STUDIES

THE AUTONOMY OF THE EU'S LEGAL ORDER AND ITS DIMENSIONS

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Abstract:

The concept of autonomy lies at the core of the distinctiveness of European Union law and of the EU's legal order. While the EU system is a creation drawing features from both an international organization and a federal state, the European Court of Justice has strongly proclaimed in its case law the sui generis nature of the Union as a supranational entity, relying heavily on autonomy as a key principle of the Union's legal order. Without purporting to cover the full spectrum of possible analytical approaches, this paper examines some of the conceptions regarding the nature and dichotomies characterizing the autonomy of EU law, which might prove helpful in mapping the evolution of the notion into an 'existential' principle of the EU. The paper also discusses the internal and external dimensions of autonomy, with an emphasis on the latter, illustrating the evolution of external perceptions and the EU's dynamics on the international plane.

Keywords:

European Union; legal order; public international law; autonomy; internal autonomy; external autonomy; sui generis entity.

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Introduction

The autonomy of its legal order has been the mantra of the European Union (EU) for more than five decades. The European Court of Justice (ECJ), through its historical decisions, proclaimed that the EEC Treaty had set up a system which was more than 'a new legal order of international law'[1] – it had, in fact, 'created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States'.[2] It has been argued that in establishing the principles of direct and immediate effect and the supremacy of EU law – which European lawyers nowadays take for granted – the Court was merely reading into what was already there, ingrained in the nature of the first European treaties[3] and that under the rules of interpretation of international law it could have reached the same result[4]. Others have taken the view that this was a revolutionary turn[5], a display of

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[1] Judgment of 5 February 1963, *van Gend en Loos,* 26-62, EU:C:1963:1, ECR,12.

[2] Judgement of 15 July 1964, *Costa,* 6-64, EU:C:1964:66, ECR, 593.

[3] David EDWARDS, 'Judicial Activism—Myth or Reality? Van Gend en Loos, Costa v. ENEL and the Van Duyn Family Revisited' in Angus I. K. CAMPBELL, Meropi VOYATZI (eds.), *Essays in the Honour of Lord Mackenzie-Stuart* (Trenton 1996) 29.

[4] Joseph H. H. WEILER, 'Rewriting Van Gend en Loos: Towards a Normative Theory of ECJ Hermeneutics' in Ola WIKLUND (ed.), *Judicial Discretion in European Perspective* (Kluwer Law International 2003) 150–151.

[5] For instance, Morten RASMUSSEN, 'Revolutionizing European Law: A History of the Van Gend en Loos Judgment' (2014) 12(1) I•CON https://doi.org/10.1093/icon/mou006 140; Karen

judicial activism[6] that has characterized the Court ever since. Regardless of the approach one was to embrace with respect to the incipient stages of construction of the European Union, what is clear is that through reaffirmation and repetition, the ECJ has integrated these rules in the foundations of the system as we know it and as part of the backbone on which other ramifications have subsequently been built.

This distinctiveness of EU law and of the EU legal order or system itself (terminologies used almost interchangeably or at least in close proximity to each other) is at the core of the idea of autonomy. Its general function is to 'establish boundaries around the extent to which the EU legal order can interact with both national legal orders and the international legal order, reflecting a basic understanding of autonomy as "self-rule" in many respects'.[7] It is worth noting, however, that pervasive as it is, the concept of autonomy of the EU legal order is nowhere to be found in the EU Treaties.[8] It has been

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ALTER, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP 2001) 18–20.

[6] For ample discussions on the facets of judicial activism in the EU, see Mark DAWSON, Bruno DE WITTE and Elise MUIR (eds.), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013); also, Valerie DHOOGHE, Rosanne FRANKEN, Tim OPGENHAFFEN, 'Judicial Activism at the European Court of Justice: A Natural Feature in a Dialogical Context' (2015) 20 Tilburg Law Review (2015) 122; Michael BLAUBERGER, Susanne K. SCHMIDT, 'The European Court of Justice and Its Political Impact' (2017) 40(4) West European Politics 907.

[7] Niamh Nic SHUIBHNE,'What Is the Autonomy of EU Law, and Why Does That Matter?' (2019) 88(1) Nordic Journal of International Law 10.

[8] References to the EU Treaties should be understood as concerning the two consolidated versions of the main EU instruments in force at present: the Treaty on the Functioning of the European Union (TFEU) and the Treaty on the European Union (TEU), collectively resulting from the adoption of the Treaty of Lisbon, which entered into force on 1 December 2009. Similarly, earlier versions of the Treaties did not include any mention of the concept of autonomy of the Community/EU system/legal order or of Community/EU law. However, it has

created and developed by the ECJ in its jurisprudence[9] in various areas of competence[10] and continues to remain a flexible and fluid tool that enables the Court to shape the sphere of EU law application and interaction with internal[11] and external[12] legal systems.[13] The pervasive character, but also the elusive nature of autonomy has offered ample food for thought and for academic writings to EU law scholars.

Without purporting to cover the full spectrum of possible approaches, section I of this paper analyzes some of the conceptions regarding the nature

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been argued that the open texture of the language leaves room for interpretations that may sometimes fall beyond the actual text of the law, and yet remain valid – see Diana BOTĂU, Constantin VALENTIN, *Drept internațional. Partea generală*, (Hamangiu 2023) 217 *et seq*.

[9] Jed ODERMATT, 'The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?' in Marise CREMONA (ed.), *Structural Principles in EU External Relations Law* (Bloomsbury 2018) 292.

[10] Some significant examples of opinions or judgments in which the ECJ has referred to, defined and employed the notion of autonomy of the EU legal order are: Opinion of 14 December 1991, *EEA Agreement I (Opinion 1/91)*, 1/91, EU:C:1991:490, para. 35; Judgment of 3 September 2008, *Kadi and Al Bakaraat International Foundation*, Joined Cases C-402/05 P and C-415/05 P, EU:C:2008:46, paras. 4 and 282; Opinion of 8 March 2011, *Draft agreement on the European and Community Patents Court (Opinion1/09)*, 1/09, EU:C:2011:123, paras. 67, 76 and 89; Opinion of 18 December 2014, *Draft agreement on accession to the ECHR (Opinion 2/13),* 2/13, EU:C:2014:2454, paras. 174, 176, 179-200; Judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paras. 17, 21, 33, 37 and 59.

[11] The domestic systems of the 28 EU Member States.

[12] The systems of third countries and international organizations, but also other decentralized international systems of norms.

[13] Nicholas TSAGOURIAS, 'Conceptualizing the Autonomy of the European Union', in Richard COLLINS, Nigel D. WHITE (eds.), *International Organizations and the Idea of Autonomy* (Routledge 2011) 339: 'The concept of autonomy has been embedded in the legal and political culture of the European Union and has been the harbinger of important legal and political developments'.

and dichotomies characterizing the autonomy of EU law that could prove helpful in mapping the evolution of the notion into an 'existential' principle of the EU.[14] Section II examines autonomy in its internal and external dimensions in more detail, with an emphasis on the latter, illustrating the evolution of external perceptions and the EU's dynamics on the international plane.

I. On the nature of EU autonomy

A. Autonomy as a structural principle of EU law

A first observation relating to the nature of autonomy as described by the ECJ is that while it encompasses a multitude of rules and principles collected under the same umbrella, it has become at the same time an EU law principle on its own terms.[15] A number of well-recognized rules and principles – such as conferral of competences,[16] effectiveness[17] and uniform application[18] of EU law, independence[19] (and interdependence)[20] of the EU legal system in relation to the national systems of the Member States, sincere cooperation[21] and mutual trust,[22] rule of law[23] and protection of fundamental

[14] Judgment of 17 December 1980, Commission *v. Belgium*, 149/79, EU:C:1980:297, para. 19.

[15] SHUIBHNE, *supra* note 7 at 19.

[16] *Opinion 2/13, supra* note 10, para. 162.

[17] *Van Gen den Loos, supra* note 1 at 7.

[18] *Costa, supra* note 2 at 594.

[19] *Van Gen den Loos, supra* note 1 at 7; *Costa, supra* note 2 at 593; *Achmea, supra* note 10, para. 33.

[20] *Opinion 2/13, supra* note 10, para. 167.

[21] *Achmea, supra* note 10, para. 58.

[22] *Opinion 2/13, supra* note 10, para. 168.

[23] *Kadi, supra* note 10, paras. 281-284; *Opinion 2/13, supra* note 10, paras. 168-170.

rights[24] – are constitutionally embedded elements of the EU order[25] and contribute to creating its autonomous character, which is in turn protected by the CJEU.[26] Thus, according to Shuibhne, autonomy becomes a general principle of EU law in its own right, as a 'discernible sum that is greater than its individual parts'[27]. It is, in fact, recognized as a structural principle that is employed by the EU in its external dimension to design its interactions with other international legal regimes.[28]

B. Discursive vs. exclusive autonomy

The central role played by the EJC in safeguarding autonomy brings us to a second line of analysis that helps framing this notion. Sharing the predominantly critical tone regarding the Court's *Opinion 2/13* on the EU's accession to the ECHR, Pirker and Reitemeyer introduce a distinction between a discursive and an exclusive approach to autonomy,[29] which is useful to bear in mind when approaching the internal/external dichotomy below. In their words:

> '… under a discursive understanding of autonomy, the Court would to some extent be open to the idea that EU law is discussed more

[24] *Kadi, supra* note 10, para. 316; *Opinion 2/13, supra* note 10, para. 170.

[25] M. KLAMERT, 'The Autonomy of the EU (And of EU Law): Through the Kaleidoscope' (2017) 42(6) European Law Review 815, 817.

[26] Opinion 1/91, *supra* note 10, para. 35; see also, *Kadi*, *supra* note 10, para. 282.

[27] SHUIBHNE, *supra* note 7 at 19; see also Takis TRIDIMAS, *The General Principles of EU Law* (OUP 2006) 1; ODERMATT, *supra* note 9 at 294.

[28] Odermatt, *supra* note 9 at 297; Marise CREMONA, 'Structural Principles and Their Role in EU External Relations Law' in Marise CREMONA (ed.), *Structural Principles in EU External Relations Law* (Bloomsbury 2018) 11.

[29] Benedikt H. PIRKER and Stefan REITEMEYER, 'Between Discursive and Exclusive Autonomy – Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law' (2015) 17 Cambridge Yearbook of European Legal Studies171.

> broadly also by external actors. (…) [T]he autonomy of the EU would be shaped by the EU acting in concert with its partners in international conventions and agreements. The self-perception of discursive autonomy is one of confidence, as the possibility that other judicial actors may engage in a discussion of EU law is not seen as a threat *per se*. Exclusive autonomy, on the other hand, opens its discussions only to stakeholders and is therefore closed for parties outside the EU. (…) By excluding external influences, the self-perception is one of a rigid autonomy that needs to be shielded from dilutive external influences'.[30]

By following a clearly exclusive approach in *Opinion 2/13*, the ECJ had taken a stance different from that of the other internal stakeholders in the EU, who had all agreed to ECHR accession in principle and who considered the autonomy of the EU's legal order 'strong enough to open up to external influences in the field of human rights'.[31] What this distinction reconfirms is an ambiguity of autonomy that allows for different understandings of its sphere and role even between internal actors pertaining to the same system. It also underscores the willingness of the Court to use it as a shield from what it perceives as threats to the EU legal order, even when it is singular in its view.[32] In the same vein of thought, other scholars approach this distinction as one between relative and absolute autonomy,[33] both in what the relation of

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[30] *Idem*.

[31] *Ibid*. at 172.

[32] A position which has been criticized as too extreme and as a move from 'securing self-rule to entrenching self-reference' – see SHUIBHNE, *supra* note 7 at 24.

[33] Bruno DE WITTE, 'European Union Law: How Autonomous is Its Legal Order?' (2010) 65(1) Zeitschrift für öffentliches Recht 142: '[T]he autonomy of EU law is not absolute but relative; it does not mean that EU law has ceased to depend, for its validity and effective application, on the national law of its Member States, nor that it has ceased to belong to international law'. See also Tamás MOLNÁR, 'The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States' in *Hungarian Yearbook of*

the EU with its Member States is concerned, as well as in its interactions with international law and other international organizations.

II. Dimensions of EU autonomy

A. The internal dimension of autonomy

Closely intertwined with its external effects,[34] the internal autonomy of the EU legal order describes the link between the Union and its Member States.[35] This relation is characterized by a seemingly paradoxical interplay[36] between the independence of the EU legal system from the national systems of the Member States and a close interdependence between the two spheres,[37] which ensure the effective and uniform application of EU law, but also allow for the adequate implementation of the process of integration.[38] Internal autonomy is not unique to the EU;[39] it is, in fact, a necessary element

International Law and European Law 2015 (Eleven International Publishing 2016) 433-459, available at SSRN: https://ssrn.com/abstract=2807572, p. 6 of the online SSRN version.

[34] Loïc AZOULAI, 'Structural Principles in EU Law: Internal and External' in Marise CREMONA (ed.), *Structural Principles in EU External Relations Law* (Bloomsbury 2018) 42.

[35] Ramses A. WESSEL, Steven BLOCKMANS, 'Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations – An Introduction' Ramses A. WESSEL, Steven BLOCKMANS (eds.) *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Springer 2013) 1.

[36] Shuibhne, *supra* note 7 at 13.

[37] Cremona, *supra* note 28 at 17-18.

[38] *Idem* at 6. *Opinion 2/13*, *supra* note 10, para. 172; See also, Christina ECKES, 'International Rulings and the EU Legal Order: Autonomy as Legitimacy?' *in* Marise CREMONA, Anne THIES, RAMSES A. WESSEL (eds.), *The European Union and International Dispute Settlement (Bloomsbury* 2017) 12.

[39] Odermatt, *supra* note 9 at 294-295.

recurrent in most international organizations, which enables the new subjects of law to achieve 'institutional maturity'.[40] However, the extent of the EU's internal autonomy is remarkable and hardly comparable to that of other international organizations. The main architect of this construction was, as noted previously, the ECJ, through its groundbreaking decisions in the 1960s.[41] The Court had relied on the external system of reference (international law) in order to 'emancipate' Community law from it,[42] but also from the national systems of the Member States. By moving from 'a new legal order of international law'[43] through 'a new legal order'[44] towards 'its own legal system'[45] in its characterization of the European Communities, the ECJ achieved a net internal delimitation from the system of public international law. In this new construction, the vertical relationship of the EU with its Member States is governed by such rules as direct and immediate application of EU law and supremacy over national law, based on the effective and

[40] *Idem* at 295.

[41] See *supra*.

[42] Molnár, *supra* note 33 at 4: in discussing the strategy of the ECJ, Molnár notes that 'if EU law is construed by the Court as something completely different and independent from international law, representing a wholly new category of law, then Member States cannot apply their ordinary legal techniques and arguments developed for the domestic reception of norms originating from international law when it comes to enforcing EU law in the national legal systems, including the legal effects they produce internally'.

[43] *Van Gend en Loos, supra* note 1.

[44] Judgment of 13 November 1964, *Commission of the European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium* Joined Cases 90-63 and 91-63, EU:C:1964:80, 1232.

[45] *Costa*, *supra* note 2.

uniform interpretation ensured by the Court.[46] However, while the EU is a separate and supranational order, it remains highly connected to, and dependent on the domestic systems: it is national courts who are tasked with applying EU law, in constant dialogue with the ECJ.[47]

B. The external dimension of autonomy

The external autonomy of the EU defines its relation to public international law and essentially covers two aspects: the recognition of the entity's status as an independent actor on the international plane and the impermeability of its legal order to external influences.[48] In what the former aspect is concerned, the entry into force of the Lisbon Treaty clarifies the international personality of the Union.[49] However, ontological questions about the nature of the EU's legal system have yet to be answered.[50] From that perspective, the separate actorness of the EU is closely linked to the second aspect of autonomy – the (im)permeability of its legal system. The biggest interrogations take place at the borders of the systems. They concern the nature of the inevitable exchanges between general international law and the

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[46] Mainly through the preliminary ruling mechanism, one of the cornerstones of the EU legal order - Article 267 TFEU. For the struggles such a dialogue may encounter, see Diana Botău, 'La Cour Constitutionnelle de la Roumanie et le droit de l'Union européenne. Amitié ou réserve?' in O.A. MACOVEI (dir.), *La décennie européenne de la Roumanie et la Bulgarie. Le bilan d'une appartenance différencié à l'Union européenne* (mare & martin 2022) 119-139.

[47] For a decision discussing the procedural dimension of direct and immediate application of EU law, as well as supremacy and preemption, see Judgment of 9 March 1978, *Simmenthal II*, 106/77, EU:C:1978:49, paras. 13-26, 643-645.

[48] ODERMATT, *supra* note 9 at 296.

[49] Article 47 TEU.

[50] The EU is sometimes still perceived as a mere 'reflection of the collective will of the Member States' or as 'simply an international law regime' - ODERMATT, *supra,* note 9 at 292.

special legal system of the EU: are these communications among members of the same 'species'? Or are the systems altogether distinct? These questions remain a topic of effusive commentary. The abundance of legal scholarship on EU external autonomy illustrates not only the importance of the subject, but also the fact that this story may be told in many ways. It lends itself as a fertile terrain for exploring questions of legitimacy[51] and historical evolution of the Union's integration,[52] as well as for application of concepts of legal philosophy.[53]

The EU's legal system has often been described as a self-contained regime,[54] although given its increasing participation in international relations and multilateral instruments, not an isolated one. The EU (mainly through the ECJ) has constantly asserted the distinctiveness of its order in the international sphere and has correspondingly sought its recognition as autonomous. Thus, in interactions with other subsystems or with general international law, the EU appears to have constantly taken a defensive stance.[55] The ECJ, its main architect and fierce protector, has repeatedly

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[51] ECKES, *supra* note 38.

[52] For instance, RASMUSSEN, *supra* note 5.

[53] See Catherine RICHMOND, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law' (1997) 16(4) Law and Philosophy 377; Mark 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(1) Cornell International Law Journal 1.

[54] See Joseph H. H. WEILER, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2422; on a view disputing the fully self-contained character of the EU see Bruno SIMMA, Dirk PULKOWSKI, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17(3) EJIL 483, 516: The continuous assertion of the Community's *sui generis* character [...] does not by itself create "an own legal order". From a public international law perspective, the EC legal system remains a subsystem of international law'.

[55] See, on the relation of European law with general international law, *Kadi*, *supra* note 10, paras. 285-288.

asserted that autonomy requires that the Court itself be in the position to determine the validity, content and scope of application of EU law[56] – in other words, that the Court holds the monopoly of both procedural and substantive interpretative power over EU law.[57] In addition, in making its determination, the Court will operate within the 'logic of the EU legal order rather than being dependent on any form of recognition by national or international law'.[58] This general approach of the ECJ has led to characterizations of its position as 'selfish'[59] or autarkic,[60] but such criticism does not so far appear to have moved the Court.

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[56] Christina ECKES, 'The European Court of Justice and (Quasi-)Judicial Bodies of International Organisations', in Ramses A. WESSEL, Steven BLOCKMANS (eds.) *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Springer 2013), 85-100.

[57] See generally, on the particularities of legal interpretation at the ECJ, Sorina DOROGA, Alexandra MERCESCU, 'A Call to Impossibility: The Methodology of Interpretation at the European Court of Justice and the PSPP ruling' (2021) 13 European Journal of Legal Studies 87, https://doi.org/10.2924/EJLS.2021.006.

[58] ECKES, *supra* note 38 at 12.

[59] See, for instance, the discussions in Bruno DE WITTE, 'A Selfish Court? The court of Justice and the Design of International Dispute Settlement Beyond the European Union' in Marise CREMONA and Anne THIES (eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014) 33.

[60] Piet EECKHOUT, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?', Jean Monnet Working Paper 01/15, available at http://jeanmonnetprogram.org/wp-content/uploads/2015/04/JMWP-01-Eeckhout1.pdf, archive: https://perma.cc/6WWW-2PHF, at 39: discussing the ECJ's position regarding the EU's accession to the ECHR, Eeckhout concludes that *Opinion 2/13*, 'is based on a concept of autonomy which borders on autarky. (...) It is clear that the CJEU has not digested the idea of external control, and sees it as a threat rather than an opportunity. In theoretical terms, it has opted for a version of radical legal pluralism, which enables it to confirm its supreme authority, unhindered by the integration of the Convention system'.

In order to assess to what extent (if at all) the ECJ's representation of the EU legal order corresponds to that of the world at large, two lines of analysis can prove useful: the first is the view of the insider looking out and the second is the view of the outsider looking in.

C. The view of the insider looking out

For many scholars writing on topics of European law, the affirmation that the EU's legal order is separate and independent from international law is almost a given, taken at face value. Weiler and Haltern, for instance, plasticly compare the attempts of fitting this *sui generis* entity into the category of international organizations (following the traditional dichotomy between international organizations and states) to trying 'to push the toothpaste back into the tube'.[61] This euphemism in fact encapsulates two statements: a recognition of the original source of EU law in international law, as well as the irreversible departure from it and the evolution of the new legal system into something new.[62] Through its case-law, the ECJ was the main driving force behind both generating this departure and maintaining its progressive evolution. However, one should note that while a big part of the Court's case-law (and certainly its historical decisions, such as *Costa v. ENEL*) strongly implies that the legal order created by the European Treaties is something separate from international law, a *sui generis* one, the ECJ has

[61] Joseph H. H. WEILER, Ulrich R. HALTERN, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz' in Anne-Marie SLAUGHTER, Alec STONE SWEET, Joseph Weiler (eds.), *The European Courts and National Courts – Doctrine and Jurisprudence* (Bloomsbury 1998) 331.

[62] See, for a similar view, Sionaidh DOUGLAS-SCOTT, *Constitutional Law of the European Union* (Longman 1st edition 2002) 260.

never affirmed this in unequivocal terms.[63] It never expressly stated that its legal system was outside of the realm of international law, although it did make a similar statement in relation to the national systems of the Member States.[64] The reasons for its reluctance to make the final step are somewhat speculative, but it is fair to assume that the earlier three-pillar construction of the EU,[65] as well as national constitutional sensitivities[66] might have played some role in the ECJ's choice.

In any case, the general image that the EU has projected over more than half a century since the decision in *van Gen den Loos* is that of a supranational political union with a high degree of integration, whose legal order has developed in a manner that distinguishes it both from national domestic systems and public international law.[67] Thus, in what the latter is concerned, it is worth examining some of the rulings of the ECJ that examine

[63] DE WITTE, *supra* note 33 at 147.

[64] For instance, *Costa*, *supra* note 2.

[65] Between the entry into force of the Treaty of Maastricht (1993) and that of the Treaty of Lisbon (2009), the European Union relied on a three-pillar structure: one 'community pillar', made up of the European Communities and two 'non-community pillars', comprising provisions of inter-governmental cooperation in the areas of (1) Police and Judicial Co-operation in Criminal Matters (initially named Justice and Home Affairs) and (2) the Common Foreign and Security Policy. The special principles and rules developed by the Court as pertaining to the EU's legal order were applicable in the community pillar, but the relations in the second and third non-community pillars were still governed by the general rules of public international law. The Court could thus not have been able to assert, at that point, the complete separation of EU law from international law without creating uncertainty about the manner in which the three deeply interconnected pillars would operate.

[66] DE WITTE, *supra* note 33 at 148.

[67] On the view of the ECJ as an actor seeking to advance a political project, as well as on a more extensive discussion on the distinctiveness of legal orders, see Alexandra MERCESCU, 'Is There Generic Law? The Issue of Constitutionalism' in S. GLANERT, A. MERCESCU and G. SAMUEL, Rethinking Comparative Law (Edward Elgar, 2021) 283 *et seq*.

this distinction, in the interactions of the EU system with external instruments of international law (to which the Member States participate either solely by themselves or alongside the Union).

From its earliest opinions on the compatibility with Community law of projected external agreements of the EC,[68] the Court has consistently employed the concept of autonomy of the Community legal order as a shield against what it perceived to be threats coming from the general system of international law.[69] In most cases, even though the proposed external agreements contained clauses designed to safeguard the specific features of the Union's legal order, the Court's opinion was adverse.[70] In discussing the compatibility of international agreements with the EC/EU system, the Court has repeatedly emphasized the importance of the judicial component of autonomy, requiring that the ECJ be the sole and final interpreter and adjudicator on matters of European law and that it not be required to yield to

[68] Under the former Article 300(6) of the EC Treaty and current Article 218(11) of the TFEU, upon request of the main European institutions or Member States, the Court may be called to give its opinion in respect of the compatibility with the EU Treaties of projected international agreements of the Union.

[69] See, for instance, *Opinion 1/91*, *supra,* note 10, paras. 65-72: '[A]n international agreement providing for a system of courts, including a court with jurisdiction to interpret its provisions, is not in principle incompatible with Community law and may therefore have Article 238 of the EEC Treaty as its legal basis. However, Article 238 of the EEC Treaty does not provide any basis for setting up a system of courts which conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community'.

[70] Only in *Opinion 1/92* and *Opinion 1/00* did the Court find that the autonomy of the EC/EU legal order was not endangered. See Opinion of 10 April 1992, *EEA Agreement II (Opinion 1/92)*, 1/92, EU:C:1992:189, para. 42 and the dispositive part of the Opinion; Opinion of 18 April 2002, *European Common Aviation Area (Opinion 1/00)*, 1/00, EU:C:2002:231, paras. 44-46.

the decisions of external judicial bodies.[71] Any other option, the Court claimed, would have adversely affected the very foundations of the Union.[72]

Three cases from the more recent history of the Court are particularly relevant in illustrating its very strong stance when affirming the external autonomy of the Union and its understanding of the EU's legal order. The first one is *Kadi*, in which the Court indirectly – albeit not very subtly – decided to give prevalence to EU law and its fundamental principles related to the rule of law over a resolution of the UN Security Council.[73]

> In characterizing the relation of the Community legal system with international law, the Court stated that 'the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty'.[74]

The second case concerns the draft treaty for accession of the European Union to the ECHR – *Opinion 2/13* – in which, taking a singular view,[75] the Court concluded that the proposed mechanism would adversely affect the autonomy of EU law, *inter alia*, in its components concerning the judicial monopoly of the ECJ to interpret EU law, mutual trust between the

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[71] *Opinion 1/91, supra* note 10, para. 71; *Opinion 2/13, supra* note 10, paras. 170-174.

[72] *Kadi, supra* note 10, para. 282; *Opinion 1/91*, *supra* note 10, paras. 35, 71.

[73] For ample discussions on this judgment, see Grainne DE BURCA, 'The European Court of Justice and the International Legal Order after Kadi' (2010) 51(1) Harv. Int'l L.J. 1; Veronika FIKFAK, 'Kadi and the Role of the Court of Justice of the European Union in the International Legal Order' (2012-2013) 15 Cambridge Y.B. Eur. Legal Stud. 587.

[74] *Kadi*, *supra* note 10, para. 285.

[75] All the other internal stakeholders, including the European Commission and the Advocate General had expressed and agreement in principle with respect to the draft accession treaty.

Member States and the allocation of powers fixed by the European Treaties[76]. As remarked in numerous scholarly articles,[77] in striking down the proposed accession mechanism without even attempting to save the prolonged accession efforts by offering conditional approval (although article 6(2) TEU mandates that the EU become a party to the ECHR),[78] the Court had displayed almost an isolationist position that, from a purely legal perspective, appears to be excessively formalistic and difficult to comprehend.

The third illustrative case is one that concerns the sphere of investment protection, through which the Court has essentially laid the ground for dismantling the network of BITs concluded between the EU Member States: the *Achmea* judgment.[79] This decision deals with two themes of particular interest: it discusses the complex relationship between EU law and international investment law, but it also depicts the most recent position

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[76] Fon an extensive analysis on the relationship between the ECHR and EU law, see Raluca BERCEA, *Protecția drepturilor fundamentale în sistemul Convenției Europene a Drepturilor Omului* (C.H. Beck 2020), 51 *et seq.*

[77] See, for analyses of *Opinion 2/13*, for instance, Katja S. ZIEGLER, 'Beyond Pluralism and Autonomy: Systemic Harmonization as a Paradigm for the Interaction of EU Law and International Law' (2016) 35(1) Yearbook of European Law 667; Louise HALLESKOV STORGAARD, 'EU Law Autonomy versus European Fundamental Rights Protection—On Opinion 2/13 on EU Accession to the ECHR' (2015) 15 Human Rights Law Review 485; Raluca BERCEA, 'Le temps de l'adhésion n'est toujours pas venu – Notes en marge de l'Avis 2/13 du 18 décembre 2014 de la Cour de Justice de l'Union Européenne' (2015) 5(1) Revista Română de Drept Comparat 88; ECKES, *supra* note 38 at 17-21.

[78] Article 6(2) TEU: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'.

[79] The (in)famous Judgment of 6 March 2018, *Achmea,* C-284/16, EU:C:2018:158. See also the joint declarations of the governments of the EU Member States of January 15-16, 2019, concerning the termination of all intra-EU BITs by December 6, 2019.

of the CJEU regarding the external dimension of autonomy.[80] Although the decision had far-reaching implications for the EU system of investment protection and ISDS, when analyzed in more detail, its findings are not, in fact, all that surprising, in spite of the uproar that it had caused at the time in the international (arbitration) community.[81] The Court did not depart from its previously expressed views on autonomy of EU law and concluded that the ISDS mechanism established in the Netherlands-Slovakia BIT was contrary to the essential provisions of Articles 267 and 344 TFEU concerning the preliminary ruling procedure and, respectively, the prohibition of Member States to submit disputes concerning the Treaties to any method of settlement other than those provided for in the Treaties themselves. In line with its previous protective stance, the Court was of the opinion that there was a real risk that the arbitral tribunal would incidentally have to make interpretations of EU law, thus disturbing the exclusive competence of the Court and its role in ensuring uniformity and consistency. While clarifying the situation of (at least a part of) intra-EU BITs, the decision in *Achmea* also confirmed the very reduced appetite of the CJEU for dialogue with external adjudicatory bodies.[82]

D. The view of the outsider looking in

The case-law of the ECJ on external autonomy is not a truth-telling mirror: the image that the CJEU perceives of itself and of the EU's legal order,

[80] For an ampler commentary, see Cristina CONTARTESE, Mads ANDENAS, 'EU autonomy and investor-state dispute settlement under inter se agreements between EU Member States: Achmea' (2019) 56 Common Market Law Review 157.

[81] See also Szilárd GÁSPÁR-SZILÁGYI, 'It is Not Just About Investor-State Arbitration: A Look at Case C-284/16, Achmea BV', European Papers (30 May 2018), available at http://www.europeanpapers.eu/en/europeanforum/it-is-not-just-about-investor-state-arbitration-achmea-case, archive: https://perma.cc/A4N7-E26F.

[82] CONTARTESE/ANDENAS, *supra* note 78 at 191.

one it has arduously worked to shape, is not necessarily one and the same with what the international community sees. In fact, the most significant obstacle that could hamper the perception of external actors is the very structure of the international legal system itself: its binary nature. On the international plane there are, in principle, only two types of main subjects of international law: states and international organizations. Their corresponding legal orders may be summarized through the dichotomy of public international law / domestic law – *tertium non datur*. Of course, these types of orders display multiple variations, but such variations are erected on the same two basic structures and only stand to re-confirm their nature. In fact, in the characterizations of scholars who are reluctant to accept the *sui generis* claim of the EU's legal order, the EU is described as 'the most highly developed specimen of the species and as a model for other international organizations',[83] but an international organization, nonetheless, included in one of the two known species.[84]

This so-called inclusive view[85] of the EU's nature also appears to be supported by the report of the International Law Commission (ILC) on the fragmentation of international law. In exemplifying the occasional use of the concept of 'self-contained regime', the report points, among others, to the field of European/EC law as a regime of 'functional specialization' which is

[83] Jan KLABBERS, 'The Changing of International Organizations' in Jean-Marc COICAUD, Veijo HEISKANEN (eds.), *The Legitimacy of International Organizations* (United Nations University Press 2001) 221.

[84] See also DE WITTE, *supra* note 33 at 146. De Witte also remarks that, surprisingly, in the scholarship on the nature of the EU, more ink is spent on elaborate arguments by those who dispute the separate nature of the EU's legal order, while the supporters of the *sui generis* thesis are content to mainly rely on the authority of the ECJ (146-147).

[85] *Idem*.

nonetheless included under the wide umbrella of public international law.[86] Even more significantly, in discussing the manner in which the EU's presence as an international actor contributes to fragmentation, the report adopts the position proposed by Jan Klabbers[87] and notes that 'the European Community, acting under the "first pillar" of EU competences is a subject of international law and *for practical purposes may be treated towards the outside world as an intergovernmental organization*, with whatever modification its specific nature brings to that characterization'[88] [emphasis added]. One could potentially argue that after the consolidation of the three pillars of the Union and the advanced integration brought about by the entry into force of the Treaty of Lisbon, the members of the ILC might take a second look at their characterization of the EU's legal regime and reconsider. However, the question remains: has European integration been deepened to such an extent that the EU is completely removed from the realm of international organizations? And if so, has it moved on the spectrum towards the nature of a state or it has rather become a third, hitherto unknown category?

In the eyes of other international adjudicatory bodies, the EU still appears to be perceived as an order that, in spite of numerous particularities, maintains its ties with public international law. The International Court of Justice (ICJ), as well as other arbitral tribunals dealing with matters of

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[86] The International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti KOSKENNIEMI (2006), UN Document A/CN.4/L.682, 68, para. 129.

[87] Jan KLABBERS, 'Presumptive Personality: The European Union in International Law' in Martti KOSKENNIEMI (ed.) *International Law Aspects of the European Union* (Martinus Nijhoff Publishers 1997) 231-254.

[88] ILC, *Fragmentation of International Law*, *supra* note 84 at 113, para. 219.

general international law[89] have so far been sympathetic to the jurisdictional sensitivities of the ECJ (especially in its extensive interpretation of Article 344 TFEU) and have either chosen to elegantly sidestep the issue of a potential direct conflict[90] or cede in favor of the CJEU's jurisdiction.[91] Thus, the ICJ has not had the opportunity, so far, to directly address the nature of the EU's legal order and its interactions with international law. In the few cases that could have tangentially touched upon EU law through the presence of EU Member States as parties to the dispute brought before it, the ICJ has displayed restraint towards the ECJ, in line with its general approach of 'friendly mutual respect' practiced 'in the interest of the "integrity of international law"'.[92] Thus, in the *Jurisdictional Immunities* case,[93] Germany and Italy agreed that the matter did not implicate questions of EU law and that it only involved the relationship between the two states that was governed by general international law.[94] In the *Fisheries Jurisdiction*[95] and the *Jurisdiction and*

[89] See the discussion on the positions of the arbitral tribunals in the *Mox Plant* and the *Iron Rhine* disputes in Christina BINDER, Jane A. HOFFBAUER, 'The Perception of the EU Legal Order in International Law: An In- and Outside View' in Marc BUNGENBERG, Markus KRAJEWSKI, Christian TAMS, Jorg Philipp TERHECHTE and Andreas R. ZIEGLER (eds.), *European Yearbook of International Economic Law 2017* (Springer 2017) 158-163.

[90] *Iron Rhine Railway Arbitration*, Belgium v. The Netherlands, Award, XXVII, RIAA 35 (24 May 2005), paras. 101 *et seq.*

[91] See *Mox Plant Case*, Ireland v. United Kingdom, Annex II Tribunal (PCA), Order no. 6, Termination of Proceedings (6 June 2008).

[92] See BINDER/HOFFBAUER, *supra* note 87 at 165.

[93] *Jurisdictional Immunities of the State*, Germany v. Italy, 2008 ICJ, Application Instituting Proceedings, (23 December 2008).

[94] *Jurisdictional Immunities*, *supra* note 91, para. 6.

[95] *Fisheries Jurisdiction*, Spain v. Canada, 1998 ICJ 432, Jurisdiction (4 December 1998).

Enforcement of Judgments in Civil and Commercial Matters[96] cases, the ICJ was closer to discussing the ECJ's jurisdiction; however, in the *Fisheries Jurisdiction* it decided to sidestep the issue in light of Canada's claim that the dispute had already been settled through the agreement that it had concluded with the EU, while in the second case the parties settled the dispute before the ICJ had an opportunity to state its views on the matter.[97]

Outside of the framework of general international law, the relationship of the ECJ with the Dispute Settlement Body (DSB) of the WTO displays a whole different range of complexities. The first element to note is that the EU is a party to the WTO in its own right and therefore, for the purposes of compliance with its obligations stemming from this status, EU law is treated as similar to the domestic law of any other contracting party.[98] Significantly, the DSB has described the CJEU not as an international adjudicatory body, but as a 'domestic court of 27 out of 153 Members of the WTO'.[99] However, when the separate character of the EU's order is at times recognized, it still appears to be placed closer to the domestic end of the spectrum and characterized, for instance, as a '*sui generis* domestic constitutional arrangement'.[100]

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[96] *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, Belgium v. Switzerland, 2009 ICJ, Application Instituting Proceedings, (21 December 2009).

[97] BINDER/HOFFBAUER, *supra* note 87 at 164-165.

[98] See for a more detailed discussion BINDER/HOFFBAUER, *supra* note 87 at 167-170.

[99] Panel Report, *European Communities and Its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, (16 August 2010), para. 7735, footnote 974.

[100] Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R (15 March 2005), para. 7.725.

The examples discussed above portray the perception of the EU's legal order by the international community as a kaleidoscopic image: changing shape depending on the angle from which it is observed. From an external vantage point, there is no crystalized single answer as to the nature of the EU and its peculiar legal regime – only the ambiguity of a spectrum of possibilities between an international organization and a federal state. The EU may thus take advantage of the ongoing systemic transformations in different areas of international law, in order to further push for recognition of its autonomous legal order on the international plane, although such recognition could surely only be achieved incrementally.

Conclusion

This contribution has sought to analyze some of the approaches (doctrinal or jurisprudential) concerning the autonomy of the EU's legal order and its shaping into an existential principle of the EU. In examining the various aspects and dimensions of autonomy, the paper has shown that while the EU is an expert architect of hybrid structures, it has not (yet) succeeded in embedding itself on the international level as a true *sui generis* entity, recognizable as such by external actors.

In fact, having taken the view of the outsider looking in, the conclusion to be drawn is that the ECJ, possibly the strongest symbol of the Union's legal order, has difficulties placing itself in a particular point on the spectrum of judicial bodies, between an international court and a domestic one.[101] This, in turn, is indicative of an identity ambiguity of the EU itself on the international

[101] ECKES, supra note 38 at 27-28.

plane. While the Court affirms that the legal order of the Union has departed from public international law, for the external viewer, it is still pendulating between an international organization and a domestic system, for lack of a third choice. It might even be concluded that as long as there is only one entity of this type in the international community, its identity will remain fluid and its legal texture open, taking a different shape depending on the angle from which it is being observed.

On the other hand, whatever its legal nature might be, it is undeniable that the EU is an important actor in the world arena, wielding significant power in relation to other states and international organizations. From this point of view, the absence of language (or concepts) in current international law to accurately designate an entity like the EU rather stands as a testament to the difficulty of articulating the uniqueness of the EU's system in an international legal order that continues to operate with binary notions and that is perhaps too slow to respond to change.[102]

[102] Hersch Lauterpacht for instance, argued for a theory of material completeness of international law - see Hersch LAUTERPACHT, *The Function of Law in the International Community* (OUP 1933).

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