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The Court of Justice of the European Union for Hedgehogs

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The Court of Justice of the European Union for Hedgehogs

The fox knows many things, but the hedgehog knows one big thing. The fox, for all his cunning, is defeated by the hedgehog's one defence.[1]

Introduction

The Court of Justice of the European Union [hereafter "the Court"] has been a principal actor of the development of the European Union legal system.[2] Its achievements have been extraordinary and the Court enjoys considerable interpretive authority. Despite occasional friction with courts in individual Member States and relentless academic criticism, the Court remains an influential actor in the European and global judicial landscape.

Sustaining coherence of the case law has been understood as a vital constitutional responsibility of the Court.[3] Ronald Dworkin would argue that courts need to have a unified vision of the legal system in which they operate in order to reach coherent decisions. Interpretation of the law as speaking with one voice, as Dworkin's idea of law as integrity requires, is a value with special relevance in the legal realm.[4] Dworkin's idea of law speaking with one voice relates to Isaiah Berlin's argument that hedgehogs "relate everything to a single central vision".[5] The fox knows many things, Berlin argues, "but the

*I would like to sincerely thank Gráinne de Búrca and Joseph Weiler, as well as Duncan Kennedy, Mark Tushnet, William Alford, Hans Micklitz, Giorgio Monti, Lewis Sargentich, and David Wilkins for their support. I am, as always, also profoundly indebted to my beloved wife, Eva Kukovec.

[1] Eugène-Melchior de Vogüe Berlin, An Essay on Tolstoy's View of History, *in* 1 THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 1 (Isaiah Berlin, 1997).

[2] GRAINNE DE BÚRCA, JOSEPH H. H. WEILER, THE EUROPEAN COURT OF JUSTICE (Oxford University Press 2001); Eric Stein, Lawyers, Judges, and the Making of a Transnational Constitution, 75 AMERICAN J. INT. L. 1, 1-27; KAREN ALTER, THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS (Oxford University Press 2009); Joseph H. H. Weiler, The Transformation of Europe, 100 YALE L. REV. 2403, 2403-2483 (1991).

[3] NIAMH NIC SHUIBHNE, THE COHERENCE OF EU FREE MOVEMENT LAW: CONSTITUTIONAL RESPONSIBILITY AND THE COURT OF JUSTICE (Oxford University Press, 2013). This book examines the Court's constitutional responsibility to articulate a coherent vision of the EU internal market in the jurisprudence of free movement.

[4] RONALD DWORKIN, THE LAW'S EMPIRE (Harvard University Press 1986).

[5] Berlin, *supra* note 1, at 1 "For there exists a great chasm between those, on one side, who relate everything to a single central vision, one system, less or more coherent or articulate, in terms of which they understand,

hedgehog knows one big thing. The fox, for all his cunning, is defeated by the hedgehog's one defence".[6] The jurisprudence of the Court has been approached from several perspectives including ideology,[7] neoliberalism,[8] *effet utile* and teleology,[9] internal market logic,[10] or globalization logic,[11] deeper integration,[12] positivism[13] and constitutionalism.[14] Practitioners, fellow judges, politicians and academics alike critique,

think and feel – a single, universal, organising principle in terms of which alone all that they are and say has significance – and, on the other side, those who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some de facto way, for some psychological or physiological cause, related to no moral or aesthetic principle." (Jun18, 2019), https://www.businessinsider.com/fox-hedgehog-ancient-saying-about-leadership-2019-6?r=US&IR=T.

[6] Berlin, *supra* note 1, at 1.

[7] Tamara Ćapeta, Ideology and Legal Reasoning at the European Court of Justice, *in* 89 THE TRANSFORMATION OR RECONSTITUTION OF EUROPE: THE CRITICAL LEGAL STUDIES PESPRECTIVE ON THE ROLE OF THE COURTS IN THE EUROPEAN UNION (Tamara Peršin, Siniša Rodin eds., 2018); Damjan Kukovec, Law and the Periphery, 21 EUR. L. J. 406, 406-428 (2015).

[8] Alexander Somek, From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing
Social Democratic Imagination, 18 EUR. L. J. 711, 721 (2012).

[9] Nial Fennelly, Legal Interpretation at the European Court of Justice, 20 FORDHAM INT. L. J. 656, 672-678 (1996).

[10] Dimitry Kochenov, EU Citizenship: Some Systemic Constitutional Implications, *in* 11 IN EUROPEAN CITIZENSHIP UNDER STRESS (Nathan Cambien, Dimitry Kochenov, Elise Muir eds., 2020): "EU citizenship is not yet unquestionably endowed with fundamental rights. While numerous EU citizenship rights are obviously there, […] from free movement and family reunification to social assistance, citizens' initiative and fundamental rights in times of economic crisis, to freedom to move investments around the Union and voting rights – the dependence of any EU citizenship rights claims on the division of competences between the EU and the Member States unquestionably demonstrates the far-reaching limits of EU citizenship. This is because the division of competences between the EU and the Member States generally follows what one can term as a cross-border or internal market logic." Jotte Mulder, Unity and Diversity in the European Union's Internal Market Case Law: Towards Unity in 'Good Governance'?. 34 UTRECHT J. INT. EUR. L. 4, 4–23 (2018). Mulder argues that the challenge is finding unity in social diversity and many commentators consider that the Court has interpreted the constitutional foundation of the European Union as having turned market access rights into fundamental rights and social policy into an obstructive power that has to be limited. He contends that the Court has developed a proportionality assessment that is able to accommodate a plethora of Member State policy choices.

[11] Johan Meeusen, The "Logic of Globalization" Versus the "Logic of the Internal Market": A New Challenge for the European Union, 4 AUC – IURIDICA 19, 19-29 (2020): "In its recent judgment in Google/CNIL (C-507/17), on the territorial reach of the EU data protection rules and the "right to be forgotten", the CJEU introduces a new "logic of globalization" which must be distinguished from the traditional "logic of the internal market". While the latter justifies extraterritoriality in case internal market interests are affected, restraint characterizes the former."

[12] Carl Lebeck, National constitutionalism, openness to international law and the pragmatic limits of European Integration European law in the German constitutional court from EEC to the PJCC, 7 GER. L. J. 907, 907-946: "The integrationist approach relies thus to some extent on the assumption that democratic procedures are less effective than other institutional designs to resolve gridlocks, which also requires courts to step into to solve the problems."

[13] Alexander Somek, Liberalism and the Reason of Law, 84 MOD. L. REV. 394, 394-409 (2020).

[14] Hans Micklitz, Norbert Reich, The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive, 51 COMMON MARK. L. REV. 771, 771-808 (2014).

comment and attempt to predict the case law of the Court from numerous perspectives, which could be understood as perspectives of the fox.

What, if anything, however, could be understood as the hedgehog's perspective – as a single central vision and force that makes the jurisprudence of the Court follow its specific path? How can the unity and coherence of the European legal system sitting above a diverse mix of national legal systems, with several different languages, be ensured?[15] What is the organising principle of coherence of the Court, given its role in the European Union? [16]

This article explores whether autonomy, defined as an idea of a new legal order with its distinct ontological and axiological character, can be understood as such a single, universal, organizing meta vision in terms of which all that the Court does has significance.

It is submitted that autonomy serves as an organizing principle, it makes the case-law of the Court comprehensible and offers both a better ex ante insight of what is to be expected from the Court in terms of its decision-making as well ex post explanation of the Court's judgments. A reconstruction of the case law of the Court in light of such a vision offers a starting-point for legal investigation of the jurisprudence of the Court.

A clear caveat may best be put forward in the beginning. We may never discover all the causal chains that operate in any legal system. The number of such causes is infinitely great, the causes themselves infinitely small.[17] Yet, as this article argues, autonomy can be understood as representing the single synoptic vision of coherence and integrity of the Court. Autonomy reverberates throughout the case law and lawyers

[15] SACHA PRECHAL, BERT VAN ROERMUND, THE COHERENCE OF EU LAW: THE SEARCH FOR UNITY IN DIVERGENT CONCEPTS (Oxford University Press 2008).
[16] There is a recurrent question of the source of coherence of the decision-making of the Court of Justice of the European Union, in comparison to national constitutional courts. See for example: Urška Šadl, Joxerramon Bengoetxea, Theorising General Principles of EU Law in Perspective: High Expectations, Modest Means and the Court of Justice, *in* 41 GENERAL PRINCIPLES OF LAW: EUROPEAN AND COMPARATIVE PERSPECTIVES (Stefan Vogenauer, Stephen Weatherill eds., 2017). For the exploration of the notion of coherence in European Union law, see also for example Dunja Duic, The concept of coherence in EU law, 65 ZBORNIK PRAVNOG FAKULTETA U ZAGREBU 537, 537-554 (2015).
[17] Berlin, *supra* note 1, at 459.

engaging with the Court miss it at their peril. Given the Court's unique position in the European and global judicial fabric, autonomy would justifiably be its central force.

Section one explains the development and understanding of autonomy in EU law in light of the case-law of the Court that explicitly mentions it. It proposes that autonomy should not be understood merely as a shield against other legal systems, as a jurisdictional claim, but as an ideal principle that guides the argument of the Court.

Section two first explains the role of coherence in legal argument in general. It then argues that autonomy is justifiably the source of coherence of the Court's case law given its specific ontological and axiological character that is constantly evolving and reshaping in the process of ordering pluralism.

Section three argues that autonomy is omnipresent in the reasoning of the Court and that it is the centripetal force of EU case law, even when invisible and not explicitly mentioned in decisions of the Court. This section identifies some of the "deep currents" of autonomy running through the case law, specifically by showing that human rights protection and the rule of law are not an irritant to autonomy, but rather inseparable from it and that they are mutually reinforcing. It also explains why equation of autonomy with sovereignty does not accurately grasp its character, and how the autonomy of the EU legal order is intrinsically connected to its effectiveness. It is further argued that no other principle can plausibly compete with autonomy in enabling the new legal order's coherence. Finally, it argues that the autonomy as coherence reflects the Aristotelian analysis of seeking knowledge and that autonomy, as the coherence-enabling cause, is not the end-goal in and of itself. It rather ensures that all the goals and values of the Treaty are realized.

The article concludes that autonomy is the most foundational element of the Court's reasoning, ensuring the coherence of its decision-making, its predictability and consistent development of legal principles. It is the hedgehog's synoptic vision, the Court's "one big thing", which has made the EU legal system what it is today.

I. The concept of autonomy beyond a jurisdictional claim

Autonomy is one of the most contested concepts of EU law. This section will first explain the historical development of autonomy in the case law of the Court and some of the best-known cases on autonomy, which have led to its understanding as a shield against other legal systems, protecting autonomy from external control and influence. Yet, this understanding does not fully appreciate autonomy's central role in the case law of the Court.

Autonomy has been understood as self-rule and ability to choose the path for itself.[18] It has been also understood as a relationship of an autonomous order with others and an ability to shape this relationship.[19] It has been further described as an instantiation of independence, of freedom from external control or influence.[20] The concept of autonomy exists in public international law, however, it has developed into a self-standing idea with precise legal meaning in EU law.[21]

Autonomy, or a claim to a legal order autonomous from national law of Member States, as well as from international law, has been called the single most far-reaching, and probably most disputed, principle of the European Union.[22] It has been said to be one out of several elements that, combined, make up "the essentials of European constitutional

[18] Jed Odermatt, When a Fence becomes a Cage: The Principle of Autonomy in EU External Relations Law, 7 EUI WORKING PAPER 1, 1 (2016).
[19] Jan Willem van Rossem, The Autonomy of EU Law: More is Less?, *in* 13 BETWEEN AUTONOMY AND DEPENDENCE THE EU LEGAL ORDER UNDER THE INFLUENCE OF INTERNATIONAL ORGANISATIONS 13-46 (Ramses A. Wessel, Steven Blockmans eds., 2013).
[20] SHORTER OXFORD ENGLISH DICTIONARY (Oxford University Press 2007). Christopher Vajda, Achmea and the
Autonomy of the EU Legal Order, LAWTTIP WORKING PAPERS 1, 9-19 (2019).
[21] Odermatt, *supra* note 18, at 3-5. On various ways of understanding autonomy see also Katja S. Ziegler, Autonomy: From Myth to Reality – or Hubris on a Tightrope ? EU Law, Human Rights and International Law, *in* 267 RESEARCH HANDBOOK ON EU HUMAN RIGHTS LAW 267 (Douglas-Scott, Hatzis eds., 2017); Tamás Molnár, Revisiting the External Dimension of the Autonomy of EU Law: Is There Anything New Under the Sun?, 57 HUNG. J. LEG. STUD. 178, 178-197 (2016).
[22] Theodor Schilling, The Autonomy of the Community Legal Order: An Analysis of Possible Foundations, 37 HARV. INT. L. J. 389 (1996).

law".[23] The idea of "an independent source of law" has been central to its development.[24]

Autonomy started its development internally, against the legal orders of the Member States in the 1960s. It was primarily discussed within the framework of supremacy and direct effect. Much as it is apparent today, the Union with powers which could be exercised independently of the Member States was not self-evident from the inception of the Community.[25] The seeds of autonomy in European Union law were sown in the *Van Gend en Loos* judgment in which the premise of direct effect and the new legal order was established, including the premise that the question of direct effect was a question of EU law.[26] In other words, it is EU law, an autonomous legal system, itself that determines the effect and nature of European Union law within the national legal orders.[27]

Costa Enel set out that the premise of the new legal order having direct effect could succeed only when "an independent source of law" or in French "une source autonome"[28] had been established.[29] Without such a basis, the Court had thought, the direct effect and primacy could fall prey to considerations of a national constitutional nature. This was even more clearly set out in *Stauder* and *Internationale Handelsgesselschaft*. The motive

[23] Nikos Lavranos, Protecting European Law from International Law, 15 EUR. FOREIGN AFF. REV. 265, 268-271 (2010). Lavranos lists autonomy alongside other notions such as the allocation of powers fixed by the EU Treaties and the Court's exclusive jurisdiction.
[24] Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66, Case 6-64. According to the Court of Justice of the European Union in Costa, "the law stemming from the Treaty, an independent source of law, could not [...] be overridden by domestic legal provisions [...] without the legal basis of the Community itself being called into question".
[25] Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1, Case 26-62: especially referring to the Member States' submissions.
[26] Bruno De Witte, Direct Effect, Supremacy and the Nature of the Legal Order, *in* THE EVOLUTION OF EU LAW (Paul Craig, Grainne de Búrca eds., 2012).
[27] Robert Schütze, EC Law and International Agreements of the Member States: An Ambivalent Relationship?' 9 CAMB. YEARB. EUR. LEG. STUD. 387, 387–440 (2006–07); Judgment of the Court of 30 September 1987, *Meryem Demirel v Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400, Case 12/86. The Court of Justice recognised the direct effect of certain agreements in accordance with the same criteria identified in the Judgement Van Gend en Loos.
[28] Van Rossem, *supra* note 19.
[29] The English version of Costa speaks of "independent" instead of "autonomous". Other language versions, however, including the French original, consistently speak of "autonome"—French and Dutch—or "autonomen"—German.

of unity is enveloped in the principle of supremacy's aim to prevent significant distortions as regards the application of EU law in the Member States.[30]

These origins of autonomy were given concrete expression in the Opinion 2/13[31] in which the Court of Justice concluded that the draft agreement on the EU's accession to the European Convention on Human Rights (ECHR) was not in line with the Treaties and Protocol 8. The Court was concerned that the draft Accession Agreement did not take into consideration the special character of the autonomous legal order of the EU, including the judicial dialogue and mutual trust, some of the best-known features of autonomy. The effect of the EU's proposed accession on the unity and effectiveness of the autonomous EU legal order with its own particular ontological character stood out as its central concern.[32]

Furthermore, autonomy is explicitly mentioned in external relations case law when the Court seeks to remain in control and preserve its exclusive jurisdiction to interpret and apply European Union law.[33] It became clear in the Opinion 2/13, in the *Mox Plant*,[34] and in *Achmea*[35] that the goal of protection of autonomy in these situations is set in Article

[30] Van Rossem, *supra* note 19.
[31] Opinion of the Court (Full Court) of 18 December 2014, *Adhésion de l'Union à la CEDH*, ECLI:EU:C:2014:2454, Case Opinion 2/13.
[32] *Id.* Likewise, the Court was concerned that the principle of mutual trust could be harmed by the scrutiny of national courts' decisions within the framework of European Arrest Warrant, Dublin II and Brussels II Regulation, which could significantly limit the effectiveness of the autonomous EU legal order. The Court was wary of the threat to the judicial dialogue between the Court of Justice and national courts. The Court had several other reservations, including concerning the jurisdiction of the ECtHR in the sphere of common foreign and security policy, which it itself does not have or concerning the co-respondent mechanism, whereby the ECtHR would be assessing the requests by the EU and the Member States to join proceedings, which would require interpretation of EU law by the ECtHR, a role that is reserved by the Treaties to the court of Justice of the European Union.
[33] Odermatt, *supra* note 18, at 5; Van Rossem, *supra* note 19, at 19.
[34] Judgment of the Court (Grand Chamber) of 30 May 2006, *Commission of the European Communities v Ireland*, ECLI:EU:C:2006:345, Case C-459/03, para 154. In the Mox Plant case, the treaty at issue was the United Nations Convention on the Law of the Sea (UNCLOS), which constitutes a global multilateral agreement on the law of the sea. The case arose from a dispute between the United Kingdom and Ireland regarding a nuclear facility situated on the coast of the Irish sea. Ireland started the arbitral procedure against the UK at the level of international law pursuant to the dispute settlement provisions in UNCLOS. Art. 287, Article 1, Annex VII, UNCLOS However, as the dispute also touched upon EU law, the Court could not accept the manifest risk to the jurisdictional order laid down in the Treaties by another tribunal deciding on questions of European Union law.
[35] Judgment of the Court (Grand Chamber) of 6 March 2018, *Slowakische Republik v Achmea BV*, ECLI:EU:C:2018:158, Case C-284/16. Achmea has clearly set the end of the intra-Union investment treaties criticized from several perspectives, particularly from the perspective of lowering investor protection in the European Union. See Laurens Ankersmit, Achmea: le début de la fin du RDIE en et avec l'Europe ? (Apr.

344 of the Treaty, which safeguards against Member States submitting disputes which concern EU law to tribunals other than the Court of Justice.[36] According to this Article, "the interpretation or application of the Treaties" should be reserved to the Court.

Another example of the Court's concern for its own autonomous decision-making is the Opinion 1/91. The Court rejected the newly-created EEA tribunal, because it would be competent to guarantee the homogeneous application of rules of the EEA agreement, itself identically-worded to the Union rules. This would create a parallel and binding interpretation to that of the Court, effectively handing over the keys as regards the interpretation of EU law to another tribunal and seriously infringing the EU law's autonomy.[37] International treaties concluded by the Union thus cannot alter the competences of its organs, including of the Court, as set out in the Treaties.[38]

The motivation behind the Court's assertion of jurisdiction is a desire to ensure uniform and consistent interpretation of European Union law.[39] Autonomous decision-

24, 2018), https://www.iisd.org/itn/fr/2018/04/24/achmea-the-beginning-of-the-end-for-isds-in-and-with-europe-laurens-ankersmit. The comments went as far as to argue that the CJEU has gone as far as *ultra vires* and that the judgment should thus not be respected by national legal systems.
John P Gaffney, Slovak Republic v. Achmea: A Disproportionate Judgment? (Sept 14, 2018), http://arbitrationblog.kluwerarbitration.com/2018/09/14/slovak-republic-v-achmea-a-disproportionate-judgment. Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection (Jan. 17, 2019), https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en. The joint statement of several Member States that Achmea will be respected gave a clear message.

[36] There have been numerous critiques of the judgment Achmea. Kochenov has argued that the Achmea judgment and post-Achmea developments such as the recently signed Termination Agreement to terminate the intra-EU BITs have been leading to significant—possibly irreparable in the short- to medium-term—lowering of the procedural and substantive protection standards for European investors in times when they are in need of more rather than less protection. Dimitry Kochenov, Nikos Lavranos, Achmea versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union, HAGUE J. RULE LAW (2021).

[37] Opinion of the Court of 14 December 1991, *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, ECLI:EU:C:1991:490, Opinion 1/91, para 35.

[38] Opinion of the Court (Full Court) of 8 March 2011, *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets*, ECLI:EU:C:2011:123, Opinion 1/09, paras 76 – 89; See also Opinion of the Court of 18 April 2002, *Accord sur la création d'un espace aérien européen commun*, ECLI:EU:C:2002:231, Opinion 1/00, para 12 ff; Opinion of the Court of 26 April 1977, *Accord relatif à l'institution d'un Fonds européen d'immobilisation de la navigation intérieure*, ECLI:EU:C:1977:63, Opinion 1/76. Court of Justice's autonomous decision-making prerogatives was a concern in opinion 1/76, in which it rejected the formation of a judicial body which would be composed of six Judges of the Court and one from Switzerland, as the former Judges would face a conflict of allegiance.

[39] Opinion of the Court of 14 December 1991, *Accord EEE – I*, EU:C:1991:490, Opinion 1/91, para 40: "An international agreement providing for such a system of courts is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude

making of the Court was confirmed to be ensured in the Opinion 1/17 regarding the investment chapter in the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA).[40] CETA's investor-state dispute settlement system withstood the test of protection of the autonomous legal order[41] because its decision-making was deemed to be constructed in a way that did not infringe upon the Court's autonomous decision-making, similar to the WTO resolution system, whose panel resolutions are not directly effective and are entirely separate from the decision-making of the Court.

Unity and effectiveness of the autonomous EU legal order were also the Court's concern in several other cases regarding its relationship to international law.[42] Importantly, in *Kadi* the Court referred to "the autonomy of the Community legal system" and explained that the exclusive jurisdiction conferred on it by the Treaty forms "part of the very foundations of the Community".[43] The Court also clearly set out that international norms should not be allowed to bypass the rule of law which underpins the Treaties and particularly the central aspect of the Court's mission – judicial review and protection of rights.[44]

The ensuing discussion and criticism of that case law on autonomy have focused on its jurisdictional character, shielding the European Union from external control and influence. Autonomy has been, with rare exceptions,[45] a repeated target of academic

international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions."

[40] See Christina Eckes, The autonomy of the EU legal order, 4 EUROPE AND THE WORLD: A LAW REVIEW 2, 2-19 (2020). The separation provision of Article 8.31.2 stated, first, the ISDS mechanism "shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of CETA"; second, it "may consider, as appropriate, the domestic law of a Party as a matter of fact"; third, it "shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party"; and, fourth, "any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party".

[41] *Id.*

[42] There is rich literature on the subject of the relationship between international law and EU law. See eg. Joseph H. H. Weiler, Ulrich R. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass, 37 HARV. INT. L. J. 411 (1996); Schilling, *supra* note 22; RENÉ BARENTS, THE AUTONOMY OF COMMUNITY LAW (Kluwer Law International 2004); Bruno de Witte, European Union Law: How Autonomous is its Legal Order?, 65 Z. ÖFFENTL. RECHT 141, 141-155 (2010).

[43] Judgment of the Court (Grand Chamber) of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461, Joined cases C-402/05 P and C-415/05 P, para 282.

[44] *Id.*

[45] Daniel Halberstam, It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward, 16 GER. L. J. 105, 105-146 (2015).

criticism, particularly coming at the expense of the EU's effective participation in the international legal order,[46] including joining the European Convention on Human Rights.[47]

In this context, it has been often asserted that autonomy is akin to the claim of sovereignty.[48] Following such understanding the argument was that the EU needs more protection than that of a well-established sovereign state because of the nature of the EU legal order.[49] Autonomy has been understood as an absolute or relative, primarily jurisdictional, institutional or normative *claim of the Court*.[50]

Autonomy indeed seems to speak loudest when the constitutional core of the European Union is at risk. The defensive character and shield[51] of autonomy are an emanation of its development. Yet, autonomy plays a wider role than an exclusive *claim* by the Court.[52] To Van Rossem, autonomy denotes the quality, rather than quantity of the legal order. He has also argued that autonomy is not exactly in the same league as primacy, fundamental rights protection or judicial review, but rather forms a premise upon which such fundamental principles are built.[53]

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[46] Grainne de Búrca, The EU, the European Court of Justice and the International Legal Order after Kadi, 1 HARV. J. INT. L. 1, 1-52 (2009); Odermatt, *supra* note 18, at 5; De Witte, *supra* note 42, at 150. For the critique of the Mox Plant case see: Martti Koskenniemi, International Law: Constitutionalism, Managerialism and the Ethos of Legal Education, EUR. J. LEG. STUD 1, 1-18 (2007); JAN KLABBERS, TREATY CONFLICT AND THE EUROPEAN UNION (Cambridge University Press 2009), at 148.

[47] See Bruno de Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union, *in* 33 THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW: CONSTITUTIONAL CHALLENGES 33-46 (Marise Cremona, Anne Thies eds., 2014); Halberstam, *supra* note 45; Piet Eeckhout, Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?, 38 FORDHAM INT. L. J. 955, 955-992 (2015); Jiří Malenovský, Comment tirer parti de l'avis 2/13 de la Cour de l'Union européenne sur l'adhésion à la Convention européenne des droits de l'homme, 119 REVUE GENERALE DE DROIT INT. PUBLIC 705, 705-742 (2015); Fabrice Picod, La Cour de justice a dit non à l'adhésion de l'Union européenne à la Convention EDH. - Le mieux est l'ennemi du bien, selon les sages du plateau du Kirchberg, 6 SEMAINE JURIDIQUE EDITION GENERALE 230, 230-234 (2015); Eleanor Spaventa, A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13, 22 MAASTRICHT J. EUR. COM. L. 35, 35-56 (2015); Dimitry Kochenov, EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?, 34 YEARBOOK OF EUR. L. 74, 74-96 (2015).

[48] Eckes, *supra* note 40; Van Rossem, *supra* note 19.

[49] Eckes, *supra* note 40.

[50] *Id.* Odermatt, *supra* note 18, at 1.

[51] Eckes, *supra* note 40.

[52] Judge Vajda helpfully distinguishes between the normative, jurisdictional and institutional. See Vajda, *supra* note 20.

[53] Van Rossem, *supra* note 19, at 18: "In any event, the bottom line of this argument is that autonomy is not exactly in the same league as, say, primacy, fundamental rights protection or judicial review, but forms the premise upon which such fundamental principles of EU law are built."

Autonomy is the Court's synoptic vision, which has made the EU legal system what it is today. Autonomy is not a principle to be balanced, not a right, not a telos, but rather the Court's central ideal element in the background of supremacy, direct effect, judicial review, fundamental rights, rule of law and other doctrines and principles of EU law. The Court keeps remaking it in this vision - it is the Court's "one big thing". To fully grasp the notion of autonomy and its role in the decision-making of the Court, its role in legal reasoning needs to be addressed, also in cases when autonomy is not explicitly mentioned. Autonomy is sometimes visible, explicitly mentioned by the Court, and at other times it is not, yet it is omnipresent in the judgments of the Court.

If this proposition is true, the "bad man", in the sense of Oliver Wendell Holmes[54] – who can be clearly also a well-intentioned citizen or anyone who would like to get to know the system before investing precious time and resources into a legal dispute –, who would like to understand or predict the decision-making of the Court, would have to first, on the most essential systemic level, turn to autonomy to understand the Court's overall past and future decision-making.

In order to explore autonomy's character as an ideal principle that guides the argument of the Court, it is necessary to turn to the broader role of autonomy in legal reasoning and, specifically, to the argument of coherence.

II. Autonomy as a source of coherence

A legal system, properly so called, establishes criteria of good and sufficient legal argument.[55] According to Dworkin, judges in the courts make legal assertions in line with

[54] Oliver Wendell Holmes, The Path of Law, 10 HARVARD L. REV. 457 (1897). Such an exploration of the process of decision-making also fits into the Oliver Wendel Holmes' understanding of the legal system. According to Holmes, law in action is what courts are likely to do in fact. This is what the "bad man" is interested in in fact when trying to predict the Court's decision-making. The prophecies of what the courts will do in fact, and nothing more pretentious, are what he means by the law.

[55] LEWIS SARGENTICH, LIBERAL LEGALITY: A UNIFIED THEORY OF OUR LAW (Cambridge University Press 2018), at 22.

established "ground rules".[56] The ground rules of legal enterprise state the truth conditions for the propositions of law.[57]

Coherence is a ground rule with special relevance in the legal realm in terms of the role which it should play in guiding judges seeking to interpret the law correctly. It plays an important role in Dworkin's understanding of law as integrity, which means that law is a coherent phenomenon, rather than a set of discrete decisions. Features of the law such as the doctrine of precedent, arguments from analogy, and the requirement that like cases be treated alike seem particularly apt to be illuminated via some kind of coherence explanation.[58] Coherence is certainly not the sole desideratum which guides the Court in interpreting the law. The Court's interpretative reasoning has been argued to be best understood in terms of a tripartite approach whereby the Court justifies its decisions in terms of the cumulative weight of purposive, systemic and literal arguments.[59] Coherence is merely one, albeit important, feature of a successful interpretation.[60]

When a judge decides a "hard case", her decision must fit the existing legal landscape. The decision must be coherent with the cases, statutes, constitutional provisions, and so forth. This requirement of fit is holistic. That is, the decision must fit all of the law and not just the law that is directly relevant to the case at hand.[61] As the European Union forms a united, self-referential legal order, with its own internal claim to validity,[62] the Court's essential concern is its unity and the uniform application of its

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[56] *Id.*, at 23.
[57] *Id.*
[58] Interpretation and Coherence in Legal Reasoning, Stanford Encyclopedia of Philosophy (May 29, 01), https://plato.stanford.edu/entries/legal-reas-interpret/.
[59] GUNNAR BECK, THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EU (Hart Publishing 2013).
[60] Dworkin, *supra* note 4.
[61] Legal Theory Blog, (Jul 31, 11), https://lsolum.typepad.com/legaltheory/2011/07/legal-theory-lexicon-the-law-is-a-seamless-web.html. A coherence account of adjudication, according to Raz, hold that courts ought to adopt that outcome to a case which is favoured by the most coherent set of propositions which, would justify them.
[62] Van Rossem, *supra* note 19, at 19. Exploration of autonomy in its jurisprudential sense leads to Hart's understanding of autonomy. Lindeboom has forcefully explained from the Hartian perspective that legal systems are autonomous when they have their own rule of recognition, rules constituting its foundation. He argues that the Court's case law on autonomy, supremacy and direct effect can be conceptualized as internal statements referencing this rule of recognition, which leads him to conclude that we should be comfortable in recognising the EU legal system's autonomy even if we do not normatively endorse it. Lindeboom Article on Autonomy A strong Hartian jurisprudential backing is reassuring for the notion of autonomy in EU law. Hart's theory, however, has significant limitations in explaining the role of autonomy in the legal reasoning of the Court. There is a general obstacle in using Hart's theory in addressing legal reasoning of courts. Hart

rules.[63] Citizens are entitled to a coherent and principled extension of past decisions. Therefore, coherent decision-making of the Court plays an important role.

In order to properly seek out the source of coherence of the Court's decision-making, it has to be considered that coherence needs to be in touch with the concrete reality of law in the jurisdiction under consideration.[64] The judicial context and the role of courts in a democratic polity vitally affect courts' interpretative methods.[65] Only judicial philosophy reflecting the court's systemic understanding of the normative preferences and institutional constraints of the legal order in which those courts operate is capable of securing the coherence and integrity of that legal order and judicial accountability, constraining the power of those courts to the normative preferences of that legal order.[66]

The institutional and normative context of the Court in the European Union is increased internal and external pluralism.[67] Internal pluralism encompasses plurality of constitutional sources (both European and national) and conditional acceptance of supremacy of European Union law over national constitutional law, which confers upon European Union law a kind of contested or negotiated normative authority, as well as political pluralism that can assume a radical form, particularly as conflicting political claims are often supported by claims of national authority.[68] External pluralism, on the other hand, derives from the increased interaction and interdependence of the European Union legal order with international legal order.[69] This context requires the Court to

largely ignores the regimen that controls ideal argument in liberal legality. Sargentich, *supra* note 55, at 108.

[63] Van Rossem, *supra* note 19, at 19; RENÉ BARENTS, THE AUTONOMY OF COMMUNITY LAW: EUROPEAN MONOGRAPHS (Kluwer Law International 2004).

[64] JOSEPH RAZ, THE RELEVANCE OF COHERENCE, ETHICS IN THE PUBLIC DOMAIN (Clarendon Press 1994).

[65] Miguel Poiares Maduro, Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism, 1 EUR. J. LEG. STU. 137, 138-139 (2007).

[66] *Id.*, at 139. Maduro argues that the Court of Justice reasons in light of the broader context provided by the EU legal order, specifically pluralism and in light of its systemic context, "the constitutional telos". So there is not only the telos of the rules, but also a telos of the legal context in which those rules exist. Maduro thus discusses the teleological and metatelological reasoning which is important for autonomy of the EU legal order as it assumes an independent normative claim and a claim of completeness, as these claims face national legal challenges.

[67] *Id.*, at 137-138.

[68] *Id.*

[69] *Id.*, at 138.

adopt particular methods of interpretation[70] and is also specifically, important for securing coherence.

The European Union is characterized by deep disagreement.[71] This deep disagreement was the reason for its creation[72] and is also one of the factors that keeps justifying its existence. In other words, overcoming deep division on issues concerning virtually every area of social life is the Union's historic raison d'être.[73] The European Union's mandate lies in this particular constant development. The Court is set in an organization committed to healing the deep and perpetual divisions of Europe in practically every field of social life.[74]

What is the source of coherence in such a diverse and specific entity such as the European Union, characterized by internal and external pluralism? Some have argued that the Court decides cases based on the creation of the common market or the market logic,[75] others have argued that deeper integration guides the Court's reasoning.[76] Yet, the

[70] *Id.*, at 138-139.
[71] JEAN-CLAUDE MILNER, CONSIDERATIONS SUR L'EUROPE (Éditions du Cerf 2019).
[72] The Schuman Declaration (May 9, 50), https://www.consilium.europa.eu/en/70-schuman-declaration.
[73] Grainne de Búrca, Europe's raison d'être, *in* EUROPEAN UNION'S SHAPING OF THE INTERNATIONAL LEGAL ORDER (Dimitry Kochenov, Fabian Amtenbrink eds., 2013).
[74] Much as is at the same time committed to human rights protection. The claim that the European Court of Justice is not a human rights court should be understood in this sense. ALLAN ROSAS, LORNA ARMATI, EU CONSTITUTIONAL LAW (Hart Publishing 2018), at 51. European Court of Human Rights (ECtHR) is set in a different ontological, normative and judicial institutional environment, Rosas Constitutional Law Introduction, 51 and to some extent also in a different axiological structure than the Court of Justice. The normative divergence of the parties to the European Convention of Human Rights should not be undermined and the axiology of the European Court of Human Rights is clearly not permanently fixed either. However, the ECtHR is a court set in an organization whose aim is common commitment to human rights protection by contracting parties extending far beyond the Member States of the European Union. It is characterized by ex post, subsidiary control of human rights protection.
[75] Mulder, *supra* note 10: Mulder argues that the challenge is finding unity in social diversity and many commentators consider that the Court has interpreted the constitutional foundation of the European Union as having turned market access rights into fundamental rights and social policy into an obstructive power that has to be limited. H contend that the Court has developed a proportionality assessment that is able to accommodate a plethora of Member State policy choices. Meeusen, *supra* note 11: "In its recent judgment in Google/CNIL (C-507/17), on the territorial reach of the EU data protection rules and the "right to be forgotten", the CJEU introduces a new "logic of globalization" which must be distinguished from the traditional "logic of the internal market". While the latter justifies extraterritoriality in case internal market interests are affected, restraint characterizes the former." Judgment of the Court (Grand Chamber) of 24 September 2019, *Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés*, ECLI:EU:C:2019:772, Case C-507/17.
[76] Eeckhout, *supra* note 47.

thinking of the Court cannot be reduced to such propositions,[77] as will be further explained in the next section.

If a coherent voice of a Court set in such pluralism cannot be based on "the internal market" nor on "further integration", what can it be based on? Clarification is offered by Dworkin's idea of law as a fraternal attitude, an expression of how we are united in community though divided in project, interest and conviction.[78] Judges are instructed to identify legal rights and duties, so far as possible, on the assumption that they were created by a single author—the community personified.[79] Legal interpretation is a function of this larger community upon which the Court and the European Union depend and which evaluates the legitimacy of the Court. What larger community is the Court set in?

The Court of Justice finds itself in a particular structure of constitutional pluralism and needs to deliver justice and coherence within this ontological[80] premise. The constitutional pluralism of the European Union entails a distinct form of political pluralism and normative ambiguity[81] in which its axiology, while having a clear common core, is not entirely a priori set or pre-determined. As Rosas points out, at the very top of the hierarchy of EU norms stand the value foundations of the EU legal order (Article 2 Treaty of the European Union (TEU)) as well as national constitutional principles.[82] These principles and their interpretations may diverge. Thus, the axiology of the European Union, while based on fundamental values of Article 2 TEU and national constitutional foundations, is not a priori set, but is rather developed constantly within the premise of autonomy of EU law in a dialogue with national legal systems and the international legal sphere.

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[77] Kukovec, *supra* note 7.
[78] Dworkin, *supra* note 4.
[79] *Supra* note 58.
[80] Siniša Rodin, A Metacritique of the Court of Justice of the EU (Nov 2, 2015), https://www.biicl.org/documents/772_rodins_paper_2015.pdf. Siniša Rodin has argued that interpretation of European Union law takes place within the specific framework of basic ontological identities. Those ontological identities are the Legal Basis, the Act, the Agent and the Legitimacy of the social arrangement under which European Union law operates.
[81] Maduro, *supra* note 65, at 145.
[82] Rosas, *supra* note 74.

The Union can indeed be described as a Verfassungverbund, a constitutional compound,[83] which rests on general constitutional principles that all actors have in common as well as on pluralist normative awareness[84] in which national courts and legal systems constantly interact with the European Union courts and EU law. It is in this relationship of constant dependency that the axiology is developed according to the vision of the founding fathers as embodied in the Treaties.[85] In other words, while the European Union is based on the fundamental common (and possibly conflicting) axiological commitments, a priori axiological coherence would not allow for the kind of pluralism that the Union is constantly ordering, specifically through dialogical engagement in the preliminary reference procedure, but also otherwise, in a constant judicial relationship with national legal orders and the international legal sphere.

How can the community of the EU, characterized by profound pluralism, speak with one voice? In the described ordering of pluralism, it is autonomy of EU law that can provide the unity that is necessary in the pursuit of the many goals of the Union and which justifiably acts as an essential source of coherence of the Court's decision-making. In the context of the European Union, the notion of autonomy receives a unique ontological and axiological character that also defines its sui generis nature. Autonomy, an idea of a new legal order with its distinct ontological and axiological character, is a predisposition for a dialogue with other, national and international, legal systems. Pluralism, as ordered in the European Union, needs an ideal element of autonomy of EU law to fulfil its promise of simultaneous unity and diversity, an autonomous system that is also in dialogue and open to the wider world, satisfying both the demands of internal and external pluralism. Autonomy of EU legal order defines and legitimates the proper role of the Court in the European Union and in the world and provides the source of its legitimacy.

Thus, the Court's most fundamental argument of coherence needs to be pursued within the premises of this pluralist mandate. Autonomy is a predisposition of pluralism. It keeps ensuring pluralism whilst enabling the Court to speak with one voice. The notion of the autonomous EU legal order articulates a coherent system in which the Court can

[83] Van Rossem, *supra* note 19.
[84] Maduro, *supra* note 65.
[85] See The Schuman Declaration, *supra* note 72.

provide the best fit that would otherwise be lacking in a context of constitutional pluralism.

III. Autonomy's omnipresence in the case law of the Court

After establishing that autonomy is justifiably the Court's essential source of coherence, this section explores how autonomy provides the omnipresent normative fabric of the Court's decision-making and guides its legal argument, even if not explicitly mentioned in the case law. It identifies some of the "deep currents" of autonomy, which run through the case law, clearly without the aim of being exhaustive. The section explains how autonomy assists, in numerous ways, in leading the Court to the conclusion that one interpretation provides a better justification of existing constitutional practice than another.

The cases addressing the jurisdictional aspect of autonomy, set out in the previous section, have drawn attention to autonomy as a claim of the Court. Understanding autonomy as an occasional claim of the Court leads to the perception that after *Costa Enel* the concept of autonomy disappeared from the radar for a long time and eventually re-emerged at the beginning of the 1990s, in Opinion 1/91.[86] This would indeed be the

[86] Van Rossem, *supra* note 19. As a denominator for the relationship between the Union and the Member States, the notion only resurfaced in ECJ Case Internationale Handelsgesellschaft (Judgment of the Court of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114, Case C-11/70), in which the ECJ clarified that the primacy rule makes no exception for norms of a constitutional nature. Cf. further Judgment of the Court (Fifth Chamber) of 18 January 1984, *Ekro BV Vee- en Vleeshandel v Produktschap voor Vee en Vlees*, ECLI:EU:C:1984:11, Case 327/82, para 11; Judgment of the Court of 19 September 2000, *Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster*, ECLI:EU:C:2000:468, Case C-287/98, para 43, in which the Court stressed the importance of "an autonomous and uniform interpretation" of Community measures. Opinion of the Court of 14 December 1991, *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, ECLI:EU:C:1991:490, Opinion 1/91. Van Rossem, *supra* note 19: As we have seen, the Court does not explicitly mention the concept of autonomy very often. To his knowledge, apart from the four cases discussed in the previous section, there are only three other cases in which the ECJ explicitly mentions the concept of autonomy. These cases are: Judgment of the Court of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114, Case 11-70; Opinion of the Court of 18 April 2002, Accord sur la création d'un espace aérien européen commun, ECLI:EU:C:2002:231, Opinion 1/00; Opinion of the Court (Full Court) of 8

conclusion if presence of autonomy in the case law was limited to those cases in which autonomy is explicitly mentioned. However, despite the lack of explicit mention, autonomy never disappeared after *Costa Enel*.

The discussion emphasizing the jurisdictional aspect of autonomy assumed that it operates at the outer border of the EU legal order, shielding it from external influence.[87] Autonomy, however, is the centripetal force of EU case law that is just most visible at EU law's outer border, but in fact permeates the legal system as a whole. Autonomy is sometimes visible, explicitly mentioned by the Court, and at other times it is not, yet it is omnipresent in the judgments of the Court.

The Court of Justice confirmed the omnipresence of autonomy in the EU legal system in the Opinion 2/13.[88] It explained that autonomy relates to the constitutional structure of the European Union, the nature of EU law, the principle of mutual trust between the Member States, the system of fundamental rights protection provided for by the Charter, the substantive provisions of EU law "that directly contribute to the implementation of European integration",[89] including the Treaty provisions providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy.[90] Furthermore, autonomy relates to the principle of sincere cooperation and to the EU system of judicial protection, the keystone of which is the preliminary reference laid down in Article 267 TFEU.[91]

The Opinion 2/13 thus confirms that judgments that explicitly mention autonomy are an emanation of a much larger undercurrent. The following analysis of its ever-presence reveals the structure of autonomy and its normative influence. A reconstruction of the case law of the Court shows that autonomy operates constantly as a mode of legal reasoning, either visibly or invisibly.

March 2011, *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets*, ECLI:EU:C:2011:123, Opinion 1/09.

[87] Van Rossem, *supra* note 19, at 27-31; Odermatt, *supra* note 18.

[88] Opinion of the Court (Full Court) of 18 December 2014, *Adhésion de l'Union à la CEDH*, ECLI:EU:C:2014:2454, Case Opinion 2/13.

[89] Koen Lenaerts, The Autonomy of European Union Law, AISDUE 6 (2019).

[90] Judgment of the Court (Grand Chamber) of 5 December 2017, *Criminal proceedings against M.A.S. and M.B., ECLI:EU:C:2017:936*, Case C-42/17.

[91] *Id.*, paras 174-176.

A. Autonomy operating visibly

As noted in the previous section, the autonomy is most visible at the EU law's outer border shielding the European Union from external control and influence. These jurisdictional cases, such as Opinion 2/13, *Kadi*, *Mox Plant*, and *Achmea*, indeed sparked most discussion and criticism. A focus on these type of cases, however, does not fully appreciate the character of autonomy. First, we turn to other instances where autonomy operates visibly in the case law of the Court.

Autonomy is certainly most visibly present any time the Court invokes an "autonomous interpretation". As frequently emphasized by the Court, autonomous concepts must be interpreted independently from national law. The need for uniform application of European Union law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union.[92]

Autonomy is important particularly when concepts of EU law, if dependent on the specific features of the relevant legislation of the Member States, could create discrepancies in their application within the European Union.[93] There are numerous examples of such interpretation. Autonomous interpretation is required with regard to the notion of the 'court' or 'tribunal' which may or must make a reference in the

[92] Judgment of the Court (Grand Chamber) of 16 July 2020, *AFMB e.a. Ltd v Raad van bestuur van de Sociale verzekeringsbank*, ECLI:EU:C:2020:565, Case C-610/18. Since the concepts referred to in para 48 of the present judgment play a crucial role in the identification of the applicable national social security legislation in accordance with the conflict of law rules laid down, respectively, in Article 14 of Regulation No 1408/71 and in Article 13 of Regulation No 883/2004, an autonomous interpretation of those concepts becomes all the more essential, as the Advocate General stated, in essence, in point 39 of his Opinion, given the single legislation rule mentioned in para 41 of the present judgment, which means that the legislation of one single Member State must be designated as being applicable.; That interpretation must take into account the context of the provision and the purpose of the legislation in question (Judgment of the Court (Fifth Chamber) of 18 January 1984, *Ekro BV Vee- en Vleeshandel v Produktschap voor Vee en Vlees*, ECLI:EU:C:1984:11, Case 327/82, para. 11). Judgment of the Court of 19 September 2000, *Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster*, ECLI:EU:C:2000:468, Case C-287/98, para 43.

[93] Judgment of the Court (Fifth Chamber) of 21 January 2016, *Les Jardins de Jouvence SCRL v État belge*, ECLI:EU:C:2016:36, Case C-335/14, para 47.

preliminary reference procedure. A number of factors are taken into account including whether the court in question is established by law, permanent, with compulsory jurisdiction, deciding *inter partes* and independent. [94] Further examples include the concept of 'misappropriation of State funds', within the meaning of Article 1(1) of Decision 2011/172 and Article 2(1) of Regulation No 270/2011.[95] The concept of an "individual contract of employment" referred to in Article 20 of Regulation No 1215/2012,[96] or the concepts of 'branch, "agency" and "other establishment", referred to in Article 7 of Regulation No 1215/2012 as implying a centre of operations which has the appearance of permanency, such as the extension of a parent body, also require autonomous interpretation.[97]

Furthermore, for the purposes of the issue and execution of a European arrest warrant, the concept of "same acts" in Article 3(2) of Council Framework Decision 2002/584 constitutes an autonomous concept of EU law.[98] Further, in *Mantello*, the Court stated that the *ne bis in ide*m principle should be given an autonomous interpretation in EU law.[99]

In public procurement, "a body governed by public law" is an effective concept of EU law which must receive an autonomous and uniform interpretation throughout the EU[100] and refers to the ability of contracting authorities to pursue market-oriented

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[94] La qualité de juridiction est interprétée par la Cour comme une notion autonome du droit de l'Union. La Cour tient compte, à cet égard, d'un ensemble de facteurs tels que l'origine légale de l'organe qui l'a saisie, sa permanence, le caractère obligatoire de sa juridiction, la nature contradictoire de la procédure, l'application, par cet organe, des règles de droit ainsi que son indépendance. Recommandations à l'attention des juridictions nationales, relatives à l'introduction de procédures préjudicielles, OJ C 338, 6.11.2012, p. 1–6.

[95] Judgment of the General Court (Fifth Chamber) of 12 December 2018, *Mohamed Hosni Elsayed Mubarak v Council of the European Union*, ECLI:EU:T:2018:905, Case T-358/17.

[96] Judgment of the Court (First Chamber) of 25 February 2021, *BU v Markt24 GmbH*, ECLI:EU:C:2021:134, Case C-804/19.

[97] *Id.*

[98] Judgment of the Court (Grand Chamber) of 16 November 2010, *Gaetano Mantello*, ECLI:EU:C:2010:683, Case C-261/09: And whether a person has been 'finally' judged is determined by the law of the Member State in which the judgment was delivered.

[99] *Id.*

[100] Judgment of the Court of 15 January 1998, *Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH*, ECLI:EU:C:1998:4, Case C-44/96, paras 20-21; Judgment of the Court (Sixth Chamber) of 12 December 2002, *Universale-Bau AG, Bietergemeinschaft: 1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, 2) ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH*, ECLI:EU:C:2002:746, Case C-470/99, paras 51–3; Judgment of the Court (Sixth Chamber) of 15 May 2003, *Commission of the European Communities v Kingdom of Spain*, ECLI:EU:C:2003:276, Case C-214/00, paras 52-53; Judgment of the Court (Sixth Chamber) of 16 October 2003, *Commission of the*

activities without losing their classification as contracting authorities for the purposes of public procurement law.[101] Furthermore, EU public procurement law has exclusive authority to determine the meaning of "a public contract".[102]

In addition, the Court sometimes observes that the autonomous concept of EU law must be interpreted in accordance with its usual meaning in everyday language, when it is not defined in the Treaties, such as the concept of 'votes cast', contained in the fourth paragraph of Article 354 TFEU.[103] Very often, as this also generally characterizes the court's decision-making, autonomy is supported by the teleological or "*effet utile*"[104] reasoning, when interpretation must take into account not only the wording of that provision but also its context and the objective pursued by the legislation in question. This follows from numerous examples such as that concepts of "working time" and of "rest period" are concepts of EU law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of Directive 2003/88. According to the Court, only an autonomous interpretation of that nature is capable of ensuring the full effectiveness of that directive and the uniform application of those concepts in all the Member States.[105] Hence, despite the reference to "national laws and/or practice" in Article 2 of Directive 2003/88, Member States may not unilaterally determine the scope of the concepts of "working time" and "rest period" by making the right, which is granted directly to workers by that directive, to have working periods and corresponding rest periods duly taken into account, subject to any condition or any restriction whatsoever.

European Communities v Kingdom of Spain, ECLI:EU:C:2003:544, Case C-283/00, para 69. HERWIG C. H. HOFMANN, CLAIRE MICHEAU, STATE AID LAW OF THE EUROPEAN UNION (Oxford University Press 2016).

[101] *Id.*

[102] *Id.*, at 167: "The determining factor of its nature is not what and how is described as public contract in national laws, nor is the legal regime (public or private) that governs its terms and conditions, nor are the intentions of the parties. The crucial characteristics of a public contract, apart from the obvious written format requirement, are: (i) a pecuniary interest consideration given by a contracting authority; and (ii) in return of a work, product, or service which is of direct economic benefit to the contracting authority." See also Judgment of the Court (Fourth Chamber) of 29 October 2009, *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:2009:664, Case C-536/07.

[103] See for example Judgment of the Court (Grand Chamber) of 3 June 2021, *Hungary v European Parliament*, ECLI:EU:C:2021:426, Case C-650/18

[104] See eg. Urška 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, 8 EUR. J LEG. STU. 18, 18-45 (2015).

[105] Judgment of the Court (Grand Chamber) of 9 March 2021, *RJ v Stadt Offenbach am Main*, ECLI:EU:C:2021:183, Case C-580/19.

Any other interpretation would frustrate the effectiveness of Directive 2003/88 and undermine its objective.[106]

This is clearly just a small sample of cases in which the Court considers autonomous interpretation. These questions arise in various fields of EU law and very often, the Court does not even discuss interpretation in terms of it being "autonomous" – some terms so clearly require autonomous interpretation that the Court uses it without its mention. Definition of "per object" or "per effect" violation of Article 101 TFEU, the notion of "selectivity of state aid" as per Article 107 TFEU or the notion of "individual and direct concern" for the purposes of standing under Article 263 TFEU are just some examples where autonomy does not need to be mentioned. This does not mean, however, that autonomous interpretation is not actively operating, it is just not explicitly set out.

B. Autonomy not explicitly mentioned but operating actively

In order to support the argument of omnipresence of autonomy in the EU legal system and its central role in the reasoning of the Court, I will turn to cases in which autonomy is not explicitly mentioned but nonetheless invisibly plays an active and decisive role, providing a direction (and ex-post explanation) of the decision-making of the Court as well as its ultimate coherence.

There are many cases where autonomy clearly plays the centripetal role of the reasoning of the Court even if it is not explicitly mentioned. This section reconstructs several judgments to support this argument, most notably the ERTA judgment.[107] This judgment was vital for establishing the so-called ERTA doctrine of implied external powers, whereby the presence of internal EU competence has primacy over that of Member States' external acts. The Court rejected the intergovernmental and ancillary role of the Council[108] and made a vital step toward an even more complete legal order – toward

[106] *Id.*
[107] Judgment of the Court of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, ECLI:EU:C:1971:32, Case 22-70.
[108] [108] The case goes back to the negotiation of an international agreement concerning the work of crews of vehicles engaged in international road transport and Member States considered that the agreement was a product of the Member States, not of the Council. The Commission saw the

the autonomy of EU law. This so-called ERTA pre-emption significantly disempowered Member States in external relations, by developing the doctrine of parallelism of norms on the internal and external level, and enhanced jurisdictional autonomy of the Union without mentioning the concept of autonomy at all.[109]

The reason for the oversight of ERTA in the discussion of autonomy might be that this judgment, as with numerous others, is silent on autonomy of EU law. Yet, autonomy is its guiding force. The Court, while not invoking the "new legal order" nor "autonomy" explicitly, sets out that "regard must be had of the whole scheme of the Treaty no less than to its substantive provisions".[110] The central concern of uniformity of the autonomous legal system clearly lay behind the paragraph saying that "each time the [Union], with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form they may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope".[111] Moreover, Advocate General Dutheillet de Lamothe laid the basis of the reasoning of the Court in ERTA arguing that the Member States negotiating the international agreement constituted a threat to the "new legal order", an autonomous legal order, as had recently been set out in *Van Gend en Loos*.[112]

Unlike the seminal judgments *Van Gend en Loos* and *Costa Enel*, the ERTA doctrine even found clear acceptance in the Treaty.[113] The judgment is important for the

agreement impinging on the internal competence in transport, given the existence of a prior Regulation regulating the field and brought the case before the Court. Judgment of the Court of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, ECLI:EU:C:1971:32, Case 22-70, paras 77-79.

[109] *Id.*, para 22. The Court argued that based on the Union's competence in transport policy and the principle of loyal cooperation read in conjunction, "it follows that to the extent to which Union rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Union institutions, assume obligations which might affect those rules or alter their scope."

[110] *Id.*, para 15.

[111] *Id.*

[112] *Id.*

[113] Article 3(2) TFEU sets out that the Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope. Article 216(1) TFEU sets out that the Union can conclude an international agreement also in such cases, not only when the Treaty expressly provides for it.

European Union to effectively exercise its autonomy in external relations law, and thus appears to be most important for external autonomy, in the sense that international action of the EU should not be undermined by the Member States.[114] However, the judgment is just as important for the Union's internal autonomy, as it settled some internal competence battles between the Member States and EU institutions in addition to solving the competence battles between EU institutions themselves.[115]

The Court in ERTA set out clearly "that with regard to the implementation of the provisions of the Treaty the system of internal [Union] measures may not therefore be separated from that of external relations".[116] The Court left no doubt that autonomy is indivisible. Only a Union that is able to have a coherent set of jurisdictional autonomy can exercise such an autonomy externally. ERTA thus bridges the relationship between external autonomy from international law and autonomy from Member States' legal systems and shows their unity,[117] without mentioning the idea of autonomy at all.

A further example of autonomy playing an active role without it being mentioned is a recent case of *Slovenia v Croatia*.[118] Slovenia brought an action on the basis of Article

[114] Odermatt, *supra* note 18, at 1.
[115] For the progeny of ERTA see Judgment of the Court (Grand Chamber), 4 September 2014, *European Commission v Council of the European Union*, ECLI:EU:C:2014:2151, Case C-114/12; Opinion of the Court (Grand Chamber) of 14 October 2014, *Adhésion d'États tiers à la convention de La Haye*, ECLI:EU:C:2014:2303, Case Opinion 1/13; Judgment of the Court (Grand Chamber) of 5 December 2017, *Federal Republic of Germany v Council of the European Union*, ECLI:EU:C:2017:935, Case C-600/14; Opinion of the Court (Full Court) of 16 May 2017, *Accord de libre-échange avec Singapour*, Opinion 2/15.
[116] Judgment of the Court of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, ECLI:EU:C:1971:32, Case 22-70, para 19.
[117] Former Judge Allan Rosas noted that any meaningful study of the constitutional order of the Union must include the external relations of the Union.
[118] Judgment of the Court (Grand Chamber) of 31 January 2020, *Republic of Slovenia v Republic of Croatia*, ECLI:EU:C:2020:65, Case C-457/18. Annex III (List referred to in Article 15 of the Act of Accession: adaptations to acts adopted by the institutions) of the Treaty between the Member States of the EU and the Republic of Croatia concerning the accession of the Republic of Croatia to the EU, referring to section fisheries, p. 49-50 OJ EU L 112, 24. 4. 2012. The treaty refers to the changes of , first, Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ L 358, 31.12.2002, p. 59) that in annex 1 adds section "coastal waters of Croatia" with reference: "(*) The above mentioned regime shall apply from the full implementation of the arbitration award resulting from the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, signed in Stockholm on 4 November 2009." and, second, the same adds in the section coastal waters of Slovenia. Furthermore, it also changes Council Regulation (EC) No 1198/2006 of 27 July 2006 on the European Fisheries Fund (OJ L 223, 15.8.2006, p. 1), where in Article 27 adds the following para: "5. The EFF may contribute to the financing of a scheme of individual premiums for fishers who will benefit from the access regime laid down in Part 11 of Annex I to Regulation (EC) No 2371/2002 as amended by the Act of Accession of Croatia. The scheme may only apply during the period 2014 to 2015 or, if this occurs earlier, up until the

259 TFEU arguing that Croatia had failed to fulfil its obligations under EU law by not complying with obligations stemming from an arbitration agreement concluded with Slovenia that was intended to resolve their border dispute, and from an arbitration award defining the borders between the two Member States.[119]

The Court held that it lacked jurisdiction to give a ruling on the interpretation and obligations of an international agreement concluded by Member States whose subject matter falls outside the areas of EU competence. The Court noted that the arbitration award had been made by an international tribunal set up under a bilateral arbitration agreement governed by international law, the subject matter of which did not fall within the areas of EU competence and to which the European Union was not a party. The Court observed that neither the arbitration agreement nor the arbitration award formed an integral part of EU law.

The Court importantly stated that the reference to that arbitration award, made in neutral terms by a provision of the Act of Accession of Croatia to the European Union, could not be interpreted as incorporating into EU law the international commitments made by both Member States within the framework of the arbitration agreement.[120] Accordingly, the Court held that the infringements of EU law pleaded were, in the case in point, ancillary to the alleged failure by the Republic of Croatia to comply with the obligations arising from the bilateral agreement at issue.

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date of the full implementation of the arbitration award resulting from the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, signed in Stockholm on 4 November 2009."

[119] *Id.*, Croatia and Slovenia concluded an arbitration agreement, undertaking to submit their dispute on the issue of establishment of their common border to the arbitral tribunal established by the agreement, whose award would be binding on them. Following the communications in the course of the arbitral tribunal's deliberations between the arbitrator appointed by the Republic of Slovenia and that State's Agent before the arbitral tribunal, Croatia took the view that the tribunal's ability to make an award independently and impartially was compromised and decided to terminate the arbitration agreement. The arbitral tribunal decided that the arbitration proceedings should continue and made an arbitration award defining the sea and land borders. Croatia did not execute that arbitration award and Slovenia brought an action for failure to fulfil obligations before the Court, arguing that Croatia had infringed a number of obligations under primary law by failing to comply with its obligations stemming from the arbitration agreement and the arbitration award and thereby also infringed a number of provisions of secondary law.

[120] Judgment of the Court (Grand Chamber) of 31 January 2020, *Republic of Slovenia v Republic of Croatia*, ECLI:EU:C:2020:65, Case C-457/18.

Despite not being mentioned, autonomy, particularly external autonomy from international law, played an important role in the reasoning of the Court, as the case touched on the essential question of incorporation of norms of international law into the autonomous EU legal order.

International agreements entered into by the EU form an integral part of the autonomous EU legal order and bind it in accordance with Article 216(2) TEU. International rules are thus incorporated into EU law or "unionized". They are treated in the same fashion as internal norms. Moreover, they receive the status of a higher norm, above the secondary legislation. At the same time, they are below the value foundations of the EU legal order (Article 2 TEU) and national constitutional principles, below the general principles of Union law (including fundamental rights) and below written primary law, such as the TEU and TFEU with protocols.[121] An international norm needs to be formally binding upon the EU before it can create effects within the European legal order.

Integrating norms that are not binding upon the Union by Member States unilaterally would result in EU norms which would prevail over secondary norms. The integrity of the Union and its autonomy could be broken if norms were introduced into the EU legal order through international law rather than agreed on internally. The autonomous legal order would be put in peril if Member States were able to bring in their will to (de)regulate through the back door.[122] A threat of undermining EU law by international law was also effectively rejected by the Court with regard to the GATT[123] and WTO rules, which were found not to have direct effect in the EU legal system.[124] The direct

[121] Rosas, *supra* note 74.
[122] Van Rossem, *supra* note 19, at 22; Eric Stein, Daniel Halberstam, The United Nations, The European Union and the King of Sweden: economic sanctions and individual rights in a plural world order, 46 COMMON MAR. L. REV. 13, 13-72 (2009).
[123] However, in the International Fruit cases, the Court decided to incorporate GATT into the EU legal order. The first reason was based on the argument that GATT has become binding on the Community because there had been a significant transfer of powers from the Member States to the Community in the field of trade policy. The second reason was that third parties allowed the Community to Act within the GATT framework, which means that GATT became a part of the community from the perspective of international law. Yet, given various aspects of the GATT, including the great flexibility of its provisions, possibilities of unilateral withdrawal and GATT was not given no direct effect. Doctrinal Analysis, https://jeanmonnetprogram.org/archive/papers/98/98-3--2.html.
[124] Judgment of the Court of 23 November 1999, *Portuguese Republic v Council of the European Union*, ECLI:EU:C:1999:574, Case C-149/96.

effect would follow only when the EU intended to implement the obligation in question or when the EU measure expressly referred to it.[125]

Yet, the threat remained that other norms of international law could threaten the autonomy of EU law in terms of hierarchy of norms. The question was finally resolved in *Kadi*[126] where the Court refused the application of "external" international obligations in order to preserve fundamental norms of the European legal order, in particular the right of defence and the right to property. The incorporation of external norms into the autonomous EU legal system is conditional upon their compliance with the fundamental values and structures of the Union. The application of international legal norms can thus be denied if they conflict with the Treaties, including the Charter on Fundamental rights or general principles of law.[127]

To draw conclusions from an international norm, the latter thus needs to be first integrated, incorporated into the autonomous EU legal system. In the case *Slovenia v Croatia* the obligation to execute the arbitral award was, however, never incorporated into the autonomous system of EU law.[128] Had the Accession Act of Croatia to the European Union contained a provision that Croatia and Slovenia assume the obligation to execute the arbitral decision, the situation would have been different. Autonomy of EU law, while again not explicitly mentioned, played the central role in the resolution of the case.

C. Autonomy as a silent undercurrent

[125] Judgment of the Court of 22 June 1989, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission of the European Communities*, ECLI:EU:C:1989:254, Case 70/87; Judgment of the Court of 7 May 1991, *Nakajima All Precision Co. Ltd v Council of the European Communities*, ECLI:EU:C:1991:186, Case C-69/89.
[126] Judgment of the Court (Grand Chamber) of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461, Joined cases C-402/05 P and C-415/05 P.
[127] *Id.*
[128] The enforcement of the arbitral agreement only marked the starting date for the application of some specific legislation on fisheries and, given its minor importance, was mentioned in the footnotes of an annex. There was no condition for any party to uphold the arbitral agreement, as the Court also concluded, the reference was entirely "neutral".

In order to fully understand the omnipresence of autonomy in the case law of the Court it is necessary to look into its character and relationship with certain fundamental principles of EU law, particularly the rule of law and human rights protection. Autonomy is present in every judgment of the Court, ensuring the development of a new legal order which needs to be constituted in order to preserve the process of pluralism and existence of the Union. Sometimes autonomy is just a silent undercurrent, yet plays a central role. This is the case in judgments concerning the respect of the rule of law and human rights protection where the Court generally does not discuss autonomy nonetheless autonomy still plays a fundamental role.

It is sometimes alleged that the rule of law and human rights protection are separate from autonomy and that autonomy is given preference vis-à-vis those and other values of the European Union as set out in Article 2 of TEU[129]. However, the idea of "autonomy *or* rule of law" and "autonomy *or* human rights" is not borne out by the analysis. The rule of law and human rights protection form the fundamental part of autonomy's axiology. Moreover, their importance is further heightened by the autonomy's essential need for constant legitimacy. The enhanced need of legitimacy is due to the deeply dependent character of autonomy.

Autonomy, the new legal order, is unlike sovereignty characterized by profound dependence. Understanding autonomy as a disguised claim to sovereignty[130] would thus be a mischaracterization. Sovereignty is an expression of self, of a people, nation, territory. Much as both lawyers and international relations' scholars concluded that sovereignty cannot be understood as an absolute billiard ball,[131] but rather as relational and disaggregated, it still aims for absolute protection. Sovereignty is not ordering pluralism among different legal orders. Autonomy is rather necessarily developed in a

[129] Violeta Moreno Lax, The Axiological Emancipation of a (Non) Principle: Autonomy, International Law and the EU Legal Order, *in* 45 THE INTERFACE BETWEEN EU AND INTERNATIONAL LAW 45-72 (Inge Govaere, Sacha Garben eds., 2019); Steve Peers, Negotiations for EU accession to the ECHR relaunched - overview and analysis (Jan 30, 2021), http://eulawanalysis.blogspot.com/2021/01/negotiations-for-eu-accession-to-echr.html?m=1. Eeckhout, *supra* note 47. Kochenov, *supra* note 47.

[130] Van Rossem, *supra* note 19, at 5. Eckes, *supra* note 40. John Martin Gillroy, Conclusion: The Metaphysical Elements of Sovereignty, *in* 257 AN EVOLUTIONARY PARADIGM FOR INTERNATIONAL LAW 257-266 (Palgrave Macmillan 2013).

[131] ABRAM CHAYES, ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (Harvard University Press 1998); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton University Press 2005).

relationship with "the other" – with national legal orders and international law. The European Union legal order is structurally dependent particularly on the former. A priori dependence on others is autonomy's central component. Authority and recognition are bestowed on the Union by the "high contracting parties". The Union has limited conferred competences,[132] derived legal personality[133] and is ultimately dependent on the high contracting parties who can amend the Treaties or even leave the Union.

The Union is highly dependent upon the Member States in order to carry out its functions and they remain a vital part of the EU constitutional structure, both in international relations,[134] as well as internally within the Union. The acceptance of the supremacy of EU rules over national constitutional rules has not been unconditional.[135] Furthermore, the application of EU law has always been decentralised. The dynamic of interpretation is at least partially a function of, or dependent upon, national courts and national litigants.

The EU is thus said to have a negotiated or contested normative authority.[136] It is dependent on the national courts, national institutions, on Member States and citizens of the Union.[137] The Court is set in in a structure of profound pluralism in which it needs to constantly battle for its legitimacy. The pluralist system with autonomy at its centre breaks down when autonomy does not have the proper legitimacy. The autonomous legal order needs to earn its legitimacy, every day anew.

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[132] Treaty on European Union, OJ 115, 09/05/2008 P. 0018 – 0018, Article 5.
[133] *Id.*, Article 47.
[134] Odermatt, *supra* note 18, at 18. Pieter Jan Kuijper, Esa Paasivirta, EU International Responsibility and its Attribution: From the Inside Looking Out, *in* 35 THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION: EUROPEAN AND INTERNATIONAL PERSPECTIVES 41-42 (Malcolm Evans, Panos Koutrakos eds., 2013): "The EU […] is the victim of a paradox in international relations. It seeks to act as a strong and unified actor towards the outside world in international relations and that is what it is supposed to do according to its latest charter, the Treaty of Lisbon. However, because of its basic structure, it is highly dependent on its Member States for carrying out its policies and implementing its laws, including in the field of international relations."
[135] Judgment of the Court (Grand Chamber) of 11 December 2018, *Proceedings brought by Heinrich Weiss and Others*, ECLI:EU:C:2018:1000, Case C-493/17. *Syndicat Generale des Fabricants de Semoules* [1970], French Conseil d'Etat, *Landtová* Pl ÚS 5/12 [2012], Ústavní soud; Case P 1/05 and K 18/04, both in 2005, Trybunał Konstytucyjny.
[136] Maduro, *supra* note 65.
[137] *Id.*

Legitimacy of the work of an unelected institution such as the Court should be sought in administrative analysis. This means that legitimacy should be sought primarily in legal, technocratic and functional claims.[138] EU law had to build an integral life of its own with its own coherence, precedents, its own formal and ideal elements. How these elements are mediated through national institutions and perceived by a plethora of actors is vital for the legitimacy and thus for the existence of the new autonomous legal order. The rule of law and human rights protection are important examples of the interplay of the axiological and ontological dimensions of autonomy that reinforce autonomy and give it further legitimacy.

C. 1. Autonomy and the rule of law as inseparable and mutually reinforcing

One of the fundamental principles of the EU legal system in which autonomy operates silently but decisively in the decision-making of the Court is the rule of law. Rule of law has been argued to play a subservient role to autonomy.[139] Yet, the respect of rule of law is central to an autonomous *legal* order and its axiology.[140] The rule of law is simultaneously an axiological anchor of autonomy and vitally legitimizes it. The Court's central role, performing effective judicial review designed to ensure compliance with EU law is the essential element of the rule of law,[141] without which autonomy does not exist.[142] Judicial review legitimates the new legal order which was set up precisely to settle disputes legally.

Judicial independence, one of the preeminent features of the rule of law as set out in Article 19 of the TEU, is central to autonomy. Autonomy is ordering pluralism of legal systems in the European Union. If there is no rule of law underlying the entire system,

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[138] Peter L. Lindseth, Reflections on the 'Administrative, Not Constitutional' Character of EU Law in Times of Crisis, *in* 1 SIXTY YEARS LATER: RETHINKING COMPETING PARADIGMS FOR EU LAW IN TIMES OF CRISIS, IN PERSPECTIVES ON FEDERALISM 9 (Marta Simoncini, Gert Straetmans eds., 2017).
[139] Kochenov, *supra* note 47.
[140] Judgment of the Court of 25 February 1988, *Parti écologiste "Les Verts" v European Parliament*, ECLI:EU:C:1988:94, Case 190/84; Judgment of the Court (Grand Chamber), 3 October 2013, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, ECLI:EU:C:2013:625, Case C-583/11 P, para 91: "union, based on the rule of law".
[141] Judgment of the Court (Grand Chamber) of 28 March 2017, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, EU:C:2017:236, Case C-72/15, para 73 and the case-law cited.
[142] *Id.*

the structure in which the autonomous legal order is set breaks apart. The EU operates by means of law, it is thus essential that there is a mutual trust between courts which enables national courts to rely upon the notion that law is correctly implemented throughout the Union and for the Court to engage with them in an effective dialogue. Autonomy and the rule of law are thus not mutually exclusive, but rather mutually reinforcing.

The European Union is based on the rule of law which had to establish a complete system of legal remedies and procedures designed to enable the Court to review the legality of acts of the EU institutions.[143] National courts and tribunals, in collaboration with the Court, jointly fulfil the duty[144] entrusted to them by Article 19 TEU[145] of ensuring that in the interpretation and application of the Treaties the law is observed.[146] This is a vital ontological feature of autonomy.

This ontology is reflected in *Portuguese judges* case[147] where the Court decided that Article 19 TEU extends beyond the implementation of subjective rights of EU law and Article 47 of the Charter. Following this judgment, effective legal protection set out in

[143] Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, ECLI:EU:C:2018:117, Case C-64/16, paras 34, 36.

[144] See, to that effect Opinion of the Court (Full Court) of 8 March 2011, *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets*, ECLI:EU:C:2011:123, Opinion 1/09, para 66; Judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, para 90; Judgment of the Court (Grand Chamber) of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, para 45).
The likelihood that the Court will find another international court to be compatible with EU law is quite low, if one is to consider the Court's long standing case-law (*Opinions 1/91, 1/92, 1/00, 1/09, 2/13* and *Achmea*). The accession to the European Court of Human Rights, investor-state tribunals under intra-EU BITs, the proposed European Patent Court and the proposed EEA Court have all fallen 'victims' to this case-law.

[145] The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19 TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (see, to that effect, Judgments of 13 March 2007, *Unibet*, C 432/05, EU:C:2007:163, para 37 and judgement of 22 December 2010, *DEB*, C 279/09, EU:C:2010:811, paras 29-33).

[146] Opinion of the Court (Full Court) of 8 March 2011, *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets*, ECLI:EU:C:2011:123, Opinion 1/09, para 69; Judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, para 99.

[147] Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, ECLI:EU:C:2018:117, Case C-64/16.

Article 19 TEU applies also outside the application of EU law. Judicial independence[148] is thus a structural requirement, not linked only to the application of EU law by Member States when they are implementing EU law, as set out in Article 52(1) of the Charter. Article 19 TEU affects the entire European Union legal system and[149] Member States have to comply with it in all respects.

The judgment in *Portuguese judges* case is also a reflection of the structural dependence of the autonomous new legal order on the whole judicial system of the Member States in the European Union. When judicial independence breaks down in Member States, the system of dialogue between independent courts breaks down. This further confirms that autonomy and the rule of law are not mutually exclusive, but rather inseparable and mutually reinforcing. This portrays how the ontology of the autonomous legal order played an important role in this case, reinforcing the axiology of the rule of law.

C. 2. Autonomy and human rights protection as inseparable and mutually reinforcing

Human rights protection has been likewise called an "irritant to the policy-based coherence of the EU legal order".[150] However, human rights are not an irritant, but a fundamental part of autonomy's axiological character and vital for its legitimacy.

Human rights have been historically indispensable for the autonomy of the EU legal order and its legitimacy. In *Internationale Handelsgesellschaft*, the Court powerfully reaffirmed the supremacy of then Community law, holding that recourse to

[148] *Id.*, para 44. The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (see, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, para 51, and of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, para 37 and the case-law cited).
[149] Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, Case C-64/16, confirmed in Judgment of the Court (Third Chamber) of 9 July 2020, *VQ v Land Hessen*, ECLI:EU:C:2020:535, Case C-272/19.
[150] Šadl, Bengoetxea, *supra* note 16.

national constitutional principles and fundamental rights to judge the validity of Community measures would have an adverse effect on the uniformity and efficacy of Community law. This, however, was only effectively possible because the Court set out in the following paragraph of the judgment that fundamental rights formed an integral part of the general principles of law protected by the Court of Justice.[151] A genuine liberal legal system without adequate human rights protection in today's judicial landscape indeed appears impossible. The Court also stated clearly in *Kadi* that it viewed fundamental rights at the very heart of autonomy of EU law, as a precondition of the legality and legitimacy of the EU legal order,[152] rejecting automatic integration of international law into the system of EU law without a proper human rights review.

Thus, human rights form a fundamental part of autonomy's axiological character, and autonomy and human rights are inseparable and mutually reinforcing. Human rights protection is in the service of autonomy and vice versa.

This does not mean that there is no tension between the axiological and ontological character of autonomy. The principle of mutual trust[153] between Member States' authorities and particularly courts, one of the prominent features of the autonomous EU legal order, is often portrayed to be at variance with appropriate human rights protection. Following Opinion 2/13, it has been asserted that when implementing EU law, the Member States may be required to presume that fundamental rights have been observed by the other Member States, so that they may not check whether the other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU. [154] A Member State may thus only in exceptional cases, "check whether that other Member

[151] Judgment of the Court of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114, Case C-11/70, para 4. See PAUL CRAIG, UK, EU AND GLOBAL ADMINISTRATIVE LAW: FOUNDATIONS AND CHALLENGES (Oxford University Press 2015), at 333-335.

[152] Judgment of the Court (Grand Chamber) of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461, Joined cases C-402/05 P and C-415/05 P.

[153] Clemens Ladenburger, The Principle of Mutual Trust between Member States inthe Area of Freedom, Security and Justice, 23 ZEuS 373, 380 (2020).

[154] Opinion of the Court (Full Court) of 18 December 2014, *Adhésion de l'Union à la CEDH*, ECLI:EU:C:2014:2454, Case Opinion 2/13, paras 191-92. Moreno Lax, *supra* note 129, at 62.

State has actually, in a specific case, observed [...] fundamental rights",[155] which led to criticism that this creates many violations of human rights.[156]

The Court has not been insensitive to these issues. In *Aranyosi and Caldararu*[157] the Court decided that the absolute prohibition on inhuman or degrading treatment or punishment is part of the fundamental rights protected by EU law. Accordingly, where the authority responsible for the execution of a European arrest warrant has in its possession evidence of a real risk of inhuman or degrading treatment of persons detained in the Member State where the warrant was issued, that authority must assess that risk before deciding on the surrender of the individual concerned and decide whether the surrender procedure should be brought to an end.[158]

The tension between mutual trust and human rights protection certainly exists. Another example is the case *Detiček* in the context of the mutual trust and application of the Brussels Regulation. In that case the Court of Justice assumed that human rights of the child were best protected by returning the child to their father, where the first instance court in the first Member state decided to give him custody.[159] The mother, by bringing the child to another Member state, thus "illegaly abducting" them, foreclosed the right of appeal.[160] It will thus never be known if the return of the child to the father truly best protected the child's rights. The presumption of the correctness of the judgment of the first Member State's court applied, based on the principle of mutual trust.

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[155] Peers, *supra* note 129. Judgment of the Court (Third Chamber) of 23 December 2009, *Jasna Detiček v Maurizio Sgueglia*, ECLI:EU:C:2009:810, Case C-403/09 PPU.
[156] Peers *Id.* Peers has argued that if it were possible to resist removal to another Member State on human rights grounds despite the Dublin rules on asylum responsibility or resist the execution of a European arrest warrant or enforcement of a judgment according to the Brussels regulation, then many violations of human rights in individual cases would be avoided.
[157] Judgment of the Court (Grand Chamber) of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198, Joined Cases C-404/15 and C-659/15 PPU.
[158] *Aranyosi* and *Caldararu* had a precedent in the cases of *N.S.* (C-411/10 and C-493/10), where the Court held that national courts, may not transfer an asylum seeker to that Member State where there are substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.
[159] Judgment of the Court (Third Chamber) of 23 December 2009, *Jasna Detiček v Maurizio Sgueglia*, ECLI:EU:C:2009:810, Case C-403/09 PPU, para 43.
[160] *Id.*, para 52.

Autonomy is, however, not above human rights, as those are not an external element to autonomy. As confirmed by the Court and explained above, human rights are integral to autonomy. Human rights are integrated in the legal analysis, including in the analysis of proportionality, which, when properly reasoned and giving maximum expression possible to the conflicting values, give the decision-making and the autonomous legal order further legitimacy. The axiology of human rights importantly contributes to the centripetal force of autonomy and reinforces it.

This does not mean that critical evaluation of the case law of the Court is not vital. How tensions and conflicts within the system are resolved in any particular case is certainly subject to important discussion. There is no one single possible form of autonomy. Several variations of autonomy are certainly debated behind the closed doors in Luxembourg. Decisions of the Court should be carefully analysed and critically evaluated by academia, practitioners and the public. This is an essential part of the legal and general social development in a democratic society. However, the baby should not be thrown away with the bath water. Autonomy is a valid coherence-enabling principle of the Court's reasoning that is justifiably omnipresent in its decision making.

While the axiology of human rights reinforces autonomy, the axiological and ontological character of autonomy simultaneously plays a role in human rights case law. As Advocate General Villalón set out in *Samba Diouf*, the right of judicial protection under Article 47 of the Charter of fundamental rights has, as part of autonomous EU legal order, "acquired a separate identity and substance, which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR. In other words, once it is recognized and guaranteed by the European Union that fundamental right goes on to acquire a content of its own".[161]

Autonomy also played a decisive role in the interpretation of Article 51 of the Charter which provides that the provisions of the Charter are binding on the EU institutions and the Member states, without a mention of individuals. The Court,

[161] Judgment of the Court (Second Chamber) of 28 July 2011, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, ECLI:EU:C:2011:524, Case C-69/10, para 39, and AG Cruz Villalón's Opinion, ECLI:EU:C:2011:102.

however, found that the Charter does have horizontal direct effect, when the necessary conditions are met.[162] Not giving the Charter direct effect, under those conditions,[163] would be against the ontology of autonomy, as set up by *Van Gend en Loos*, which places individuals at the heart of the autonomous new legal order.[164]

Indeed, the direct involvement of individuals in the daily functioning of the European Union and the Court is autonomy's defining ontological feature as per the *Van Gend en Loos* judgment. If autonomy was limited to EU law's relationship with national legal orders and international law, which the discussion of autonomy focusing on the jurisdictional aspect of autonomy assumes, without having a trace in relationships between public authorities and individuals (vertical direct effect) and between individuals (horizontal direct effect), the most fundamental aspect of autonomy of EU law would be negated in the sphere of application of fundamental rights.

The discussion on autonomy and human rights protection thus leads to several important conclusions. First, human rights are an integral axiological part of autonomy, not its "irritant". Furthermore, human rights are essential for the legitimacy of an inherently dependent autonomous legal order. At the same time, autonomy plays a decisive role in the interpretation of human rights, even when not explicitly mentioned. Autonomy and human rights are inseparable and mutually reinforcing. Moreover, the relationship between autonomy and human rights reveals that autonomy is not reserved for jurisdictional issues, which have marked the discussion of autonomy in EU law. It is not reserved for relationships between the Court and other courts and decision-makers, nor restricted to the relationship between EU law on the one hand and Member State law and international on the other. Autonomy, rather, shapes all vertical and horizontal legal

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[162] Judgment of the Court (Grand Chamber) of 17 April 2018, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI:EU:C:2018:257, Case C-414/16; Judgment of the Court (Grand Chamber) of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*, ECLI:EU:C:2018:874, Case C-684/16; Judgment of the Court (Grand Chamber) of 6 November 2018, Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn, ECLI:EU:C:2018:871, Joined Cases C-569/16 and C-570/16.

[163] The criteria are very similar to the Van Gen den Loos criteria. Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1, Case 26-62.

[164] General principles of law have been given horizontal direct effect in some circumstances. Judgment of the Court (Grand Chamber) of 22 November 2005, *Werner Mangold v Rüdiger Helm*, ECLI:EU:C:2005:709, Case C-144/04; Judgment of the Court (Grand Chamber) of 19 January 2010, *Seda Kücükdeveci v Swedex GmbH & Co. KG*, ECLI:EU:C:2010:21, Case C-555/07.

relationships subject to the jurisdiction of the Court, being thus omnipresent in the case law of the Court.

C. 3. Effectiveness of the autonomous legal order, state aid law and the search for autonomy's outer boundaries

For good measure and to further portray autonomy as the centripetal force of the reasoning of the Court, this discussion will turn to the principle of effectiveness. Furthermore, to confirm the argument about autonomy's ubiquitous presence in the EU case law, it will briefly look into a random field of exclusive EU competence. State aid law will be shortly presented as an example of the operation of autonomy in the decision-making of the Court, despite the fact that the Court either mentions it only occasionally or is entirely silent on it.

The autonomy of the EU legal order is intrinsically connected to its effectiveness. Norms of the new legal order have to be effective, there would be no autonomous EU legal system if no one applied it.[165] Effectiveness thus underscores autonomy and autonomy in turn plays a vital force in its interpretation. Emphasis on the general principle of the effectiveness of the autonomous EU legal system is seen in various forms throughout the system. *Effet uti*le or effectiveness of norms has played an important role in Court's reasoning ensuring the autonomous new legal order is effective[166] and the Court has regularly relied in its argument on effective enjoyment of rights under the Treaty.[167]

In order to ensure the effectiveness of the autonomous legal order, the Court also foresaw that national law must provide specific remedies. In the *Francovich* case, which importantly drew on and contributed to effectiveness of the new EU legal order, the Court set up Member State liability for a breach of EU law referring to the fact that "the EEC

[165] Justin Lindeboom, The Autonomy of EU Law: A Hartian View, 13 EUR. J. LEG. STU. 271, 271-307 (2021).
[166] See for example Judgment of the Court of 6 October 1970, *Franz Grad v Finanzamt Traunstein*, ECLI:EU:C:1970:78, Case 9-70, para 5; Judgment of the Court of 26 February 1991, *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen*, ECLI:EU:C:1991:80, Case C-292/89; Judgment of the Court (Grand Chamber) of 28 March 2017, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, EU:C:2017:236, Case C-72/15.
[167] For effective enjoyment of citizenship rights under Article 20 see Judgment of the Court (Grand Chamber) of 8 March 2011, *Gerardo Ruiz Zambrano v Office national de l'emploi*, Case C-34/09, para 45.

Treaty has created its own legal system".[168] Just like supremacy and direct effect, the principle of state liability ensures autonomy of the new legal order. In *Courage*, in which the Court concluded that national law must provide an action for damages against a private party for breach of the Treaty competition rules, the Court explicitly referred to the *Van Gend en Loos* wording of the new autonomous legal order, which also has individuals as their subjects,[169] again affirming that autonomy with its specific axiological and ontological character is omnipresent in the case law of the Court, also in horizontal legal relationships.

The constant development of autonomy indeed guides the decision-making of the Court across the entire diverse field of EU law. European Union law is compartmentalized into distinctive areas of law, such as common foreign and security policy, competition law, trademark law, free movement of goods and citizenship, to mention just a few. These fields also have their own internal coherence driven by the sectoral demands, while always simultaneously guided by fundamental principles of law and overall autonomy of the EU legal order.

State aid control lies at the heart of the autonomous EU legal system that constantly guides it visibly and invisibly, as it guides any area of EU law. Thus, the General Court recently restated in the *Danish bottles* case[170] that Article 107(1) TEU, which sets out the conditions for the existence of state aid, should be given autonomous and uniform interpretation throughout the European Union. Thus, in examining whether the measure consisting of exemption from charging of the deposit was State aid, German law and Germany's obligations under the Directive 94/62/EC should not be considered.[171]

Furthermore, the pursuit of effectiveness of the EU system of state aid control, and thus of the autonomous system of EU law, can be seen in *Commission v Italy*,[172] in which

[168] Judgment of the Court of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, ECLI:EU:C:1991:428, Joined cases C-6/90 and C-9/90.
[169] Judgment of the Court of 20 September 2001, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, ECLI:EU:C:2001:465, Case C-453/99, para 19.
[170] Judgment of the General Court (Fourth Chamber, Extended Composition) of 9 June 2021, *Dansk Erhverv v European Commission*, ECLI:EU:T:2021:331, Case T-47/19.
[171] *Id.*, para 74.
[172] Judgment of the Court (Fourth Chamber) of 25 October 2017, *European Commission v Italian Republic*, ECLI:EU:C:2017:799, Case C-467/15 P

the Court decided that the violation of the conditions of authorized state aid automatically converts it into a new illegal aid. In other words, such aid loses, in its entirety, the character of existing aid.[173] The Court of Justice emphasized the dissuasive effect of such a conclusion, which is necessary for the effectiveness of the state aid law regime.

The Court's careful exercise of judicial review reinforces the legitimacy of the autonomous system of EU law and its decision-making processes. Based on the required standard of burden of proof in an adversarial procedure set in a system ensuring effective judicial protection, the Court has thus recently annulled, either partially or entirely, a wide number of Commission's state aid decisions.[174] Moreover, state aid law has followed the recent trend in competition law in which the emphasis is put on overcoming a formalistic approach set out in the law and enabling careful balancing and contradictory exchange between the parties regarding the effects of the activity on the market.[175] An autonomous EU legal system requires a carefully crafted contradictory procedure to satisfy the effective judicial protection requirement of Article 47 of the Charter.

Finally, to sharpen its legitimacy while upholding an autonomous EU legal order, also being aware of its docket, the Court has to carefully police the boundaries of EU and Member State competence and thus the limits of the autonomous legal system and its relationship with national and international legal orders with which it is in constant

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[173] *Id.*, para 54.

[174] Judgment of the General Court (Seventh Chamber, Extended Composition) of 15 July 2020, *Ireland and Others v European Commission*, ECLI:EU:T:2020:338, Cases T-778/16 and T-892/16; Judgment of the General Court of 12 May 2021, *Luxembourg and Amazon v Commissio*n, ECLI:EU:T:2021:252, Cases T-816/17 and T-318/18; Judgment of the General Court (Second Chamber) of 16 March 2016, *Frucona Košice a.s. v European Commission*, ECLI:EU:T:2016:152, Case T-103/14; Judgment of the General Court (Second Chamber) of 7 December 2010, *Frucona Košice a.s. v European Commission*, ECLI:EU:T:2010:498, Case T-11/07; Judgment of the General Court (Fourth Chamber) of 26 February 2019, *Fútbol Club Barcelona v European Commission*, ECLI:EU:T:2019:113, Case T-865/16; Judgment of the General Court (Fourth Chamber) of 22 May 2019, *Real Madrid Club de Fútbol v European Commission*, ECLI:EU:T:2019:346, Case T-791/16; Judgment of the General Court (Ninth Chamber) of 15 March 2018, *Naviera Armas, SA v European Commission*, ECLI:EU:T:2018:145, Case T-108/16; Judgment of the General Court (Fourth Chamber) of 12 March 2020, *Valencia Club de Fútbol, SAD v European Commission*, ECLI:EU:T:2020:98, Case T-732/16; Judgment of the General Court (Fourth Chamber) of 12 March 2020, *Elche Club de Fútbol, SAD v European Commission*, ECLI:EU:T:2020:97, Case T-901/16; Judgment of the General Court (Third Chamber) of 16 January 2018, *Starbucks Corp. v European Union Intellectual Property Office*, ECLI:EU:T:2018:4, Case T-398/16.

[175] Damjan Kukovec, Effects-based Analysis and Effective Judicial Protection, forthcoming 2021. For the description of this trend in competition law, see for example Giorgio Monti, Attention Intermediaries: Regulatory Options and their Institutional Implications, 18 TILEC DISCUSSION PAPER 1, 1-42 (2020).

dialogue. While determining these limits in state aid law, for example, the Court has concluded that taking into account the fiscal autonomy, which the Member States are recognised as having outside the fields subject to harmonisation, EU state aid law does not preclude, in principle, Member States from deciding to opt for progressive tax rates, intended to take account of the ability to pay of taxable persons. Nor does it require Member States to reserve the application of progressive rates only to taxes based on profits, to the exclusion of those based on turnover.[176] This search for boundaries is an important feature of autonomy also reflected in several judgments in other fields of law such as *Keck* in the free movement of goods or in public procurement cases before the Court which fall below the thresholds of the Directives.[177] Deference to national legal systems is a function of autonomy and dialogue. Finding the fine line on such boundaries serves the legitimacy of the omnipresent autonomy.

D. Autonomy as the Court's synoptic vision and its role in the ultimate goals of the Union

The manifestations of autonomy are found in various forms and shapes throughout the decision-making of the Court, primarily without autonomy ever being mentioned. The cases reconstructed in this article are an inevitably limited sample. Yet almost none of the mentioned cases could be explained by the oversimplification of "building the common market", or by the notions of "pro-integration" or "deeper integration".[178] Autonomy as a coherence-enabling idea may contribute to further integration. "Pro-integration" is thus a potential description of social consequences of decision-making.[179] Yet, it does not adequately describe the process of decision-making and cannot be used as a tool to coherently reconstruct the Court's decision-making.

[176] Judgment of the Court (Third Chamber) of 2 April 2020, *European Commission v Republic of Poland and Others*, ECLI:EU:C:2020:257, Joined Cases C-715/17, C-718/17 and C-719/17.
[177] Judgment of the Court (Grand Chamber) of 20 March 2018, *European Commission v Republic of Austria*, ECLI:EU:C:2018:194, Case C-187/16.
[178] Šadl, Bengoetxea, *supra* note 16, at 47-48. Eeckhout, *supra* note 47.
[179] Panos Koutrakos speaks about such effects: "The perspective of the judgment is distinctly integrationist"; "Integrationist character of the judgment" in Panos Koutrakos, Judicial Review in the EU's Common Foreign and Security Policy, 67 INT. COM. L. Q. 1-35, 23 (2018).

Effective judicial review and high standards of burden of proof are unrelated to "deeper integration". Annulment of numerous decisions of the Commission because it has not met those high standards in competition or state aid law cases, or annulling the Council's decisions when it has not properly reasoned its decisions on restrictive measures,[180] leads to results which could be described as opposing deeper integration. Nor can a quest for deeper integration explain a judgment such as *Slovenia v Croatia,* Opinion 2/13 *or Keck*. Autonomy, on the other hand, can explain these judgements and serve as a clear overall standard of coherence of the Court's decision-making and its case law.

When considering coherence, it should be noted that the number of causes that define a legal system is infinitely great, the causes themselves infinitely small.[181] Yet, the reconstruction of the case law in light of autonomy shows that autonomy can fit scattered or diffused elements of law into one all-embracing, by definition permanently incomplete, unitary inner vision.[182] A thick, complex web of events, objects, characteristics, connected and divided by literally innumerable visible and invisible links and gaps can be evaluated in symmetrical patterns of autonomy. In other words, autonomy provides a single embracing vision, whereby everything is interrelated directly, and all the doctrines and parts can be assessed by a single measuring-rod.

This single measuring rod of autonomy can also play a role in judicial efficiency. The moral development of society through deliberation provides the benefits if it is administered quickly.[183] Constraints are always there; the year has so many days, the day

[180] Judgment of the General Court (Fifth Chamber) of 9 June 2021, *Oleksandr Viktorovych Yanukovych v Council of the European Union,* ECLI:EU:T:2021:333, Case T-302/19.
[181] Berlin, *supra* note 1, at 459: "for we never shall discover all the causal chains that operate: the number of such causes is infinitely great, the causes themselves infinitely small; historians select an absurdly small portion of them and attribute everything to this arbitrarily chosen tiny section."
[182] Berlin, *supra* note 1, at 1.
[183] Judgment of the Court (Grand Chamber) of 16 July 2009, *Der Grüne Punkt - Duales System Deutschland GmbH v Commission of the European Communities*, ECLI:EU:C:2009:456, Case C-385/07 P. Judgment of the Court (Grand Chamber), 26 November 2013, *Groupe Gascogne SA v European Commission*, ECLI:EU:C:2013:770, Case C-58/12 P.

has so many hours, the Court has so many judges, the judges have so many cases.[184] Justice delayed is justice denied, as also confirmed by Article 47 of the Charter.[185]

Slow procedures undermine the autonomous legal system as well as putting individuals and companies in a position of legal uncertainty.[186] On the other hand, strong performance of the system is in the service of autonomy of the EU legal order and its legitimacy. In turn, autonomy assists the Court in administering justice. The Court is faced with countless legal rules, principles, policies and precedents. It adjudicates on issues as varied as air quality, free movement of persons, criminal law, common foreign and security policy and antidumping law. The general laws must speak in harmony, all elements must be made to cohere.[187]Autonomy helps enable coherence that would otherwise be difficult to obtain in a new legal order stemming from and relying on various legal systems. In a pluralist environment, autonomy can give the Court a clear vision of a direction and overall grounding. It enables it to deliver justice according to a coherent delineated system, enhancing its administrability.

The ultimate basis of the correlation of all the elements of EU law resides in a single synoptic vision of autonomy. To the extent that the overall legal order is identifiable through scientific research and observation, autonomy of EU legal order is its most important general characteristic. Autonomy of EU legal order is but a vague name for the totality that includes the categories and concepts of EU law, the ultimate framework, the basic presuppositions wherewith EU law functions.

Finally, in order to fully understand the role of autonomy in the case law of the Court, Aristotle's approach to the quest for knowledge provides a useful insight. Aristotle's quest for knowledge is defined by four causes: "the material cause", "the formal cause", "the efficient cause" and "the final cause".[188] These four explanatory factors

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[184] Joseph H. H. Weiler, Epilogue: The Judicial Après Nice, *in* 215 THE EUROPEAN COURT OF JUSTICE 219-220 (Grainne de Búrca, J.H.H. Weiler eds., 2001).
[185] Sacha Prechal, The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?, *in* 143 FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW 143-157 (Christophe Paulussen, Tim Takacs, Vesna Lazić, Ben Van Rompuy eds., 2016).
[186] Rapport prévu à l'article 3, paragraphe 1, du règlement 2015/2422.
[187] Sargentich, *supra* note 55, at 108.
[188] These are four explanatory factors, a grasp of all four is needed to have a proper knowledge of something. Material cause reflects what something is made of. The formal cause is the pattern, structure or form that the matter realizes in becoming a determinate thing. Efficient cause is the agent responsible for a matter to

explain how autonomy is not the final purpose of legal reasoning, as often asserted in the academic debate. Autonomy only ensures coherence of the Court's decision making to achieve the values and purposes as set out in the Treaties.

The Court does not create its own agenda and it is far from being the only agent in the process of seeking justice ("efficient cause", agent). National courts, parties, including individuals, European Union institutions and Member States bring the material – facts, legal problems, questions and their own visions of their resolution to the Court ("the material cause", material). The meaning of autonomy ("the formal cause", structure) arises in and out of this engagement with the realities in society.

The Court, guided by autonomy in its art of interpretation constantly (re)produces the formal cause – the autonomy- out of the provided material, further shaping autonomy in its ever-evolving form. In other words, autonomy governs the process along the way to its realization. It governs its own development from potentiality to actuality, based on the existing ontological and axiological understanding of autonomy. Yet, autonomous legal order – the coherence-enabling formal cause – is not the final cause of itself.[189] Autonomy is in service of the goals and values that the autonomous legal order serves ("final cause", final purpose).

The European Union is not a goal in itself, it is a functional entity, a means to reach the goals and values set out in the Treaties. Autonomy as an idea of coherent interpretation thus serves the existence and functioning of the autonomous legal order of the European Union in its multiple functions set out throughout the Treaties, which themselves are unable to provide coherence of the overall decision-making of the Court.

take a particular form. Final cause is that for the sake of which a thing is done. THE WORKS OF ARISTOTLE: TRANSLATED INTO ENGLISH UNDER THE EDITORSHIP OF J. A. SMITH M.A. AND W. D. ROSS M.A. (Clarendon Press 1908), at 634-637 and at 2293-2295.

[189] For a different opinion see Moreno Lax, *supra* note 129, at 48: "[Autonomy] was first used to describe the distinctiveness of EU law, as the consequence of integration, to subsequently become the normative cause (or raison d'être) of the European project. Autonomy has gone from being a (privileged) means securing the (formal) emancipation of EU law from its international roots, to becoming a (rootless) end in itself, detached from any identifiable value base – whether in the Rule of Law or in fundamental rights – despite Article 2 of the Treaty on European Union."; *Id* at 71: "The idea of autonomy the CJEU embraces is a remarkably reductionist notion, exclusively focused on negative protections from external (and externalised) restraint. It views it as pure self-determinism and unmolested self-action, suggesting the Union legal order should be considered autonomous for its own sake."

Autonomy ensures that all the goals and values of the Treaty are realized, either individually or jointly. These goals or purposes of the European Union are necessary to bring the diverse Member states and their citizens together in a single Union, to fulfil the promises of the Founding fathers.[190]

What are European citizens submitted to by the authority of the Court? The Court, in ensuring that in the interpretation and application of the Treaties the law is observed, is seeking to attain the values and diverse functions of the European Union which are necessary to overcome the deep divisions of Europe through the constant reshaping of the axiological and ontological form of autonomy. Citizens submit to the universal texture of life in Europe, wherein truth and justice are to be found in a pluralist setting by a kind of Aristotelian knowledge.[191] Aristotelian knowledge-finding is reflected in the observations of the Judge Fernand Schockweiler. He explained that the Court had acted as an engine for the building of the autonomous Community legal order and that the Court had given preference to the interpretation best fitted to promote the achievement of the objectives pursued by the Treaty.[192]

This development is continuous. [193] Autonomy and the coherence it provides are not set in stone. Ever-changing autonomy is ordering pluralism in a constant process,[194] to attain the purposes of the Treaty. Autonomy is coherently and consistently bringing diverse legal systems together through its constant reshaping as well as through reshaping and articulating interests and values. Autonomy and coherence should thus be understood phenomenologically – in a particular moment in time. New questions are resolved on the basis of well-established concepts, giving the basis for further new legal and economic developments.

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[190] The Schuman Declaration, *supra* note 72, first three paragraphs of the Declaration.
[191] Berlin, *supra* note 1, at 487.
[192] Gil Carlos Rodriguez Iglesias, Address on the occasion of the publication of the work of Professor Jean Victor Louis on the European Union and the future of its institutions (Brussels, Jan. 16, 1997). See Fennelly, *supra* note 9.
[193] For the need to understand any legal development and justice as situated in time and place see Damjan Kukovec, Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the Status Quo, *in* 319 EUROPE'S JUSTICE DEFICIT 319-336 (Dimitry Kochenov, Gráinne de Búrca, Andrew Williams eds., 2015); Damjan Kukovec, Hierarchies as Law, 21 COLUMBIA J. EUR. L. 131, 131-193 (2014).
[194] MIREILLE DELMAS MARTY, ORDERING PLURALISM: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING THE TRANSNATIONAL LEGAL WORLD (Hart Publishing 2009).

IV. Conclusion

Autonomy can explain the reasoning of the Court and offer the most important guideline for following and understanding the Court's jurisprudence. The reconstruction of the axiological and ontological features of autonomy is inevitably partial. Yet, it portrays that autonomy is the most foundational factor ensuring the coherence of the EU case law, its predictability and consistent development of legal principles.

The European Union was established to overcome grand historic divisions in Europe by pursuing goals through an autonomous legal order. Autonomy contributes to integrity of the judicial process, while securing the pluralism of the European Union. Importantly, it enables the Court to speak with one voice. Given the Court's particular position in the European legal structure, no other foundational principle can plausibly compete in providing coherence to its overall decision-making. Autonomy is justifiably the Court's starting point of analysis, its Archimedian point and synoptic vision.

Autonomy should not be understood as a mere sword against other legal systems, though it also performs this function. Autonomy, while not explicitly mentioned or seen in a great majority of cases, is always present, guiding the decision-making of the Court and thus forms at least the background of the Court's every decision. Autonomy constantly provides overall coherence of the decision-making of the Court and is thus central to its normative fabric. Lawyers and citizens involved in the decision-making of the Court in any capacity would discount autonomy at their peril.

Reduction of the Court's reasoning to the construction of an internal market or to furthering integration mischaracterizes the Court's analysis and misses its sophistication. While the Court of Justice indeed was instrumental in the construction of the internal market, this is just one of the several partial goals of the Treaty that serve the larger final cause as pursued by the founding fathers.[195] Sectoral goals, such as free competition or internal market, are there only to provide deeper goals of Europe, such as war prevention

[195] The Schuman Declaration, *supra* note 72.

and bringing together the deeply divided continent, but the Court's overall case law cannot be reconstructed in their partial visions.

All liberal courts can rely on coherence in their reasoning.[196] Yet, no other court can rely on autonomy established in its specific institutional and normative setting. The particular pluralist and Aristotelian search for a constant reshaping of autonomy to achieve the various goals as set out in the Treaty, which connect Europe in the unique ontological sense, confirms the European Union's sui generis character.

While there are certainly several vectors of the Court's decision-making, autonomy can be concluded to be its most essential. Autonomy is the Court's synoptic vision, which has made the EU legal system into what it is today. The Court keeps remaking it in this vision – in the words of Isaiah Berlin, it is the court's "one big thing". The mission statement of the Court of Justice of the European Union is set out in Article 19 of the TEU, stating that in the interpretation and application of the Treaties, the law is observed. This task is set in the setting of internal and external pluralism. In order to properly order this pluralism, however, the hedgehog has autonomy in mind. The fox, for all his cunning, is defeated by the hedgehog's one defence.

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[196] Sargentich, *supra* note 55.