Essays on Autonomy, Legality and Pluralism in European law

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9. Conclusions

The chapters of this dissertation have tried, in distinct ways, to provide small peeks at the role of autonomy, legality and pluralism in EU law and the EU legal system. The choice for a dissertation based on separate articles – instead of a monograph-based approach – results in a rather eclectic compilation. The seven chapters which comprise the main body of this thesis certainly are different in substance, approach, and style. On the other hand, several of the main ideas which have guided my research in the past four years return throughout the thesis. First, the idea of autonomy in law and legal reasoning as a key characteristic of the behaviour of legal systems.[1] Second, the idea of legality as a property which normative systems can possess,[2] but at the same time an ideal for normative systems which already possess that property – i.e. legal systems – to live up to.[3] Third, the idea of pluralism as a value which is both inevitable in legal and moral reasoning[4] and something whose existence is precisely denied by legal systems in their theoretical self-understanding[5] as well as their practical operation.[6]

Echoing the introduction to this dissertation, it would be foolish to claim that this dissertation comes even remotely close to a fully developed 'theory' of either autonomy, legality or pluralism in the context of European law or the EU legal system. Perhaps for the better if one may believe – as I do – that a four-year time frame is only just enough to develop

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[1] See 'Why EU Law Claims Supremacy', Chapter 2; and 'Legality and Autonomy of EU Law: You'd Better Believe It', Chapter 3; and as applied to substantive EU law, 'Interpreting the EU Internal Market', Chapter 4.

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

[3] For the notion of Fullerian legality, see the Introduction, Chapter 1; and 'Legality and Autonomy of EU Law: You'd Better Believe It', Chapter 3. As applied to the discussion on the limits of the direct effect of directives, see 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions', Chapter 5.

[4] 'In Search of Foundations: Ethics and Metaethics in Constitutional Adjudication', Chapter 6. For a practical application, see 'Breaking Chinese Law – Making European One: The Story of *Chen*, Or: Two Winners, Two Losers, Two Truths', Chapter 8.

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

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

a rough idea of a research programme.[7] In this concluding chapter, I will very briefly revisit the main theses of the three parts of this dissertation.

Part I

EU law is an autonomous legal system. This is something which literally every student of EU law knows. It may seem too trivial to be worthy of any further scrutiny. Perhaps it is. However, inquiries into the nature of the EU legal system have long struggled with the question of how we should understand the ECJ's claims of autonomy, direct effect and supremacy, and implicated questions such as how supranational authority relates to familiar notions like sovereignty, constituent power and legitimacy.

Chapters 2 and 3 are based on the premise that we can separate – at least as a matter of theoretical inquiry – questions about the structure and functioning of a legal system from questions about its political nature, its legitimacy and its intricate factual interactions with other legal systems. The EU legal system can indeed be described, accurately, I submit, as an autonomous legal system which behaves exactly like domestic legal systems. Put differently, while the politics of European integration and the structural relationships in the federal European structure frequently – and understandably – take centre stage in theoretical and practical analysis, the EU legal system remains largely unconcerned with such issues. As a legal system, it is self-referential and autopoietic, and unconcerned with its structural interactions with national and international legal systems.

As Chapter 2 showed, the doctrine of supremacy of EU law, as articulated among others in *Costa/ENEL*,[8] *Simmenthal*,[9] and Opinion 2/13 on EU accession to the ECHR,[10] captures a truism about our concept of law: law always claims comprehensive supremacy over all other normative systems. Legal systems are self-centred and frequently idealise themselves considerably more than seems warranted.[11] This is true both for national legal systems – with

[7] By 'research programme' I mean an at least marginally coherent idea for future research in the medium- to long-term. Obviously, I do not mean to refer to the idea of '(scientific) research programme' in Lakatos' philosophy of science.

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

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

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

[11] Or, as I tried to capture this in Chapter 2 by quoting the late John Gardner, legal systems are 'pretentious and rife with an inflated sense of its own importance'.

their excessive confidence in the perpetuity of their authority and legitimacy[12] – and the EU legal system – with its own excessive confidence in its messianic purposes.[13]

Obviously, legal systems interact with other legal systems as well as numerous other, non-legal normative systems. As Joseph Raz demonstrated pellucidly, however, the process of adopting norms from other normative systems by giving them binding effect does not affect legal systems' claims of normative supremacy within their own jurisdictions.[14] This certainly is true for the EU legal system, which has let itself be influenced by domestic as well as international legal spheres throughout its history, but without ever compromising ultimate authority *within* its jurisdiction.[15]

The relationship between autonomy, legality and effectiveness is further discussed in Chapter 3. The main argument pervading EU law's claims of autonomy and supremacy has always been the argument from effectiveness.[16] In Chapter 3, the ECJ's foundational case law on direct effect and supremacy is reconstructed as an *internal recognitional statement* by which the ECJ expresses a normative formulation of an autonomous EU rule of recognition.[17] In declaring the autonomy of the EU legal system, the ECJ does not *describe* the manner in which EU law is an autonomous legal system, dissociated from both domestic and international law, but *pitches* its normative formulation of an autonomous EU rule of recognition towards the national courts.[18] This is not in any way different from how legal systems generally come into existence.[19]

The chapters of part I rely on a particularly narrow theoretical framework, that is, the contemporary Anglo-American tradition of general jurisprudence. Indeed, it is submitted that the work of Hart, Raz, Coleman, Shapiro, Toh, and others, can contribute significantly to our understanding of supranational and transnational legal systems. However, of course this

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[12] A. Somek, 'The Spirit of Legal Positivism' (2011) 12 *German Law Journal* 729, 734.

[13] J.H.H. Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34 *Journal of European Integration* 825. See also, as applied to holistic interpretation, 'Interpreting the EU Internal Market', Chapter 4, section V.

[14] See J. Raz, *Practical Reason and Norms* (Clarendon Press 1975) 149–154; 'Why EU Law Claims Supremacy', Chapter 2, section III.

[15] 'Why EU Law Claims Supremacy', Chapter 2, section III.D.

[16] 'Legality and Autonomy of EU Law: You'd Better Believe It', Chapter 3, section III.

[17] Ibid. section IV.

[18] Ibid. section IV.B.

[19] Ibid. sections IV and VI. On H.L.A. Hart's magnificent 'fable' of how the legal system can emerge, see *The Concept of Law*, 3rd edn (Oxford University Press 2012) ch. 5.

framework, like any other, offers only a limited vantage point. One should be careful not falling victim to the idea that one particular perspective on law can claim an epistemic monopoly. More specifically, against the background of the (quasi-)universal claims of contemporary analytical jurisprudence one should be cautious in order not to become a parody of an analytical philosopher. This is precisely what a young William Twining found out when he, as a young graduate student at the University of Chicago, first met Karl Llewellyn. As Twining recalls, Llewellyn was quick in his diagnosis of the young jurisprudent:

> 'I was suffering from "Korzybskian paralysis"; I had found a bright new tool – conceptual analysis – and was now obsessed by it and over-using it'.[20]

To be fair, Twining admits the learned professor was probably right:

> 'I considered myself rather sophisticated, even if I seemed to be caught in an endless regress, asking in sequence what do you mean by that? What do you mean by *that*? That? That?'[21]

The foundations of the EU legal system have mainly been studied from constitutional law and political science perspectives. For this reason, I believe the perspective from analytical jurisprudence offers a refreshing, demystified, and less romantic image of the provenance and functioning of the EU legal system. There is, of course, much more to say about the foundations and operation of EU law as a normatively closed social system, from descriptive perspectives such as legal sociology and the many non-Anglo-American worlds of general jurisprudence, among others, and also from the perspective of ethical and other normative evaluation. Conceptual analysis in legal theory certainly is not all there is. However, it does have important insights to offer, precisely because it *aims* to abstract entirely from contingent characteristics of law, even though it usually fails in its inspirations.[22] In other words, even if Hart and Raz's

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[20] W. Twining, *Jurist in Context: A Memoir* (Cambridge University Press 2019) 35.

[21] Ibid. 34.

[22] One could refer to Hershovitz' wisdom on the attempts of legal philosophers to find 'universal truths' about law: 'Legal theorists like to do a lot with a little too, but their track record is decidedly less impressive. John Austin, for example, thought that he could capture the nature of law in a simple slogan: law is the command of the sovereign. H.L.A. Hart showed that Austin's theory was too simple. Among other problems, some laws are not commands, and some legal systems do not have sovereigns, at least in Austin's sense. But Hart had a simple

theories of law were to be proved entirely mistaken in terms of their universal aspirations, we would still be able to learn a lot from them about the EU legal system.[23]

Part II

The two chapters of part II emphasise the roles of respectively autonomy (Chapter 4) and legality (Chapter 5) in two separate fields of EU substantive law. The autonomy of EU legal system implies that difficult conundrums about the relationship between regulatory freedom and the *effet utile* of the internal market, and the competence division between the EU and the Member States, are primarily interpretive questions which have to be answered by EU law itself. Alas, EU law is mainly known by ECJ decision, and so the incremental process of building the substantive content of EU law – 'stone by stone' as it were[24] – means that much of the law has remained elusive for a long time. In the context of EU internal market law, the ECJ is unwilling to put much effort into operationalising the foundational objectives and basic principles into clear categories of legal form.[25] Rather, each judgment reads as a 'circumloquacious statement of the result, rather than a reason for arriving at it', to use Weatherill's words.[26] Proportionality and reasonableness take centre stage in the case law on free movement, shifting emphasis to pragmatic and case-by-case judicial decision-making. What it means exactly to apply the free movement provisions 'reasonably' cannot be found in either the ECJ's definition of a trade barrier,[27] the allocation of the burden of proof and the required standard of proof,[28] or the extent to which the free movement rules are, or should be,

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theory of his own: a legal system is a union of primary and secondary rules. Alas, Hart's theory was too simple too. It didn't distinguish law from other systems with primary and secondary rules (chess, for example, or a university's regulations). And there are reasons to doubt that rules are the fundamental building blocks of law, or that law even has fundamental building blocks at all […] But doom does not entail gloom: you can learn a lot from reading Austin and Hart, even though you cannot learn what law is'. S. Hershovitz, 'The Search for a Grand Unified Theory of Tort Law' (2017) 130 *Harvard Law Review* 942, 942–943.

[23] Ibid.

[24] Cf. K. Lenaerts, 'EU Citizenship and the European Court of Justice's "Stone-by-Stone" Approach' (2015) 1 *International Comparative Jurisprudence* 1.

[25] See 'Interpreting the EU Internal Market', Chapter 4, section II.

[26] S. Weatherill, 'The Court's Case Law on the Internal Market: "A Circumloquacious Statement of the Result, Rather than a Reason for Arriving at It"?' in M. Adams et al. (eds.), *Judging Europe's Judges* (Hart Publishing 2013).

[27] 'Interpreting the EU Internal Market', Chapter 4, section III.

[28] Ibid. section IV.

interpreted holistically.[29] While from an external perspective, the meaning and implications of economic integration are not undisputed,[30] the Treaties neither provide for clear-cut political or economic choices.[31] The result is a pervasive reliance on reasonableness, pragmatism and common sense – which certainly has its own virtues – but little doctrinal clarity to such an extent that a truly unitary framework for the free movement provisions is probably an illusion.[32] Alas, that is the price to pay for a strict commitment to autonomy, which entails that the meaning and content of EU internal market law is only known through the ECJ's judicial minimalism.[33]

However, EU doctrinal constructivism is not dead. While I do believe that scepticism as to the ability to find a watertight theory of EU internal market law is warranted, the case of direct effect of directives proves that all hope is never lost. Legality's adventures in the ECJ's case law on the limited direct effect of directives – informed primarily by the hermeneutic implications of Article 288 TFEU – have caused longstanding puzzlement in academic commentary. Notwithstanding the vast literature in the late 1990s and early 2000s, doctrine seemed incapable of finding a doctrinal explanation of the Court's meanderings on vertical, inverse vertical, horizontal, triangular and incidental effects of directives.[34] In Chapter 5, however, Lorenzo Squintani and I tried to show how the distinction between direct obligations and mere adverse repercussions, and correspondingly the notion of 'normative impact', informs the Court's case law in a consistent and predictable manner.

This does not necessarily mean, of course, that the normative impact theory is also the normatively optimal or preferred manner of balancing legality against invocability and

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[29] Ibid. section V.

[30] For a proposal to update the present conception of economic integration in the context of the EU internal market, see I. Lianos, 'Updating the EU Internal Market Concept' in F. Amtenbrink et al. (eds.), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019).

[31] 'Interpreting the EU Internal Market', Chapter 4, section V. See for a detailed analysis C. Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart Publishing 2016).

[32] See also S. Weatherill, 'The Several Internal Markets' (2017) 36 *Yearbook of European Law* 125.

[33] 'Interpreting the EU Internal Market', Chapter 4, section VI. For a critical view on the implications for legality, see 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).

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

effectiveness. It might be that a Hohfeldian framework of analysis[35] or an exclusive focus on personal and material scope[36] would ultimately be more sustainable from a moral or otherwise evaluative perspective. Nevertheless, legal analysis is destined to always mesh moral and social (i.e. empirical) factors, and so any doctrinal theory must be based in part on the available positive materials, in particular the case law. The Court's conception of legality as a principle of positive law, as manifested in the case law on direct effect, seems accurately grasped by our theory of normative impact.[37]

Part III

The chapters of Part III of this dissertation have focused on different notions of morality and pluralism in jurisprudence, with particular emphasis to the EU citizenship case law. Together, these chapters emphasise the moral importance of pluralism in constitutional adjudication: pluralism in moral and legal reasoning is more likely to result in morally justified outcomes. This type of substantive pluralism should not be mistaken for the type of analytical pluralism which is precisely *absent* in the functioning and self-understanding of legal systems. Even though legal systems are self-referential and anti-pluralistic in their formal operation, the sources of moral content, which each legal system adopts in the processes of legal interpretation, are usually profoundly pluralistic.

Chapter 6 showed how attempts to reduce the moral informants of constitutional adjudication to monolithic and self-standing ideal-types is most likely a dead end.[38] This should be unsurprising if one believes – as I do – that morality itself is pluralistic in the sense that no source of moral belief can claim to exhaustive of moral fact. Individuals, groups and entire societies can have very different and yet equally legitimate ethical commitments.[39] Notions such as 'constitutional identity', 'common sentiment' and 'universal reason' (and one may add many more potential candidates) surely are 'suppliers' of moral value, but none of them can claim a particular metaethical prerogative.

Notwithstanding the plural nature of metaethics, in relation to both the naturalistic world as well as the socially constructed universe of law and legal system morality is autonomous in

[35] Ibid. sections II.A and IV.A.

[36] Ibid. sections II.B and IV.B.

[37] Ibid. sections V and VI.

[38] See the discussion in 'In Search of Foundations: Ethics and Metaethics in Constitutional Adjudication', Chapter 6, 'Three Types of Ethical Argument'.

[39] See generally I. Berlin, *The Crooked Timber of Humanity* (Pimlico 2003).

its own right: it contains its own internal standards of justification and criticism.[40] This means that legal systems as a whole, as well as judicial judgments in themselves, can and should be morally appraisable.[41]

The moral virtues of the autonomy and plurality of legal systems are illustrated by reference to the derivative nature of EU citizenship in Chapter 7. On the one hand, EU citizenship is an autonomous status of the citizens of the Member States. On the other hand, the *acquisition* of that status is an autonomous competence of the Member States. The result is a remarkable type of pluralism through its denial. The plurality of roads towards becoming an EU citizen are maintained precisely because Member States are unlikely to give up their sovereign right to determine who their nationals are.[42] This autonomy of the Member States thus has a particular moral value towards the individual, in the sense that access to EU citizenship is inherently pluralistic.[43]

The practical implication of the plural acquisition of EU citizenship – and in particular, its moral virtue – is shown by the case of *Zhu and Chen*. One out of many roads towards EU citizenship offered Mrs Chen and her unborn baby a way out of China and its one-child-policy: a remarkable interaction between pluralism and autonomy. Further, in its judgment the ECJ makes perfectly clear that our ethical opinions about Mrs Chen's intentions and behaviour is irrelevant to the law. Even if we consider Mrs Chen a 'bad woman',[44] her compliance with Irish and EU law is sufficient for Catherine's acquisition of EU citizenship and her own acquisition of a 'derivative right of residence'. Thus, the *Zhu and Chen* case shows how Kantian legality – even though ordinarily *contrasted* with morality – has important moral virtues in itself. The background story of *Zhu and Chen* portrays the morality of autonomy and pluralism in EU citizenship law at the very micro-level.[45] It is the natural corollary of Chapter 7's discussion of the very same themes at the abstract macro-level of legal systems as such.

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[40] See also 'In Search of Foundations: Ethics and Metaethics in Constitutional Adjudication', Chapter 6, 'Confidence and Reflection as Metaethical Theory' and 'Concluding Remarks'.

[41] For some preliminary observations on the distinction between positivist and non-positivist conceptions of the systematicity of legal systems, see also 'Why EU Law Claims Supremacy', Chapter 2, sections II and III.

[42] 'Pluralism Through its Denial: The Success of EU Citizenship', Chapter 7, sections III and IV.

[43] Ibid. sections V and VI.

[44] Cf. Holmes' 'bad man', in O.W. Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

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

Final remarks and the road ahead

Some final remarks about the underlying premises of many of the chapters of this dissertation, in particular those in part I. Legal scholarship, like interpretation as such, 'follows the law of acoustics: "angle of incidence equates angle of reflection"'.[46] As there are many more questions to be asked, and answers to be given, regarding the autonomy and legality of EU law, as well as the dual role of pluralism – limited in legality's self-understanding, but pervasive in the law's informants – hopefully the chapters of this dissertation have contributed – marginally and incrementally at least – to some of the salient aspects of these themes.

The key premise of all chapters to this dissertation, and Chapters 2 and 3 in particular, is that we can learn a lot about the EU legal system by describing it in its own terms. By contrast, most scholarship on EU constitutional theory and law has focused on issues such as the confederal or federal nature of the European legal architecture, its proper qualification as 'international', 'supranational' or 'federal' law, and connections between legality, polity and moral and political legitimacy. This is where contributions to the philosophy of law in general show their explanatory power towards many characteristics of EU law which could otherwise remain obscure, such as its comprehensive claim to supremacy, and its normative commitment to the autonomy of the EU legal system and its rule of recognition. A strict conception of EU law as an autonomous legal system also sheds a different light on more pragmatic questions such as the ambit of the free movement provisions – unconcerned with anything like a 'regulatory autonomy' of the Member States – or the limits to the direct effect of directives – entirely based on the hermeneutics of EU law's principle of legality.

EU law interacts with national law, just as it interacts with morality and other normative systems. This does not, however, mean that EU law forces us to develop a theory of law which is based on normative hierarchy between legal systems or one-system theories of law which stipulate that law and morality are inseparable. The manner in which the EU legal system interacts with other normative systems reveals, if anything, the explanatory power of theories of law which emphasise law's self-referentiality and, by implication, its 'inflated sense of its own importance'. The insights of H.L.A. Hart, Joseph Raz, and their followers, provide an image of legal systems which is less romantic and less mystical than many non-positivist

[46] R.G.P. Peters, 'Constitutional Interpretation: A View from a Distance' (2011) 50 *History and Theory* 117, 135, inspired by R.G. Collingwood's method of 'question and answer'. I might add here that Collingwood's method of question and answer is only one of the many refined insights which Rik Peters taught me during his course on *Theory of History* and his subsequent supervision of my BA thesis in the 2012–2013 academic year.

theories of law as well as recent contributions to legal pluralism and constitutional pluralism. However, the demystification of law certainly has its own explanatory virtues. While the EU legal system can be, and should be, morally evaluated, understanding its nature and functioning requires at least in part a detailed analysis of its *self-understanding*. EU law does not care whether it is a federation, a confederation, supranational, international, or sui generis. In its own perception, EU law is a legal system, and that is all that matters.

Karl Llewellyn's wise diagnosis of the young William Twining's obsession in mind, 'Hartian paralysis' is of course no better than 'Korzybskian paralysis', and so it should be readily acknowledged that the themes of this dissertation can be elucidated from numerous other 'views of the cathedral' as well.

Building upon the findings of this dissertation, future research into the role of autonomy, legality and pluralism in European law would have to further scrutinise the behaviour of the EU legal system and the interactions between the EU legal system and national legal systems, but also between the EU legal system and international law and its numerous (partly) self-constitutionalised legal regimes such as the ECHR and the WTO. Beyond the attempts of Hart and others to elucidate the non-contingent nature and functioning of legal systems, this future research would also have focus on the *sociology* of legal systems and legal officials. Various perspectives from contemporary legal sociology and sociology in general could complement, or even contest, the findings of this dissertation insofar as they are informed by the more abstract legal-theoretical literature. Indeed, contemporary legal philosophy has been adapting to changes in the contingent characteristics of what we call 'law', as expressed for instance by the increasing focus on transnational legal theory, relative and overlapping legal authority, and constitutionalism beyond the state. A more informed theory of EU law which has explanatory power towards the legal phenomena as we perceive them requires all insights which legal sociology has to offer, not only with a view to legal systems and the role of the judiciary in general but also with a view to the notion of '*legal* reasoning' as a specific form of practical reasoning.

In addition, future research on the autonomy and legality of EU law as well as the role of pluralism (in all of its manifestations) in EU law specifically and the European legal space more generally, would have to focus more on the role of interpretation and hermeneutics and its relationship to the concept and sociology of law. The lengthy debate on the connection – or absence thereof – between conceptions of law such as positivism and non-positivism on the one hand, and certain methods of legal interpretation on the other hand, could serve as a viable starting point for analysis of, for example, the relationship between the *conception* of the EU

legal system and the *interpretation and understanding* of EU law. However, hermeneutics and theories of interpretation (and the 'internal point of view' more generally) are likely to have a more significant and broader role as well in future research into the nature and functioning of European law. The relationships and interconnections between the various (quasi-)autonomous legal systems of the European legal space are constantly shaped by the legal officials' understanding of both their position and role in the legal system (i.e. their self-conception) and their object of analysis (i.e. the norms of the legal system as such and their source of validity). While the constant interpretative interaction between norms from different legal systems (for instance in the context of interpretation of national law in light of EU law and the doctrine of indirect effect) may lead one to believe that the idea of (autonomous) legal systems is obsolete, perhaps a more *refined* notion of the interactions between legal systems – not only at the level of the systems as such but also at the level of individual norms – is needed to improve our understanding of the functioning of (concurrent and overlapping) legal systems.

These two perspectives – the sociology of legal systems, legal officials and legal reasoning, and theories of hermeneutics and interpretation – have been only marginally included in the chapters of this dissertation indeed. And I readily acknowledge, once more, that the theoretical framework which has informed this dissertation has substantial but incomplete explanatory power towards the complexity and richness of EU legal system's behaviour. Insofar as one may diagnose this dissertation as suffering from a fair degree of Hartian, Razian and Dworkinian paralysis, I would certainly not question this diagnosis. However, the choice for the perspective to be taken and the questions to be asked is surely a matter of '*le bon sens*',[47] to speak with Pierre Duhem once more. It is submitted, therefore, that in view of the nature, characteristics, and functioning of EU law, the seminal work of Hart and other jurists of the Anglo-American tradition of general jurisprudence has a tremendous amount of good sense.

[47] P. Duhem, *The Aim and Structure of Physical* Theory, trans. P.P. Wiener (Atheneum 1962 [1904–1905]) 217, 247, cited in D. Gillies, 'The Duhem Thesis and the Quine Thesis' reprinted in M. Curd, J.A. Cover and C. Pincock (eds.), *Philosophy of Science: The Central Issues*, 2nd edn (W.W. Norton & Company 2013) 278.