legal claims should have 'institutional support' (R. Dworkin, 'The Model of Rules I' in *Taking Rights Seriously* (Harvard University Press 1978)) and social facts exercise a 'gravitational force' on legal content (R. Dworkin, 'Hard Cases' in *Taking Rights Seriously* (Harvard University Press 1978)).

[62] Following e.g., H. Kelsen, *The Pure Theory of Law*, trans. M. Knight (University of California Press 1967) 10; J. Raz, *The Authority of Law* (Clarendon Press 1979) 146; Cf. W. Waluchow, 'Four Concepts of Validity: Reflections on Inclusive and Exclusive Positivism' in M. Adler and K.E. Himma (eds.), *The Rule of Recognition and the US Constitution* (Oxford University Press 2009).

[63] Kelsen, *General Theory* (n. 61) 39–40.

[64] For Kelsen, the presupposition of the *Grundnorm* is at least partly based on epistemological grounds rooted in neo-Kantian philosophy. See S.L. Paulson, 'The Neo-Kantian Dimension of Kelsen's *Pure Theory of Law*' (1992) 12 *Oxford Journal of Legal Studies* 311.

[65] Kelsen, *General Theory* (n. 61) 41–42, 119.

> 'The efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order. A *conditio sine qua non*, but not a *conditio per quam*. The efficacy of the total legal order is a condition, not the reason for the validity of its constituent norms'.[66]

Even individual legal norms can lose their legal validity, notwithstanding the legal system's overall efficacy, if they remain permanently inefficacious. While the validity of newly enacted legal norms is provided by a higher-order norm – making them valid *before* there are first observed or applied – '[a] legal norm is no longer seen as valid if it remains permanently inefficacious'.[67]

Building on Kelsen's framework, Joseph Raz elaborated that effectiveness in the sense of obedience to the laws is hardly a measurable criterion for the existence of a legal system. After all, '[h]ow should cases of disobedience be counted? […] How should the number of opportunities to obey the law be counted? How many opportunities not to murder does one have during a year? And how many opportunities not to steal?'.[68] Rather than looking at general obedience to the law, Raz proposes to focus on the law-applying institutions of a legal system.[69] The recognition of legal norms by law-applying institutions is a necessary condition of their existence.[70] Raz emphasizes that effectiveness only applies as a counterfactual: the question is whether the courts would apply a norm if they were presented with an appropriate case for applying it.[71] *Enforceability* rather than enforcement becomes the hallmark of effectiveness. Similarly, Eugenio Bulygin conceives of effectiveness as a disposition. If the necessary conditions for applying a norm obtain, courts will apply the norm. The effectiveness of legal norms correlates with their judicial invocability.[72] Consequently, invocability and enforceability before law-applying institutions become necessary conditions for lasting legal

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[66] Kelsen, *General Theory* (n. 61) 119.

[67] H. Kelsen, 'Validity and Efficacy of the Law', trans. B. Litschewski Paulson and S.L. Paulson, in E. Bulygin, *Essays in Legal Philosophy* (Oxford University Press 2015) 67.

[68] Raz, *The Concept of a Legal System* (n. 61) 203.

[69] Ibid. 191–201.

[70] Raz, *The Authority of Law* (n. 62) 87.

[71] Ibid. 88.

[72] E. Bulygin, 'The Concept of Efficacy' in E. Bulygin, *Essays in Legal Philosophy* (Oxford University Press 2015) 48–51.

validity. 'Legal norms purport' are only *really* legally valid, i.e. have the property of legality,[73] if they are invocable before courts.

A. The role of invocability in the ECJ case law

Raz's and Bulygin's formulation of the effectiveness–validity nexus already gives us a hint of the relevance of the Court's case law on the invocability of EU law. Direct effect is the central mechanism for the legal order to create and maintain its enforceability. According to Pescatore,

> '[a]ny legal rule is devised so as to operate effectively (we are accustomed, in French, to speak here about *effet utile*). If it is not operative, it is not a rule of law […] In other words, practical operation for all concerned, which is nothing else than "direct effect", must be considered as being the normal condition of any rule of law'.[74]

As I understand Pescatore's claim, direct effect is not really a substantive doctrine *of* EU law, but rather a doctrinal restatement of its practical operation and enforcement. Obviously, enforcement need not necessarily be *within* the Member States, and invocability need not necessarily be before *national* courts. A legal order of international law, or international law itself, might well be effective at an international level only. But skepticism of the efficacy and accordingly the legality of international law continues to this day.[75] Thus, a charitable interpretation of Pescatore's observation is that the rules of the EU Treaties would not *really* be *legal* rules if they were not directly enforced in the domestic sphere.

The early development of the case law on the principle of effectiveness in the context of procedural autonomy served a similar function to direct effect.[76] According to the doctrine of

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[73] Here I use 'legality' as a property of individual norms. In later sections, I will use 'legality' somewhat differently as a property of a system of norms. Systems of norms that possess the property of legality are legal systems.

[74] P. Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 *European Law Review* 155, reprinted in (2015) 40 *European Law Review* 135 (subsequent citations refer to the 2015 reprinted version for convenience).

[75] E.g. H.J. Morgenthau, 'Positivism, Functionalism, and International Law' (1940) 34 *American Journal of International Law* 260; J.L. Goldsmith and E. Posner, *The Limits of International Law* (Oxford University Press 2005). For a rejoinder, see A. Somek, 'Kelsen Lives' (2007) 18 *European Journal of International Law* 409.

[76] In later years the principle of effectiveness has accumulated more positive, hermeneutic content, which translates into more stringent requirements for national procedural law. For an overview of this development, N. Reich, 'The Principle of Effectiveness and EU Private Law' in U. Bernitz, X. Groussot and F. Schulyok (eds.), *General Principles of EU Law and European Private Law* (Intersentia 2013).

'procedural autonomy', pending the harmonization of procedural rules, it is for the national legal orders to lay down the rules on legal procedures and remedies to ensure the protection of the rights of individuals. National procedural rules applying to claims based on EU law may not however make the exercise of EU law rights 'virtually impossible' or 'impossible in practice', a principle which the national courts are obliged to protect.[77]

Neither the doctrine of procedural autonomy, nor its limit in the principle of effectiveness, are found in the EU Treaties. These are not interpretations of EU law in the ordinary sense.[78] Both doctrines serve to guarantee that EU law norms can be enforced before national courts. The principle of effectiveness in the case law on procedural autonomy gives normative expression to the factual observation that legal norms that cannot be invoked before courts, or that are not applied by courts when they are invoked, are insufficiently efficacious to be legally valid. Such norms are deprived of their legality.

However, this legal-theoretical appraisal of effectiveness remains incapable of describing the normative logic of the Court's case law. While the salience of effectiveness for the legality of EU law is clear, the normative character of the foundational case law remains obscure. As the logical content of *Van Gend & Loos* lies at the crossroads between the normative and the factual, we require an understanding of the *normative* point of view which takes sufficient account of the *factual* salience of efficacy. The vantage point of Hart's legal theory helps to grasp this logic.

B. The internal point of view

Central to Hart's theory of law is the distinction between the internal and the external point of view, and the corresponding distinction between internal statements and external statements. An internal statement is a statement of some legal norm or its interpretation given by someone who is committed to the rule of recognition.[79] Internal statements are therefore legal statements by those who are actively engaged in the legal system. External statements are statements by someone who merely observes the legal system and is not himself active within it. According to Hart, an external statement expresses the fact that some people accept a given rule of

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[77] *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, 33/76, EU:C:1976:188, para. 5; *Comet BV v Produktschap voor Siergewassen*, 45/76, EU:C:1976:191, para. 16; *Amministrazione delle Finanze dello Stato v SpA San Giorgio*, 199/82, EU:C:1983:318, para. 12.

[78] This is different for the positive, hermeneutic conception of the principle of effectiveness: see generally Reich, 'The Principle of Effectiveness' (n. 76).

[79] Hart, *The Concept of Law* (n. 12) 102–103.

recognition.[80] Put differently, internal statements, or statements from the *internal point of view*, are statements *of law*. External statements, or statements from the *external point of view*, are statements *about law*.[81]

Whether a legal system is efficacious is a question from the external point of view. For Hart, making internal statements about a legal system presupposes the general effectiveness of that legal system:

> 'One who makes an internal statement concerning the validity of a particular rule of a system may be said to *presuppose* the truth of the external statement of fact that the system is generally efficacious. For the normal use of internal statements is in such a context of general efficacy'.[82]

Elsewhere, Hart refers to the 'context of general efficacy' as the 'normal context' of making internal normative statements about what the law is.[83] This notion of 'normal context' is remarkably similar to Pescatore's observations that 'practical operation for all concerned […] must be considered as being the normal condition of any rule of law', 'any legal rule must be at first sight presumed to be operative in view of its object and purpose' and '"direct effect" is nothing but the ordinary state of the law'.[84]

As a participant in the (hypothetical or real) EU legal system, the ECJ necessarily adopts an internal point of view. In making statements on 'direct effect' and the necessity of facilitating the 'enforceability' of EU norms, however, the ECJ seems to make explicit the necessary preconditions for EU legality. This would amount to making an external statement about the existence of the EU legal system *from within the system*: i.e. an external statement

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[80] Hart, *The Concept of Law* (n. 12) 103.

[81] For this formulation of Hart's distinction, see 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, 451–452. For a more extensive treatment of this distinction from the perspective of the analogy between metaethics and general jurisprudence, see K. Toh, 'Plan-Attitudes, Plan-Contents, and Bootstrapping: Some Thoughts on the Planning Theory of Law' in J. Gardner, L. Green and B. Leiter (eds.), *Oxford Studies in Philosophy of Law* (Oxford University Press 2019) 10–16.

[82] Hart, *The Concept of Law* (n. 12) 104 (emphasis in original).

[83] See H.L.A. Hart, 'Scandinavian Realism' in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 168.

[84] Pescatore, 'The Doctrine of "Direct Effect"' (n. 74) 135, 153.

disguised as an internal, normative statement. Admittedly, the ECJ locates part of its hermeneutics in the principle of loyalty in Article 4(3) TEU.[85] No individual norm, however, can serve as a basis for an external statement regarding the effectiveness of either that norm itself or its legal system. As the *validity* of the norm depends on its effectiveness, the norm can never be a reason for its own effectiveness. Pescatore is obviously right to argue that any legal norm in some way aspires towards achieving its aim in reality. However, this argument is unable to bootstrap an internal, normative statement from an external statement on efficacy. Accordingly, to make sense of the autonomy thesis, we need an understanding of the autonomy thesis as an internal statement. The next section will try to provide such an understanding by conceiving the autonomy thesis as an *internal recognitional statement*, i.e. a normative expression of the rule of recognition of the EU legal system.

IV. How to Recognize 'a New Legal Order'

This section will provide an explanation of the foundational case law using two central features of Hart's theory of law. The first was introduced in the previous section: the distinction between the internal and the external point of view. The second is Hart's theory of the legal system. For Hart, a central characteristic of a legal system is that it unites a system of primary and secondary rules identified by a certain law-identifying rule, which Hart calls the rule of recognition.[86] As no legal system exists without a rule of recognition, which guarantees the former's epistemic autonomy, there must be an EU rule of recognition to protect the autonomy thesis. This Section

[85] Ibid. 140, 152.

[86] Hart, *The Concept of Law* (n. 12) 99, 116. I use the term 'central characteristic' as opposed to 'essential' or 'necessary characteristics'. Many of Hart's followers became comfortable employing metaphysical terminology of the latter sort, which became fashionable again around the time of Saul Kripke's seminal work on *a posteriori* necessary characteristics (see e.g. J. Raz, *Between Authority and Interpretation* (Oxford University Press 2009) 17, 24–25; J.L. Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis' (1998) 4 *Legal Theory* 381, 393; Shapiro, *Legality* (n. 15) 9. It is doubtful, however, whether Hart regarded the union of primary and secondary rules as 'essential to' or 'necessary for' the concept 'law', as Hart's 1950s Oxford milieu tended to eschew metaphysical talk. Moreover, ch. 10 of *The Concept of Law* considers international law as a borderline case of 'law', notwithstanding the absence of secondary rules. See further L. Green, 'The Concept of Law Revisited' (1996) 94 *Michigan Law Review* 1687; and 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 (Hart Publishing 2013).

aims to show how the ECJ's foundational case law can be understood as providing a *normative* expression of the rule of recognition.

A. *Van Gend & Loos* as an internal recognitional statement

If Hart's example of the UK legal system's rule of recognition ('Everything enacted by the Queen in Parliament is law')[87] is applied by analogy to the EU legal system at the time of *Van Gend & Loos*, we would get something along the lines of:

> 'All rules of the Treaty of Rome and all rules enacted in accordance with the Treaty of Rome are valid rules of the EEC legal system' (hereinafter: 'RR EEC')

This formulation is quite similar to the ECJ's claims in *Van Gend & Loos* and *Costa* v. *ENEL*: 'the Community constitutes a new legal order of international law', 'the EEC Treaty has created its own legal system', and in particular 'the law stemming from the Treaty [is] an independent source of law'. What these claims have in common with the analogous formulation of an EU rule of recognition is an external viewpoint towards the EU Treaties.

At multiple occasions, Hart indeed suggested that the rule of recognition cannot be expressed from the internal point of view, but can only be observed empirically and expressed as an external statement.[88] Since the rule of recognition *identifies* the law, internal statements of law are rather *entailed* by the rule of recognition.

Notwithstanding the seemingly external viewpoint expressed by the ECJ in the abovementioned claims, the ECJ's foundational case law does not merely *describe* some rule of recognition, but takes an explicitly normative approach towards it. Given that the Treaty of Rome has created its own legal system, individuals are *allowed* to invoke its norms before national courts independently of national law, and national courts are *required* to apply directly effective norms. The autonomy thesis thus seems to be a normative expression of the rule of recognition.

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[87] Hart, *The Concept of Law* (n. 12) 102.

[88] E.g.: 'The question of whether a rule of recognition exists *and what its content is*, i.e. what the criteria of validity in any given legal system are, is regarded throughout this book as an empirical, though complex, question of fact' (emphasis added), Hart, *The Concept of Law* (n. 12) 292. This strong formulation might be related to the fact that in the respective endnote, Hart goes to great lengths to distinguish the 'rule of recognition' from Kelsen's notion of the *Grundnorm*.

Whether Hart actually believed that internal, normative statements about the rule of recognition are impossible is unclear. At other times, Hart clearly stated that '[i]n the day-to-day life of a legal system its rule of recognition is very seldom *expressly* formulated as a rule' and '*[f]or the most part* the rule of recognition is not stated'.[89] Focusing on these later statements, Kevin Toh has argued recently that Hart's theory is better understood as allowing for the possibility of what he calls 'internal recognitional statements'.[90] Internal recognitional statements are formulations of a component of the rule of recognition from an internal point of view. The infrequency with which explicit internal recognitional statements are actually encountered could thus be conceived as a pragmatic phenomenon rather than a conceptual impossibility.[91] Usually participants in a legal system will only *implicitly* express the content of the rule of recognition by applying some applicable lower-order norms. Moreover, it certainly is not impossible that courts, in exceptional situations, express the content of the rule of recognition explicitly. In *Miller*, for example, the UK Supreme Court observed that EU law 'derives its legal authority from a statute, which itself derives its authority from the rule of recognition identifying Parliamentary legislation as a source of law'.[92] The rule of recognition can therefore be regarded as having both an external and an internal formulation.

At the time of *Van Gend & Loos*, we can conceive of the EU legal system's rule of recognition as having the content 'RR EEC'. Today, the rule of recognition might look something like this:

> 'All rules of the Treaty on European Union, the Treaty on the Functioning of the European Union, the Charter of Fundamental Rights of the European Union, and all rules enacted in accordance with the Treaties and the Charter are valid rules of the EEC legal system' (hereinafter: 'RR EU').

In his discussion on the formulation of the rule of recognition and Hart's distinction between external and internal statements, Toh expresses the logic of the rule of recognition in both an

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[89] Hart, *The Concept of Law* (n. 12) 101.

[90] Toh, 'An Argument Against the Social Fact Thesis' (n. 81) 485.

[91] For another hypothesis about Hart's ambiguous stance towards internal statements of the rule of recognition: K. Toh, 'Four Neglected Prescriptions of Hartian Legal Philosophy' (2014) 33 *Law and Philosophy* 689, 699–700.

[92] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para. 225.

external and an internal statement.[93] From an external point of view, a rule of recognition reads as:

> 'We [or: they] actually treat R as the ultimate criterion of legal validity in this legal system'.[94]

As an *internal* statement the rule of recognition would read:

> 'We ought to treat R as the ultimate criterion of legal validity in this legal system!'; or
> 'Let us treat R as the ultimate criterion of legal validity in this legal system'.[95]

The ECJ's statements in *Van Gend & Loos* and *Costa v. ENEL* on the existence of an independent EU legal system can similarly be conceptualized as the following internal recognitional statement:

> '"RR EEC" ought to be treated as the ultimate criteria of legal validity of the EU legal system'; or
> 'Let us treat "RR EEC" as the ultimate criteria of legal validity of the EU legal system'.

This conceptualization of the ECJ's foundational case law not only accounts for the *normative* formulation of a rule of recognition of an independent legal system, but also for the ECJ's attitude towards the national courts. Internal (recognitional) statements claim to be reason-giving for a certain group of people (for Hart, primarily courts). More specifically, the rule of recognition is a duty-imposing social rule.[96] The internal aspect of social rules is a 'reflective critical attitude' on the part of those who follow them, who consider them as a normative

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[93] Toh, 'An Argument Against the Social Fact Thesis' (n. 81) 491.

[94] Ibid.

[95] Ibid.

[96] See Raz, *The Concept of a Legal System* (n. 61) 199; J.L. Coleman and B. Leiter, 'Legal Positivism' in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing 1996) 245; S.J. Shapiro, 'What Is the Rule of Recognition (and Does It Exist)?' in M. Adler and K.E. Himma (eds.), *The Rule of Recognition and the US Constitution* (Oxford University Press 2009).

standard both for themselves and for others.[97] In stating that the EU Treaties constitute an independent legal system which can be invoked directly before national courts, the ECJ not only accepts this rule of recognition for itself, but also claims that the national courts are bound by it. More explicitly than in *Costa v ENEL*, the Court emphasized the duty-imposing nature of 'RR EEC' towards national courts in *Simmenthal*:

> 'It follows from the foregoing that every national court must, in a case within its jurisdiction, apply community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it , whether prior or subsequent to the Community rule'.[98]

In Toh's formulation of internal recognitional statements, *Simmenthal* would translate into:

> 'National courts ought to treat "RR EEC" as the ultimate criteria of legal validity of the EU legal system'.

Conceptualizing the logic of *Van Gend & Loos* and *Costa v. ENEL* as an internal recognitional statement leads to the following interim conclusions. First, the establishment of an independent EU legal system takes the form of an internal recognitional statement identifying the Treaty of Rome as an independent source of law, which is reason-giving for its legal officials. Second, this statement claims not only to impose normative duties on the ECJ, but also on the national courts. The national courts are thereby considered 'legal officials' of the EU legal system. Finally, the former conclusions entail that we are able to measure the effectiveness of the EU legal system within the Member States. The degree to which EU law is judicially invocable and enforceable before the national courts becomes dispositive of whether the EU legal system exists.

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[97] Hart, *The Concept of Law* (n. 12) 57: the internal point of view towards rules 'is manifested in the criticism of others and demands for conformity made upon others when deviation is actual or threatened, and in the acknowledgement of the legitimacy of such criticism and demands when received from others'.

[98] *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, 106/77, EU:C:1978:49, para. 21.

B. Pitching the rule of recognition: the case of general principles of EU law

While internal statements of law *presuppose* the external statement that the legal system is generally efficacious,[99] this does not mean that no internal statement can be made which does not yet fully conform to the behavior of other legal officials. Concluding otherwise would deny the possibility of judicial legal change. Outside their 'normal context', internal statements can also be made to *change* the content of the rule of recognition:

> 'It will *usually* be pointless to assess the validity of a rule […] by reference to rules of recognition […] which are not accepted by others in fact, or are not likely to be observed in the future'.[100]

As Toh puts it, by making a pitch to his interlocutors, a legal official proposing a rule of recognition or a part of one

> 'would have to be quite mindful of the existing practices among his fellow community members […] He would have to tailor his pitches in light of his fellow members' normative opinions and practices if his internal legal statements were to be successful in obtaining the appropriate uptake on their parts'.[101]

The partial or total success of the ECJ's autonomy thesis and the doctrines of supremacy and direct effect have been abundantly discussed from the perspective of historical studies[102] and judicial politics.[103] The motivational reasons for recognizing a source of law and the protected reasons this generates are beyond the scope of this article. Instead, I will try to connect the question of why national authorities would heed the ECJ's pitch for a new rule of recognition

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[99] Hart, *The Concept of Law* (n. 12) 104 (emphasis in original).

[100] Hart, 'Scandinavian Realism' (n. 83) 168 (emphasis in original).

[101] Toh, 'An Argument Against the Social Fact Thesis' (n. 81) 499.

[102] E.g. K. Alter, *Establishing the Supremacy of European Law* (Oxford University Press 2001); B. Davies, *Resisting the ECJ: Germany's Confrontation with European Law, 1949–1979* (Oxford University Press 2012).

[103] See notably e.g. Weiler, 'The Transformation of Europe' (n. 8); A.-M. Burley and W. Mattli, 'Europe Before the Court' (1993) 47 *International Organization* 41; K. Alter, 'The European Court's Political Power' (1996) 19 *West European Politics* 452; T. Pavone and. R.D. Kelemen, 'The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited' (2019) 25 *European Law Journal* (forthcoming).

to the abovementioned conceptualization of the autonomy thesis as an internal recognitional statement. As this internal recognitional statement is *normative*, its normative weight may be salient for the degree of compliance by national authorities.[104] The development of unwritten general principles of EU law in the ECJ's case law offers a remarkable illustration of how the ECJ aims to adjust the content of EU law's rule of recognition by tailoring its pitches in light of the national courts' (likely) normative opinions and practices.[105]

Recognition of certain general principles of law, even where they are not expressly mentioned in the Treaty, may simply reflect the phenomenology of adjudication: in recognizing that what they do is interpret *the law*, judges may commit themselves to recognizing particular principles which they also deem central to 'law'.[106] An early example is the case *Fédération Charbonnière de Belgique*, where the ECJ recognized as unwritten principles of EU law the prohibition of misuse of powers and the principle of proportionality.[107] In his Opinion, AG Lagrange adumbrates both the manner in which the ECJ would later construct the EU legal system and the manner in which the *content* of the legal system is infused with concepts from national law. The Treaty of Rome is:

> 'from a material point of view, the charter of the Community, since the rules of law which derive from it constitute the internal law of that Community. As regards the *sources* of that

[104] I do not want to suggest, however, that the normative weight of the autonomy thesis, if it has any, *is* the reason for national authorities to apply EU law. My claim is merely that it *could* be a reason for national authorities to apply EU law. The actual reasons national authorities have for complying with EU law, or even national law, might be very different and diverge widely among judges: see Section VI below.

[105] There are numerous other examples of how the ECJ's case law could be seen as a pitch towards the national courts for recognizing the EU rule of recognition, in particular in areas where the Court balances considerations of effectiveness against the legitimate purposes of national procedural rules. For reasons of space, this section will only discuss general principles as a primary example of how substance and effectiveness of the rule of recognition interact.

[106] See R. Dworkin's 'The Model of Rules II' and 'Hard Cases', both reprinted in *Taking Rights Seriously* (Harvard University Press 1977). Art. 19(1) TEU, in conjunction with Art. 263 TFEU, provides a basis for including in the EU rule of recognition whatever might be included in the contingent shared presuppositions among ECJ and national judges regarding the substantive characteristics of law. P. Craig, 'General Principles of Law: Treaty, Historical and Normative Foundations' in K. Ziegler, P. Neuvonen and V. Moreno-Lax (eds.), *Research Handbook on General Principles of EU Law* (Edward Elgar Publishing 2019).

[107] *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*, 8/55, EU:C:1956:7.

law, there is obviously nothing to prevent them being sought, where appropriate, in international law, but normally and in most cases they will be found rather in the internal law of the various Member States'.[108]

Similarly, in *Algera* the Court was confronted with the question of the revocability of individual rights under the Treaty. As the Treaty did not contain any applicable rules in this regard, the Court observed that:

'unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case law of the member countries'.[109]

While the inclusion of general principles in these cases may simply reflect deep conventions among ECJ judges about what 'law' is,[110] later case law on the status of fundamental rights as general principles of EU law seemed to involve a more strategic adaptation of the rule of recognition's content. Responding to the BVerfG's *Solange I* judgment,[111] the ECJ maintained the normative supremacy of EU law over all conflicting national law in *Internationale Handelsgesellschaft*.[112] The proverbial carrot to this stick was the Court's observation that fundamental rights are an inherent part of the EU legal system. The influence of *Internationale*

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[108] Opinion of AG Lagrange in Fédération *Charbonnière de Belgique v High Authority of the European Coal and Steel Community*, 8/55, EU:C:1956:6 (emphasis in original).

[109] *Dineke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v Common Assembly of the European Coal and Steel Community*, 7/56, 3/57 to 7/57, EU:C:1957:7, p. 55.

[110] In this sense, I agree with Spiermann that the ECJ judges behave like 'national judges'. O. Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10 *European Journal of International Law* 763. On the 'deep conventions' of law, see A. Marmor, 'Deep Conventions' (2007) 74 *Philosophy and Phenomenological Research* 586. Deep conventions constitute what counts as a certain social practice. As applied to law, deep conventions are both logically and culturally prior to any emerging, particular rule of recognition, as they determine 'what law in our culture is'. See A. Marmor, 'How Law Is Like Chess' in A. Marmor, *Law in the Age of Pluralism* (Oxford University Press 2007) 172–181, esp. 177.

[111] BVerfGE 37, 271, BvL 52/71 (*Solange I*).

[112] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 11/70, EU:C:1970:114.

Handelsgesellschaft, and previously *Stauder*,[113] on the content of the EU rule of recognition can be roughly formulated as follows:

> RR EEC before *Stauder* and *IHG*: 'Everything in the EU Treaties and secondary legislation adopted in accordance with the EU Treaties is law'.
>
> RR EEC after *Stauder* and *IHG*: 'Everything in the EU Treaties, unwritten general principles of law including fundamental rights and secondary legislation adopted in accordance with the EU Treaties, and general principles of law and fundamental rights, is law'.

It is not difficult to see how this change in the EU rule of recognition strengthens the ECJ's pitch towards the national courts:[114]

> *IHG*: We ought to treat 'RR EEC after *IHG*' as the rule of recognition (don't worry, it guarantees fundamental rights protection).

Or perhaps even more strongly:

> *IHG*: We ought to treat 'RR EEC after *IHG*' as the rule of recognition (don't worry, it guarantees fundamental rights protection and all other general principles common to your constitutional traditions: those are your own norms anyway).[115]

Talk of the 'common constitutional traditions of the Member States', created by the ECJ but now also part of the Treaties,[116] signals interaction between the legal system of the Member

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[113] *Erich Stauder v City of Ulm – Sozialamt*, 29/69, EU:C:1969:57, para. 7.

[114] But see B. Davies, '*Internationale Handelsgesellschaft* and the Miscalculation at the Inception of the ECJ's Human Rights Jurisprudence' in F. Nicola and B. Davies (eds.), *EU Law Stories* (Cambridge University Press 2017).

[115] Whether this pitch improved the normative attractiveness of the EU rule of recognition sustainably is of course another question. The ECJ's performance as an effective guardian of fundamental rights became questionable relatively soon after *Internationale Handelsgesellschaft*, e.g. in *Liselotte Hauer v Land Rheinland-Pfalz*, 44/79, EU:C:1979:290.

[116] E.g. Art. 6(3) TEU, and Arts. 67 and 82 TFEU.

States and the EU legal order. However, the need for the EU legal system to incorporate fundamental cornerstones of the national legal systems is mostly pragmatic and serves as a credible pitch of the EU's internal recognitional statement.

V. The Autonomy Thesis and the Doctrines of Direct Effect and Supremacy

If *Van Gend & Loos* and *Costa* v. *ENEL* express the autonomy thesis as an internal recognitional statement, this begs the question of the role of the doctrines of the direct effect and of supremacy of EU law within the Hartian framework. This section will respectively translate the two doctrines into a rather crude but consequential rule of adjudication (direct effect), and a corollary of the normativity of EU law lacking self standing analytical value (supremacy).

A. A master secondary rule: the doctrine of direct effect

The existence of an independent rule of recognition is constitutive of the existence of an independent system of norms. The role of other secondary rules – rules of change and rules of adjudication – then becomes to elaborate further the system's institutional systematicity. Rules of change abound in EU law, as evinced from the numerous legal bases in the Treaties prescribing the creation of EU secondary legislation,[117] and the procedures for amendment of the Treaty,[118] accession to the EU,[119] and exit from the EU.[120] Rules of adjudication are more elusive. While the adjudicatory competences of the ECJ itself are clearly enumerated in the Treaties,[121] the same is not true for the national courts. The latter's competences draw largely from national law. Direct effect of EU law, however, plays a crucial role here.

Direct effect has had several meanings in the ECJ's case law and legal scholarship. It has been referred to as the principle of self-execution of EU norms in the national legal orders.[122] The autonomy thesis leaves no room for an incorporation mechanism of that sort. If the EU

[117] E.g. Art. 114 TFEU.

[118] Art. 48 TEU.

[119] Art. 49 TEU.

[120] Art. 50 TEU.

[121] Art. 19 TEU; Arts. 251–281 TFEU.

[122] *Van Gend & Loos*, 26/62, EU:C:1963:1. Some authors contend that the incorporation of EU norms into the national legal orders is a function of 'direct applicability', e.g. J. Steiner, 'Direct Applicability in EEC Law: A Chameleon Concept' (1982) 98 *Law Quarterly Review* 229; S. Prechal, *Directives in EC Law* (Oxford University Press 2005) 92, 229; R. Schütze, *European Union Law*, 2nd edn (Cambridge University Press 2015) 96–97.

legal system is an *independent* legal system, national courts (and other national (administrative) authorities) must be members of the EU legal system, i.e. they must count as EU courts when they apply EU law.[123]

A more important and consequential dimension of direct effect is the invocability of sufficiently precise and unconditional EU norms before national courts. The right to invoke EU norms is essentially a rule of adjudication, which grants national courts the competence to apply norms of EU law. In more recent cases, the ECJ explicated this rule of adjudication by characterizing direct effect as an obligation on national courts and national administrative authorities to apply the EU norms invoked before them.[124] The rule of adjudication seems almost a corollary of the *internal* formulation of the rule of recognition. By identifying a source of law that national courts *qua* EU officials ought to apply, one cannot at the same time deny those courts the *competence* to apply that source of law. In this sense, direct effect *qua* rule of adjudication is a more specific expression of the internal formulation of the rule of recognition. In *Van Gend & Loos*, only after proclaiming the autonomy of EU law does the Court move on to the practical implication of this autonomy thesis, i.e. the doctrine of direct effect. In one masterful stroke, direct effect grants all national courts the competence to apply EU law norms.[125]

This competence is, of course, limited by national procedural rules. Procedural law is also part of the set of rules of adjudication.[126] Whether EU norms can be invoked before national courts, and whether national courts are allowed or obliged to apply them, flows from a complex interaction between EU and national law. However, the ability to invoke EU law norms and the

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[123] E.g. Simmenthal SpA, 106/77, EU:C:1978:49. See Dickson, 'Directives in EU Legal Systems' (n. 46). See also Lenaerts, 'Upholding the Rule of Law' (n. 57).

[124] E.g. *Fratelli Costanzo SpA v Comune di Milano*, 103/88, EU:C:1989:256, para. 31; *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, paras. 64–65. See S. Prechal, 'Does Direct Effect Still Matter?' (2000) 37 *Common Market Law Review* 1047.

[125] In this sense direct effect is indeed the 'normal state of the law' and its relevance as a separate doctrine is limited. Broader questions on the invocability of EU law, however, remain salient, see K. Lenaerts and T. Corthaut, 'Towards an Internally Consistent Doctrine on Invoking Norms of EU Law' in S. Prechal and B. van Roermund (eds.), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008); and see also 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions', Chapter 5.

[126] Hart, *The Concept of Law* (n. 12) 97: 'Besides identifying the individuals who are to adjudicate, [rules of adjudication] will also define the procedure to be followed'.

obligation on national courts to apply them subsequently is always the *default position*.[127] Furthermore, from the perspective of EU law, arguably these national rules serve as ancillary EU law. In Kakouris's words:

> 'Thus, because recourse to national procedural law has been in order to fill a gap in Community law, this law is subordinated to Community law and must, where necessary, be altered in order to fulfil its ancillary function [to ensure the effective application of substantive Community law]'.[128]

Hence, national procedural rules are *woven into* the default position enshrined in the doctrine of direct effect. In other words, EU law uses national procedural law to pursue the effective enforcement of EU substantive law. In doing so, as Kakouris observes,[129] these national rules are dissociated from their national legal system and become part of EU law.

Kakouris emphasises in this regard that national courts, when applying EU law, 'belong *from the functional point of view* to the Community legal order'.[130] The functional perspective will not suffice, however, as regards the status of national procedural rules. National procedural rules cannot be an ancillary part of the EU legal system only because national courts *qua* EU courts happen to apply them: they must be validated themselves in some way by the EU legal system.[131] It appears, however, that from the perspective of EU law, all national procedural rules which do not violate the principles of equivalence and effectiveness are validated *as EU law norms* by the doctrine of direct effect and the principle of sincere cooperation in Article 4(3) TEU *qua* rule of adjudication. This rule of adjudication could logically be rephrased along these lines:

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[127] For a clear illustration, see *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, C-453/99, EU:C:2001:465, paras. 24–31.

[128] C.M. Kakouris, 'Do the Member States Possess Judicial Procedural "Autonomy"?' (1997) 34 *Common Market Law Review* 1389, 1396.

[129] Ibid. 1404: 'in the absence of Community procedural law, the national courts apply the national rules of procedural law, *which thus become ancillary Community law*' (emphasis added).

[130] Ibid. 1393–1394.

[131] I am thankful to Boško Tripković for pressing me on this point.

> 'National courts ought to apply justiciable norms of EU law, within the constraints of the procedural rules as laid down in applicable national procedural law insofar as the latter comply with the principles of equivalence and effectiveness'.

Consequently, the validation of national procedural rules *as EU norms* could be grounded in EU law, giving them binding effect within the EU legal system. The process of giving binding effect to *extra-legal* norms is indeed pervasive in legal systems generally.[132]

B. Taking normativity seriously: the doctrine of supremacy

The supremacy of EU law is usually portrayed as a 'principle' or a '(conflict) rule', which belongs to the positive norms of EU law. Some authors suggest to distinguish between 'primacy' and 'supremacy' and between intra-systemic and trans-systemic applications of supremacy.[133] Avbelj distinguishes between primacy as 'a trans-systemic principle, which regulates the relationship between the autonomous legal orders' and supremacy, which is rather 'the feature of supreme legal acts in the legal orders of the Member States and of the EU; […] an intra-systemic feature'.[134] On the other hand, when Schütze refers to supremacy as 'the superior hierarchical status of the Community legal *order* over the national legal *orders*', this appears very similar to what Avbelj calls primacy.[135] Others have noted that EU law only claims primacy rather than supremacy, because it does not invalidate conflicting national law, as some federal supremacy doctrines do.[136]

The autonomy thesis makes this distinction redundant and translates supremacy into a truism of the legal system.[137] Primacy as a trans-systemic principle presupposes normative

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[132] See J. Raz, *Practical Reason and Norms* (Clarendon Press 1975) 151–154; and as applied to EU law, 'Why EU Law Claims Supremacy', Chapter 2, referring to other examples including Art. 6(3) TEU and Art. 52(3) CFR.

[133] M. Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' (2011) 17 *European Law Journal* 744. In the English literature, primacy and supremacy are, however, usually conflated: de Witte, 'Direct Effect' (n. 33).

[134] Avbelj, 'Supremacy or Primacy' (n. 134) 750.

[135] R. Schütze, 'Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption' (2006) 43 *Common Market Law Review* 1023, 1033 (emphasis in original).

[136] *Ministero delle Finanze v IN.CO.GE.'90 Srl*, C-10/97 to C-22/97, EU:C:1998:498, para. 21; M. Claes, 'The Primacy of EU Law in European and National Law' in D. Chalmer and A. Arnull (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 182.

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

interaction between legal orders as a whole. The self-constitutionalizing nature of legal systems, however, makes discussing the normative superiority of legal orders irrelevant.[138] Legal norms are either applied or not applied by legal officials, depending on whether these officials are committed to the rule of recognition identifying these norms as legally valid. Any application of an EU norm is an implicit commitment to at least the relevant part of an internal recognitional statement.[139] When legal officials recognize more than one legal system, the resolution of any conflict between them is simply a choice between the concurrent rules of recognition in individual cases.[140] There is no reason why legal officials could not recognize multiple rules of recognition, even though the result would probably result in overlapping, shifting and possibly confusing identities.[141]

Consequently, supremacy is a corollary of EU law's claim to be robustly normative.[142] This may well be part of our concept of law, which seems infused with the notion of supremacy over concurrent normative systems, possibly rooted in our association between law and the sovereign state.[143] In other words, any legal system, if it actually belongs to the species of law, takes itself

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[138] See also N. MacCormick, 'The *Maastricht-Urteil*: Sovereignty Now' (!995) 1 *European Law Journal* 259. Admittedly, the result is a cynical conception of legal normativity: G. Teubner, 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy' (1997) 31 *Law & Society Review* 763, 782–784.

[139] To be clear: this need not be RR EU, since the validity of an EU norm might be entailed by a national rule of recognition. But see Section VI below.

[140] See also G. Davies, 'Constitutional Disagreement in Europe and the Search for Pluralism' in J. Komárek and M. Avbelj (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012).

[141] For a similar view, N.W. Barber, 'Legal Pluralism and the European Union' (2006) 12 *European Law Journal* 306.

[142] Robust, or 'full-blooded' normativity indicates that the respective norms give *genuine* rather than formal reasons for action. The normativity of a game is usually taken to be an example of formal normativity. Whether law is as robustly normative as it claims to be will likely be a function of one's other legal-philosophical commitments. Compare e.g. D. Enoch, 'Is General Jurisprudence Interesting?', with G. Letsas, 'How to Argue for Law's Full-Blooded Normativity' both in D. Plunkett, S.J. Shapiro and K. Toh (eds.), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press 2019).

[143] A. Marmor, *Positive Law and Objective Values* (Oxford University Press 2001) 39–42. Conceptual necessity and contingency need not exclude each other as long as the former is applied to 'our concept of law'. I believe this is what Raz aims to convey when he observes that '[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'. J. Raz, *Between Authority and Interpretation* (Oxford University Press 2009) 92, 95. For how long this connection between legality and supremacy will last, is unclear. See e.g. N. Roughan, 'Mind the Gaps: Authority and Legality in International Law' (2016) 27 *European Journal of International Law* 329.

seriously up to the point of being 'pretentious and rife with an inflated sense of its own importance'.[144] In Raz's words, legal norms claim to provide both reasons for acting according to their prescriptions and exclusionary reasons for disregarding reasons for acting otherwise.[145] Elsewhere, I have argued that the ECJ's uncompromising attempts to safeguard the primacy and autonomy of EU law are best understood as an imitation of the claims to comprehensiveness, supremacy and openness of municipal legal systems.[146] *Costa v. ENEL* appears to point to the conceptual connection between law and providing protected reasons:

> '[T]he law stemming from the Treaty, *an independent source of law*, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, *without being deprived of its character as Community law*'.[147]

In Opinion 2/13, the exclusionary reasons generated by EU norms is even more explicit:

> '[T]he Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law *to the exclusion, if EU law so requires, of any other law*'.[148]

The ECJ's perspective makes questions of hierarchy irrelevant because legal orders exist as such only by virtue of a certain rule of recognition. Consequently, if we are to believe in the robust normativity of EU law, the doctrine of supremacy is only a doctrinal restatement of this belief. Within the EU legal system, EU law is supreme. Outside the scope of EU law, there is no EU legal system, hence no EU normativity.[149]

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[144] J. Gardner, 'Fifteen Themes from *Law as a Leap of Faith*' (2015) 6 *Jurisprudence* 601, 619.

[145] Raz, *The Authority of Law* (n. 62) 30. See further, Raz, *Practical Reason and Norms* (n. 133) 150–151; J. Raz, 'Authority, Law and Morality' in J. Raz, *Ethics in the Public Domain* (Clarendon Press 1995).

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

[147] *Flaminio Costa v ENEL*, 6/64, EU:C:1964:66, p. 594 (emphasis added).

[148] Opinion 2/13 on EU accession to the ECHR, EU:C:2014:2454, para. 193 (emphasis added).

[149] This conclusion is supported by the ECJ's reading of Art. 53(1) CFR in *Melloni*, C-399/11, EU:C:2013:107, which boils down to: 'when acting within the scope of EU law, do as we say. When acting outside the scope of EU law, we don't care'.

It follows that normative conflicts between the perspectivisms of the EU legal system and the national legal systems do not arise. Since the supremacy claim only applies *within* the system, it would be mistaken to conceive of the autonomy thesis as 'EU-centered monism'.[150] The ECJ has never claimed that the national legal systems are *subsumed* under the EU legal system. Such a view would be practically impossible to maintain because it would imply that national laws conflicting with EU law are *invalid* in virtue of EU law, a position which the ECJ has always rejected.[151] By contrast, the autonomy thesis is not troubled at all by the fact that EU law does not claim to entail the invalidation of conflicting national law. As EU law has no hierarchical connection with national legal systems, it is nonsensical to speak of invalidation.

Regardless, the distinction between disapplication and invalidation seems of little practical use. If national courts consistently act upon the imperative of EU law that a given national norm ought to be disapplied – which is surely the aim of the ECJ's case law – that national norm would still cease to be valid for manifestly lacking efficacy.[152] Consequently, invalidation follows logically, though indirectly, from the Court's requirements.

VI. Playing the Game

So far, I have analyzed the autonomy thesis from the vantage point of the ECJ. However, as noted above, EU law conceives all administrative and judicial authorities of the Member States as EU officials. The autonomy thesis can only be true if this is indeed the case. A common objection against the ECJ's foundational case law, however, is that there is no such autonomous EU rule of recognition in operation; national legal officials only apply EU law because their

[150] Cf. P. Eleftheriades, 'Pluralism and Integrity' (2010) 23 *Ratio Juris* 365.

[151] Ibid. Furthering his claim of 'EU monism' and 'national monism', Eleftheriades then makes a second mistake by interpreting Neil MacCormick's pluralism, set out among others in MacCormick, 'The *Maastricht-Urteil* (n. 139), 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' (Eleftheriades, 'Pluralism and Integrity' (n. 151) 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' (ibid. 371).

[152] Kelsen, *General Theory* (n. 61) 119–120.

respective national legal systems oblige them to do so.[153] This has led some theorists to cast doubt on the explanatory power of perspectivism and the concept of the EU legal system.[154] The BVerfG's insistence that the German Basic Law is the ultimate source of law from which any obligation under EU law derives its validity, is indeed mirrored in the case law of, inter alia, the highest courts of Czechia,[155] France,[156] Italy,[157] Poland,[158] the United Kingdom,[159] and most consequentially, Denmark.[160] The same argument can be made for almost all national legal systems.[161] This objection thus boils down to a refutation of the autonomy thesis on the basis of the position and behavior of national courts.

On closer scrutiny, it is not obvious how the position and behavior of national courts could either support or refute the autonomy thesis. If the autonomy thesis is, as I argued in Section IV above, an internal recognitional statement, it is normative. Many contemporary legal philosophers, however, deny the distinction between a normative and descriptive analysis of the rule of recognition. Consequently, I will proceed to unpack skepticism about the autonomy

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[153] For overviews, see e.g. de Witte, 'Direct Effect' (n. 33); R. Schütze, *European Union Law* (Cambridge University Press 2018) 130–138; P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials*, 6th edn (Oxford University Press 2015) 278–309, all with further references.

[154] In particular M. Giudice, 'Conceptual Analysis, Legal Pluralism, and EU Law' (2015) 6 *Transnational Legal Theory* 586. See also D. Burchardt, 'The Relationship between the Law of the European Union and the Law of its Member States: A Norm-based Conceptual Framework' (2019) 15 *European Constitutional Law Review* 73. See also e.g. Alter, 'The European Court's Political Power' (n. 103) 258-259; and J.H.H. Weiler, 'Europe's Constitutional *Sonderweg*' in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State* (Cambridge University Press 2003) 13.

[155] Czech Constitutional Court, Case Pl. ÚS. 50/04 (2006).

[156] Conseil d'état, Case No. 226514 (2001).

[157] Italian Constitutional Court, Case No. 183/1973 (1973).

[158] Polish Constitutional Court, Case K 18/04, OTK Z.U. 2005/5A.
(2005).

[159] *R (on the application of Miller and another) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, paras. 65–67.

[160] Danish Supreme Court, *Dansk Industri (DI) acting for Ajos A/S v the Estate left by A*, 15/2014 (2016), in which the Danish Supreme Court refused to apply the ECJ's *Mangold* case law because this were to violate the Danish constitution.

[161] Exceptions could include Estonia and the Netherlands. See Estonian Supreme Court, Opinion on the Interpretation of the Constitution No. 3-4-1-3-06 (11 May 2006); and Netherlands Supreme Court, Case 00156/04 E, NL:PHR:2004:AR1797.

thesis by conceiving of the latter as either an internal statement or an external statement about the internal point of view of national courts.

Following the findings presented in Section IV above, let us first conceive of the autonomy thesis as an *internal* statement. Accordingly, its correctness has to be assessed through normative reasoning. If this is the case, skepticism about its existence which relies on the *actual behavior* of national courts misses its mark. There is a category difference between the external statement that some actors treat a given rule as the rule of recognition, and the internal statement that some other given rule *is* the rule of recognition.[162] While national courts might treat their respective national constitutions as their ultimate constitutional standards – i.e. they are committed to their respective national rules of recognition – does not mean that their respective municipal rules of recognition *are* the rule of recognition.[163]

Maintaining a strict distinction between the external and the internal point of view, Toh suggests applying the method of reflective equilibrium by 'arguing for particular rules as making up [a community's] rule of recognition by showing that these rules do a better job of meshing with considered legal judgments than any alternative candidates for components of the rule of recognition'.[164] Accordingly, for internal recognitional statements to be correct, they have to cohere with first-order legal judgments in which we have a high degree of confidence.[165] If we ascribe significant normative weight to the value of nation-based self-

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[162] Toh, 'An Argument Against the Social Fact Thesis' (n. 81) 490–493; Toh, 'Legal Philosophy *à la carte*' in Plunkett, Shapiro and Toh (eds.), *Dimensions of Normativity* (n. 143) 235–238. See also Shapiro, *Legality* (n. 15) 102–105.

[163] Toh, 'Legal Philosophy *à la carte*' (n. 163) 237. It could be argued that this conclusion is at odds with the Hartian project and legal positivism more generally, but instead is based on Dworkinian conceptions of legality. However, Toh argues that Hart endorsed the so-called 'social fact' thesis *only* in relation to the *external point of view*. Thus, internal statements, i.e. first-order legal statements, would not supervene on social facts. Further, Toh claims that the social facts thesis as applied to internal statements is in any case implausible in view of the is–ought gap (e.g. Toh, 'An Argument Against the Social Fact Thesis' (n. 81); Toh, 'Legal Philosophy *à la carte*' (n. 163)). I believe Toh makes a strong case for his interpretation of Hartian legal theory, although I cannot fully defend this view here. I am thankful to Boško Tripković for pressing me to elaborate this point. As I try to show later in this section, even if the social fact thesis applies to *internal* statements of the rule of recognition, I believe scepticism as regards the national courts' commitments to the autonomy thesis fails to persuade.

[164] Ibid. Earlier, in Toh, 'An Argument Against the Social Fact Thesis' (n. 81) 492–493, Toh makes a similar argument which he describes as 'nongenetic justification'.

[165] Toh, 'Legal Philosophy *à la carte*' (n. 163) 237, fn. 29, emphasizes that, contrary to 'a particular misunderstanding of the method of reflective equilibrium', it is not the *prevalence* of considered legal judgments that gives them evidentiary weight, but the degree of confidence we have in them.

determinacy we are unlikely to believe in the correctness of the autonomy thesis.[166] If on the other hand, we are more skeptical of the perpetuity of national sovereignty, or even the concept of *demos* as such,[167] we are more likely to be skeptical of internal recognitional statements which conceive of national constitutional documents as having perpetual validity.

Toh even suggests that 'it is quite possible for there to be no rule that is treated by the members of a community as the rule of recognition of their legal system' and that there might be a rule that is the *real* rule of recognition of a community 'despite the lack of common recognition or acceptance of it, by the community's members or officials, as the community's rule of recognition'.[168] The autonomy thesis might be true even if the majority of national courts and other officials do not treat the EU rule of recognition as the rule of recognition.

In that case, we would be able to convince them of the fact that the EU rule of recognition and the autonomy thesis are correct because they do a better job of meshing with our considered normative judgements. These judgements would in any case include the moral purposes of European integration. The autonomy thesis might gain additional normative weight if the authority of EU law allowed the Member States to conform better to the reasons which apply to them than if they were to decide on how to act themselves.[169] However, there are numerous other considerations that could also be taken into account, which might include the moral weight of previous political decision making, i.e. the 'gravitational force' of the continuous commitment of the Member States and their institutions to the project of European integration.[170] None of these considerations *prove* that the autonomy thesis is correct. It might well be that commitment to twenty-eight national rules of recognition is equally or better able to mesh with all these values, although this seems unlikely in light of our moral

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[166] See e.g. the BVerfG's observations on Art. 79(3) German Basic Law in e.g. its *Lisbon* judgment (BVerfGE 63, 2267 (2009)) and its preliminary reference in *Gauweiler* (BVerfGE 134, 366, 2 BvR 2728/13 (Order, 12 January 2014) and 2 BvR 2728/13 (Judgment, 21 June 2016)).

[167] B. Anderson, *Imagined Communities* (Verso 1983).

[168] Toh, 'Legal Philosophy *à la carte*' (n. 163) 237.

[169] Cf. Raz's theory of the normal justification of authority, J. Raz, *The Morality of Freedom* (Clarendon Press 1986) 43.

[170] Dworkin spoke of past political decision-making as having 'gravitational force'. See also M. Greenberg, 'The Moral Impact Theory of Law' (2013) 123 *Yale Law Journal* 1118; G. Letsas, 'Law and Polity: Some Philosophical Preliminaries' (2018) 16 *International Journal of Constitutional Law* 1242.

commitments.[171] In any case, the assessment would be a normative one, not empirical. If we take seriously the notion of internal recognitional statements, the national court's commitments to their national constitutions does not threaten the autonomy thesis at all.[172] To the extent that the national courts do not treat a given EU rule of recognition as the rule of recognition, they might simply be mistaken.

As noted above, many contemporary legal philosophers in the Anglo-American tradition reject the distinction between normative and empirical formulations of the rule of recognition. They argue that the existence and content of law is only a matter of social fact.[173] Disputes about the rule of recognition can be solved by a head-count among the relevant category of legal officials.[174] For a legal system to exist, these legal officials should adopt an internal view regarding its rule of recognition. Consequently, if the national courts were indeed committed to their national rules of recognition, it would appear that the autonomy thesis would be on shaky ground.

This conclusion is, however, also premature. What is required for legal officials to take an 'internal point of view' is quite recondite. Hart emphasized that the internal point of view is not about the 'feeling', 'emotion' or 'special psychological experience' of officials.[175] Making an internal statement about the law is an 'act of recognition': in *expressing* the content of the rule, that rule is recognized as a standard for behavior and a reason for criticizing departure

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[171] I refer especially to the Member States' content-based commitments to the project of European integration, as expressed in numerous Treaty changes, as well as moral commitments arising out of content-independent, Lewisian conventions (see generally D. Lewis, *Convention* (Harvard University Press 1969)).

[172] As Toh notes, *denying* the existence of internal recognitional statements raises additional problems pertaining to the question of how social facts can generate normative reasons for action (i.e., the is–ought gap). See Toh, 'An Argument Against the Social Fact Thesis' (n. 81) 469–479.

[173] This position is shared by both inclusive and exclusive legal positivists. While inclusive legal positivists would be happy to acknowledge that in some legal systems there are norms which are valid based on their merits, their merits-based validity is entailed by a rule of recognition which is a matter of social fact. J. Raz, 'Legal Positivism and the Sources of Law' in Raz, *The Authority of Law* (n. 62) 47–48; G.J. Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 *Journal of Legal Studies* 165; Coleman, *The Practice of Principle* (n. 15) 75; Shapiro, *Legality* (n. 15) 43–44, 200–201.

[174] B. Leiter, 'Explaining Theoretical Disagreement' (2009) 76 *University of Chicago Law Review* 1215, 1222; B. Leiter, 'Theoretical Disagreements in Law: Another Look' in Plunkett, Shapiro and Toh (eds.), *Dimensions of Normativity* (n. 143) 252, 256.

[175] Hart, 'Scandinavian Realism' (n. 83) 166.

from that standard.[176] They may be a variety of reasons, however, for legal officials to maintain this perspective. John Finnis commented in this regard that the internal point of view may comprise a core, which amounts to moral acceptance, and a penumbra, which contains other, possibly conventional, reasons for committing to the rule of recognition.[177] Somewhat more cynically, Alexander Somek criticizes an egalitarian conception of the internal point of view: lower national courts might decide cases as they do because 'this is what the others do', while the supreme court itself decides cases because 'this is what we do'.[178]

Raz and Shapiro have further deconstructed idealized conceptions of the internal point of view by pointing at the pervasiveness of non-committed, or simulated, internal statements.[179] Raz famously pointed out how statements of law often do not express *endorsement* of the law, but merely prescribe the content of the law from a 'detached' point of view.[180] Legal officials can state what the law requires, just as a Catholic, who happens to be an expert in Rabbinical law, can state what the latter requires of an orthodox but relatively ill-informed Jew who asks for advice.[181]

In view of detached legal statements as a special, simulated kind of internal statement,[182] the relevance of national courts' *real* psychological attitudes towards EU law becomes obscure. Consider a Eurosceptic national judge who considers himself bound by whatever national legal

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[176] Ibid. 165–166.

[177] J. Finnis, *Natural Law and Natural Rights*, 2nd edn (Oxford University Press 2011) 13–14.

[178] A. Somek, *The Legal Relation: Legal Theory after Legal Positivism* (Cambridge University Press 2017) 41–42.

[179] E.g. Raz, *Practical Reason and Norms* (n. 133) 170–175; 'Legal Validity' in Raz, *The Authority of Law* (n. 62) 153; and 'The Purity of the Pure Theory' (1981) 35 *Revue International de Philosophie* 448, 455; Shapiro, *Legality* (n. 15) 185–187; S.J. Shapiro, 'What Is the Internal Point of View?' (2006) 75 *Fordham Law Review* 1157.

[180] Raz, 'Legal Validity' (n. 180) 153.

[181] Ibid. 156.

[182] Raz and Shapiro consider detached legal statements as distinct from internal legal statements (see n. 180). Alternatively, they can be conceived as internal legal statements if the latter is understood as including *simulated* acceptance of the law. In both cases, detached legal statements would still be part of the recognitional statements made by legal officials: K. Toh, 'Raz on Detachment, Acceptance and Describability' (2007) 27 *Oxford Journal of Legal Studies* 403. For the purpose of this paper, I take internal statements to include statements of *simulated* or *pretended* endorsement of the law as being expressed, in line with a broad conception of internal legal statements, as all statements *of law*. If detached legal statements are not taken to be internal statements, this would not affect the substance of my argument. See also J. Gardner, 'How Law Claims, What Law Claims' in J. Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Pres 2012).

rule obliges him to apply EU norms and give precedence to them, and so on.[183] He does not believe in the autonomy thesis, but this does not necessarily mean that he would refer to the national rule of recognition every time he applies an EU norm. Such judgments, while not psychologically *committed* statements of EU law, would still count as *simulated commitments* to EU law. Accordingly, a demystified image of the internal point of view entails that application of EU law by national courts presupposes simply two rules of recognition at the same time: that of the Member State and that of the EU.

Would it suffice for national courts to adopt a detached view of the autonomy thesis? That can only be denied, it seems, at the cost of undermining the concept of the internal point of view as such. Raz and others emphasized the prevalence of detached legal systems precisely to account for the fact that there is no reason that legal officials should actually believe in the moral correctness of their legal judgments. There could be many reasons why judges apply the law. For all we know, 'judges may apply the law simply in order to pick up their paychecks'.[184] What joins them together, however, is that in applying the law, they are *playing the legal game*. It is immaterial to the autonomy and legality of EU law whether national courts consider their practice of applying EU law and recognizing its supremacy warranted by reference to EU law's autonomy or to their domestic constitutional commitments, simply because judges' motivational reasons to apply the law are irrelevant to the latter's existence in general.

Hart was perhaps most accurate when he casually remarked that the legal system is constituted by *acts* of recognition, abstracting from the *beliefs* of legal officials. Accordingly, the widespread and persistent application of EU law – and the setting aside of conflicting national law – at national level casts doubt on skepticism about the autonomy thesis. Adding requirements for the degree or reality of commitment on part of the national courts seems to come at the cost of undermining the concept of the internal point of view as such.

Minimalism about the actual commitments of national courts in their 'acts of recognizing EU law' not only seems conceptually sound, it also invites EU legal theory to remain in touch with pragmatism and common sense. Discussions about the existence of an EU legal system –

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[183] In fact, I encountered such a judge when researching the background story of the *Zhu and Chen* case (*Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, C-200/02, EU:C:2004:639). This case was referred to the ECJ by Adjudicator Michael Shrimpton notwithstanding his radically Eurosceptic beliefs. See 'Breaking Chinese Law – Making European One: The Story of *Chen*, Or: Two Winners, Two Losers, Two Truths', Chapter 8.

[184] S.J. Shapiro, 'The Bad Man and the Internal Point of View' in S.J. Burton (ed.), *The Path of the Law and its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (Cambridge University Press 2000) 197, 202.

and skepticism in applying the predicate 'EU legal officials' to national courts – may simply be misconceived in light of the overall success of the application of EU law within the Member States. There is an analogy to this in G.E. Moore's appeal to common sense when responding to radical skepticism about the existence of the external world. Moore claimed to be easily able to prove the existence of the external world:

> 'How? By holding up my two hands, and saying, as I make a certain gesture with the right hand, "Here is one hand", and adding, as I make a certain gesture with the left, "and here is another" [...] How absurd it would be to suggest that I did not know it, but only believed it, and that perhaps it was not the case!'.[185]

Could we not say that the existence and effectiveness of the EU legal system can simply be taken for granted? The EU legal system has been maintained, acknowledged and applied for decades by national courts, as well as by national authorities and governments. Nevertheless, the paradoxical perspectivism of national and EU courts towards the validity of EU law leads theorists like Giudice to reject of the concept of legal system.[186] His conclusion that rival supremacy claims warrant suspension of 'belief in the truth of the respective self-understandings of the ECJ and member-state courts',[187] seems be founded on an unnecessary idealization of the concept of a legal system: uniformity among legal officials as to their reasons for committing to the internal point of view. Removing this assumption, congruent with post-Hartian theories of law, rescues the concept of a legal system and its other explanatory virtues.[188]

Concluding his treatment of the *ironic* nature of law, Somek notes that:

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[185] G.E. Moore, 'Proof of an External World' in T. Baldwin (ed.), *G.E. Moore: Selected Writings* (Routledge 1993) 147, 166.

[186] M. Giudice, *Understanding the Nature of Law* (Edward Elgar Publishing 2015) 153–156.

[187] Ibid. 153.

[188] What strikes me as odd in various proposals to abandon the concept of the legal system is the resulting absence of normative hierarchy, or at least credible epistemic access to it. Some degree of either content-dependent or content-independent systematicity seems necessary to determine what the law is.

> 'it is entirely plausible to assume that legal systems can exist even if everyone participating in their reproduction is making [detached legal statements]. All that is required are conventions governing their use'.[189]

Perhaps that is the irony of the EU legal system: even if no one – or hardly anyone except from the ECJ – actually believed in the correctness and normative force of the autonomy thesis, the latter would still be true as long the national courts actually applied EU norms. Regardless of their actual psychological attitudes, national courts are surely playing the game of EU law.[190] This does not mean that they are *not* national legal officials when they apply EU law. In applying EU law, they are simply both.

VII. Conclusion

Among the numerous normative systems upheld, communities are governed by legal systems when a certain subset of their members recognize a normative system comprising both primary norms and secondary rules concerning the identification, change and adjudication of primary norms. Not only is this Hartian perspective on legal systems unrivalled in its explanatory power for domestic legal systems, it also elucidates the nature of EU law and explains why we should be comfortable in recognizing its legality, even though this does not mean that we should normatively endorse it.[191]

The effectiveness and legality of the EU legal system are intrinsically connected. There would be no EU legal system if no one applied it. Equally, there would be no EU legal system if no one outside of Kirchberg recognized it as such. Finally, depending on one's optimism about the legality of international law,[192] there might not even be an EU legal system if it did

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[189] Somek, *The Legal Relation* (n. 179) 77.

[190] In Somek's terminology, they might be 'play-acting' (ibid. 69–72). On the analogy between law and games, see e.g. Raz, *Practical Reason and Norms* (n. 133); Marmor, 'How Law Is Like Chess' (n. 110).

[191] Spiermann, 'The Other Side of the Story' (n. 110); Somek, 'Inexplicable Law: Legality's Adventure in Europe' in N. Stehr and B. Weiler (eds.), *Who Owns Knowledge? Knowledge and the Law* (Routledge 2017).

[192] Contrary to e.g. J. Austin, *The Province of Jurisprudence Determined* [1832] (Hackett Publishing 1998) 127, 142, 201, Hart was not a radical skeptic about the legality of international law. As ch. 10 of Hart, *The Concept of Law* (n. 12) shows, Hart believed international law was 'law' even if it is not a legal system. Even so, some disagree with his disqualification of international law as a legal system, e.g. J. Waldron, 'Hart and the Principles of Legality' in M.H. Kramer et al. (eds.), *The Legacy of H.L.A. Hart* (Oxford University Press 2008); and M.

not speak directly to the administrative and judicial authorities of the Member States, to designate them as EU legal officials.

In contrast to the efficacy–legality nexus, the role of autonomy is less pragmatic and points at the symbolism inherent to EU law and to legal systems in general. The ECJ created the EU legal system and its rule of recognition by proclaiming it, and expressing its full moral endorsement of it. The Court's creation of the internal point of view for itself goes hand-in-hand with its invitation to the national courts to join in. Once we recognize the autonomy thesis as an *internal recognitational statement* which purports to achieve the national courts of the Member States' uptake, we can ditch confused talk about the 'incorporation' of EU law into national legal systems and Kelsenian conundrums of normative hierarchy between legal systems. Were the EU legal system able to read Hart's *The Concept of Law*, it would likely recognize itself.

Skeptics about the autonomy of the EU legal system fail to find support for their skepticism in contemporary legal theory about the anatomy of a legal system. Their last resort is the perspectivism of national courts and national legal systems. But casting doubt on the autonomy of EU law by reference to such perspectivism misses the point of what it means for a legal system to exist, and relies on an unwarranted idealization of the internal point of view. The EU legal system has been maintained, acknowledged and applied for decades by national courts, as well as national authorities and governments. This bare efficacy is sufficient to protect the legality of EU law and the autonomy of its rule of recognition from desuetude.[193] While there is no reason for legal officials to express anything more than a detached statement about the normativity of EU law, observers of the EU legal system in action are best advised to believe in its legality and autonomy.

Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2010) 21 *European Journal of International Law* 967.

[193] Kelsen, *General Theory* (n. 61) 119.

PART II: AUTONOMY AND LEGALITY IN SUBSTANTIVE LAW