THE OXFORD HANDBOOK OF

EUROPEAN UNION LAW

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CHAPTER 1

THE PHILOSOPHY OF EUROPEAN UNION LAW

NEIL WALKER

I. Introduction: A New Horizon

What do we mean by the philosophy of European Union (EU) law, and how do we go about studying it? A simple parsing exercise suggests that the philosophy of EU law builds upon two prior and broader areas of philosophical inquiry. The first is the philosophy of law in general, while the second is the philosophy of the European Union in general. By bringing these two sets of inquiries within a single horizon, the philosophy of European Union law can enrich our understanding of both.

The philosophy of law in general has typically been concerned with basic questions about the nature of law.[1] It asks what, if any, are the essential, distinctive or typical characteristics of law. The search breaks down into a number of more focused, though interrelated areas of inquiry. We may identify four. First, whence does law in general, including the law in general of any particular jurisdiction, derive its justification—its basic claim to authority? Secondly, what is the ideal content of law, and what are the standards or other interpretive criteria by which we can determine the proper meaning of the law? Thirdly, what are the conditions of

[1] See eg John Gardner, 'Law in General' in *Law as a Leap of Faith: Essays on Law in General* (2012) Ch 5.

the validity of law, understood in the sense of 'social normativity'? How, regardless of objective justification, do laws come to be 'socially upheld as binding standards'[2] and what, more generally, are the operative conditions of law as an effective mode of intervention in the world? How, in other words, does law work *as* law? Fourthly, what are the 'systemic' properties of a legal system, or the coherent qualities of 'the law' considered in holistic terms?

For its part, the philosophy of the EU in general is most appropriately understood as a branch of social or political philosophy.[3] Is the EU properly conceived of as a polity, and if so, what type of polity? In what respects is it like a state, or like an international organization, or like neither? What, if any, is its deep social purpose? What does it offer and how does it justify itself to its constituents, whether Member States, individual citizens, consumers or special interest holders? What type of moral or political claim, if any, does it make on these constituents?

The philosophy of EU law, in turn, should be considered as a two-way street, circulating back and forward between our two prior domains of inquiry. It should provide insight into the special case of the EU and its law from the perspective of our philosophical reflections on law in general. And, conversely, albeit as a secondary consideration, it should augment our understanding of law in general in light of the distinctive character of the EU and the special case of EU law. In a nutshell, how does our appreciation of the essential, distinctive or typical characteristics of law refine or extend our understanding of EU law, and how does our understanding of the EU and of EU law refine or extend our sense of the general characteristics of law?

How, then, to proceed? Our two-way inquiry will track the four core legal philosophical themes introduced above, considering each in light of the peculiarities of the EU case. It begins with the fundamental question of the overall justification of the authority of the European Union legal order. It is here that legal philosophy and social and political philosophy stand in closest connection, for this question requires us to look at the justifications of the EU as a socio-political project more generally, as these have influenced and been influenced by its special conditions of origin and its particular transformative dynamic. The protracted attention given to this part of our inquiry reflects its key standing in any consideration of the EU as a philosophically significant entity. Our inquiry continues with reflections on the deep normative orientation and interpretive grain of EU law. It then asks how EU law operates as an effective framework of practical reasoning. And finally, questions of the integrity or coherence of EU law, in particular its relationship, both continuous and discontinuous, with other legal systems, are examined.

[2] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1st ed, 1979) 134.

[3] See eg Heidrun Friese and Peter Wagner, 'Survey Article: The Nascent Political Philosophy of the European Polity' (2002) 10 *Journal of Political Philosophy* 342.

These questions are closely connected. Authoritative foundations are linked to the justification of the normative core and associated matters of interpretation. The efficacy of EU law is linked to its coherence and integrity. And efficacy, as we shall see, is also intimately connected to authority. Equally, the strengths and fragilities associated with the integrity of EU law are also tied to unresolved questions about the authority and appropriate purpose and meaning of EU law. Nevertheless, it is best to engage with these four themes separately and in sequence, precisely so as to best appreciate the character of their relationship.

Before we examine each theme, a methodological note is in order. Much of what we are calling the philosophy of the EU, from underlying justification and basic principles and values to bespoke conceptions of the role of law and the nature of legal order, is implicit rather than explicit.[4] This itself is connected to the distinctive novelty of the EU and its law. As a still evolving system, and one that does not easily conform to any developed genus, reflection on the ideal character and distinctive ontology of the EU and its law tends to be of two contrasting types. Either it assumes a highly speculative and aspirational form, reflecting the remote prospect of its fullest realization; or it is instead tentative, recondite, and incremental. In that latter vein, it is marked by an emphasis upon 'doing' before 'hearkening',[5] of practice before theory, and, indeed, of a meta-theoretical temper which embraces a theoretical type that is itself strongly practice-dependent. One consequence of this is that some of the philosophically interesting positions on the EU lack refined articulation. Just as they are in some measure embedded in practice, so too they have to be inferred from that practice, which means that this commentator—indeed, any commentator—on the internal philosophy of the EU and its law must perforce be prepared to go beyond reportage and engage in a constructive interpretation and elaboration of that internal philosophy.

II. Authoritative Foundations

1. Remote Origins

The idea of Europe long predates the late twentieth century debates and struggles over its institutional form. The usage of the term in any approximation of its modern continental territorial designation dates back to the fifteenth century,[6] but

[4] See further, Neil Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' 25 *Oxford Journal of Legal Studies* (2005) 281.

[5] Joseph Weiler, *The Constitution of Europe* (1999) Ch 1.

[6] Douglas Hay, *Europe: The Emergence of an Idea*. (2nd ed, 1968).

only with the secular Enlightenment did it begin to replace Christendom as *the* key signifier of a unitary civilization. This emergent sense of Europe as a distinctive and common place had social and political dimensions, and these supply the deep and intertwined philosophical roots of the modern conception of the European Union. On the one hand, early modern Europeans, or at least their elites, came to recognize themselves as sharing certain social forms and beliefs. On the other hand, early modern Europe also began to be viewed as the object of a common political design or plan.

Reflecting the close connection between these two dimensions, eighteenth-century thinkers as diverse as Kant, Montesquieu, Voltaire, Vattel, Constant, Robertson, and Burke developed an understanding of Europe as a site of both social similarity and political balance.[7] This harmonious Enlightenment image did not survive the French Revolution and the subsequent continental wars. Yet the notion of Europe as an overlapping cultural space in which many political units and ethnic types must be accommodated persisted, feeding a sense of continental interdependence—and of nascent identity—unknown in other global regions.[8] The content of that overlapping cultural space—the raw material for any social philosophy in the new Europe—included matters such as shared religion, parallel imperial experiences and ambitions, and notably, both common systems of law and close trading and commercial bonds. And the many political projects of continental union, going back as far as the French Duc de Sully's Grand Design of 1620, fed off this shared heritage and common practice.

Yet, as one writer puts it, the pan-European political project has always been 'formally at odds with itself',[9] fundamentally challenged by the very conditions that invite it. Westphalian Europe was where the idea of the modern sovereign state attained an early maturity, and so the political recognition of Europe as a discrete object could only be of an entity whose basic structure and distinctive configuration was one of prior and embedded political plurality. On the one hand, this underlying structure made for a fragile, often broken, inter-state accommodation; hence the basic attraction of projects of union. On the other hand, some such projects of union, in their overweening ambition, threatened to destroy the very diversity that was Europe's distinctive political inheritance.

The approach to Europe's political reconstruction has always taken different forms, reflecting both horns of this dilemma. Some projects have been premised on consensus, but—recalling an earlier point—have remained largely 'theoretical' in the speculative sense. They are 'pure' philosophical resources to be retrieved from the archives, if at all, only as political circumstance permits. The more 'applied'

[7] Perry Anderson, *The New Old World*. (2009) Ch 1.

[8] Anthony Pagden (ed), 'Europe: Conceptualizing a Continent,' in Pagden, A. (ed), *The Idea of Europe: From Antiquity to the European Union* (2002) 34.

[9] Anderson (n 7) 477.

projects in this longer historical perspective have tended to operate through territorial conquest or imperial design. This suggests not only a contrast, but also a relationship born of contrast, and one whose pattern continues to mark the institutional dynamics of twentieth century Europe. In 1929, for example, the French Prime Minister Aristide Briand, operating between two projects of conquest—in the shadow of the First World War and in anticipation of the Third Reich—floated through the League of Nations the idea of a consensual federation of European states. The immediate origins of the contemporary continental polity, when theoretical speculation finally achieved settled institutional form, can also be seen largely as a response to the unilateral vision of regional domination which provoked the Second World War.[10]

2. Competing Philosophies of Post-War Settlement

Yet, even though joined by a shared reaction against the forced union of conquest and by a commitment to peaceful collaboration, there were from the beginning competing visions of the nascent post-War Europolity. That competition reflects the tensions of a political experiment that simultaneously depends upon and challenges the state-sovereignty template of the modern age, as well as the complexities of the relationship between that basic question of political design and the broader sense of a common social bond and philosophy. Translated into the puzzle of foundational legal authority, we may express this distinction between political design and social philosophy through a basic discrimination between two sorts of applied philosophical question. In the first place, there is the *structural* question of the appropriate legal form and shape of the new post-state entity. Secondly, there is the *substantive* question of the key social purposes influencing that political form, and of the general jurisdictional focus and range appropriately conveyed by that political form.

As regards the *structural* question, the available models of the legal polity are typically understood as three in number.[11] They are, in turn, a neo-federalist position, treating Europe's destiny as involving some approximation of a continental state. At the other extreme, is a statist position, which comprehends the European good as ultimately reducible, rather like the typical international regime, to the inter-governmentally negotiated aggregate interests of the Member States. Located between these two, is a supranational, or in some conceptions, transnational

[10] Weiler (n 5); Peter Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (2010), Chs 2–3; Jan-Werner Muller *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (2011) Ch 4; Anderson (n 7) Ch 9.

[11] See eg Justine Lacroix and Kalypso Nicolaïdis, 'European Stories: An Introduction' in *European Stories: Intellectual Debates on Europe in National Context* (2010).

position,[12] which envisages the new Europe not as a trade-off between different levels of state or state-like authority but as transcending the logic of statehood in a new model of political design. These positions should be treated with some circumspection. There are variations in specification as well as in labelling. More significantly, once we move beyond the stylizations of their authors, or of their supporters or critics, the triptych is probably better viewed as a spectrum, and one in which there is a significant pull to the new model at the centre and so towards the discontinuity rather than the continuity of the European project with the state tradition.

In the founding phase, the structural competition was framed by a division between an ambitious and overtly neo-federalist conception of the new Europe, one, premised on the equality of the citizens of all Member States, and a narrower conception of continental integration. The former envisaged a grand political project for a post-bellum continent dedicated to learning and perpetually applying the geopolitical lesson of uncoerced co-existence under a jurisdictionally open framework of policy sharing or co-ordination. Ambitious to mark a new continental beginning, this approach, as, for example, anticipated in Altiero Spinelli's pan-European Ventotene Manifesto of 1940,[13] was one that strongly favoured a 'big bang' foundational solution. From the outset, and in many of its later iterations—notably as one important vision supporting the failed Future of Europe Convention of 2003–5—the language and methods of documentary constitutionalism have been to the fore in this neo-federalist approach.

The second, narrower but more influential, founding conception was based upon a platform of common or pooled economic affluence and other manifest common goods. This apparently more modest approach spanned a range of candidate perspectives. One such perspective was developed by prominent founders such as Jean Monnet and Robert Schuman[14] whose long-term aspiration was also a neo-federalist one, but premised instead upon a process of gradual accretion from a narrow basis through a series of limited innovations. This incremental approach was famously summed up in the 1950 Schuman Declaration's pronouncement that 'Europe should not be made all at once, or in accordance with a single plan'—a commitment supplying the platform for the ECSC Treaty of the following year.

The so-called 'Monnet method' was the touchstone for much of the subsequently influential neo-functionalist theorizing of EU integration.[15] Neo-functionalism holds that in order to maximize the effectiveness of core areas of market-making

[12] See Lacroix and Nicolaidis (n 11). They use the term 'transnational', but include within that the position of Weiler (n 5), which is self-styled as 'supranational'. See further, text at n 18.

[13] See eg Michael Burgess, *Federalism and the European Union: The Building of Europe, 1950-2000*; Derek Urwin 'The European Community from 1945-85' in M. Cini, (ed.), *European Union Politics*. (2nd ed, 2007) 13–29.

[14] Schuman was the French Foreign Minister from 1948 to 1953. Monnet, a career diplomat, was widely regarded as the visionary mind behind the Schuman Plan.

[15] See eg Ernst Hass, *The Uniting of Europe* (1958).

economic integration, appropriately supportive regulatory conditions should 'spill over' into adjacent sectors of economic and social policy: whether, say, the equalization of product safety standards or the removal of gender discrimination to provide a level playing-field in the labour market. Such spill-over would gain momentum from the gradual transfer of loyalties from state to regional level in line with the social logic of a sectorally differentiated institutional formation, and from the progressive self-assertion of higher tiers of governance benefiting from their accumulation of regulatory capacity to embrace the greater technical complexity of multi-sectoral accommodation. Along these channels, furthermore, it was predicted that economic and social integration would eventually and inevitably give rise to political integration.

Others envisaged a more strictly bounded approach to European integration. For those, such as the followers of German ordoliberalism, for whom the optimal operation of the market required its ring-fencing from the exercise of social policy,[16] or for those who supported Hans Ipsen's idea of the EU as a special purpose association for economic integration,[17] as for many other pragmatic statists identifying discrete arenas of overlapping interest, the making of a common economic area was an end in itself. Europe should be no more than a delegated market-making framework, enhancing the common pool of resources and economic welfare of all Member States, but in so doing excluded from state-based market-correcting social and welfare policy. The key legal register of this approach, rather than the familiar public-law model of documentary constitutionalism, was instead the constitution of an economic order through shared basic institutions of private law.

Patently, then, in the early diversity of political models, we observe a corresponding diversity of *substantive* social philosophies. The neo-federal vision from the outset involved a jurisdictional outlook in which Europe would have a scope and precedence of authority akin to that of the higher level of a (federal) state, while the neo-functional, ordoliberal and intergovernmental views restricted themselves, at least in the short term, to the core economic freedoms and other measures necessary to make a common market. Yet we should not overstate the distinction between these different angles of approach. Economic policies typically figure large within wider political projects and ambitions at the national or supranational level; conversely, as the neo-functionalists, amongst others, stress, visions of the polity framed by economic considerations are bound to concern themselves with the wider societal and political infrastructure supporting the economic vision.

[16] Ernst Mestmacker, 'On the Legitimacy of European Law' (1994) *RabelsZ* 615; for analysis, see eg Damian Chalmers, 'The Single Market: From Prima Donna to Journeyman' in J. Shaw and G. More (eds), *New Legal Dynamics of European Union* (1995) 55–72; Christian Joerges, '"Good Governance" in the European Internal Market: An Essay in Honour of Claus-Dieter Ehlermann' (2001) *EUI Working Papers*, RSC No. 2001/29; Alan Milward *The European Rescue of the Nation-State* (2nd ed 2000).

[17] Hans-Pieter Ipsen, 'europaische Verfassung—Nationale Verfassung' (1987) EuR 195.

Through these connections we find a gradual drift and refinement of structural models from either starting point—moving away from wide neo-federal ambition and narrow state-centred economistic arguments alike towards a new 'third way' centre of debate.

From the one side, one of the best-known and influential public philosophies of the EU, and one of the fullest attempts to specify supranationalism as a structural vision of the legal and political order, elevates economic prosperity to a polity-defining ideal within a broader understanding of the EU's mission. According to Joseph Weiler, the common market should not be justified just on wealth-maximizing grounds. As important has been the wider political prize of lasting peace—another defining ideal for a continent ravaged by two World Wars and a longer history of conflict—that the settled practice of economic co-operation and a common dignity born of the collective overcoming of poverty could help secure.[18] In turn, he argues, these complementary ideals of peace and distributed prosperity are best consolidated in an arrangement that treats Europe's transnational domain neither as a neutral inter-national arena for the pursuit of state interests nor as a form of continental proto-nationalism or incipient statehood. Instead, Europe should be cultivated in a legal-institutional space properly called '*supra*national' because situated above the Member States and standing in a transformative relationship to them. Rather than sublate or replace the state, supranationalism undertakes to honour the goods of belonging and originality associated with nation statehood. At the same time, it seeks to overcome the insularities and tame the excesses of national sentiment under a new voluntary discipline of 'constitutional tolerance',[19] exercised by the still formally sovereign members *inter se* in accordance with their new edifice of common regulation.

From the other side, many narratives of European Union which began from the economic core have branched out in reflection or anticipation of the expanding scope of the polity, though often retaining the ontological commitment to 'individualism'[20] and an 'market'[21] conception of citizenship prioritizing economic freedom. For example, Giandomenico Majone's work on a European 'regulatory state'[22] shares with ordoliberalism the idea that supranationalism should transcend partisan politics. Here, however, the invisible hand of the market is supplemented by the expert hand of the technocrat. In Majone's conception—one that enjoyed extended success in capturing the sensibility of a significant part of the Brussels elite—these additional regulatory measures are not concerned with macro-politically sensitive

[18] Weiler (n 5) Ch 7

[19] Joseph Weiler, 'A Constitution for Europe: Some Hard Choices' (2003) 40 *Journal of Common Market Studies* 563

[20] Alexander Somek, *Individualism* (2008)

[21] Michelle Everson, 'The Legacy of the Market Citizen' in Shaw and More (eds) (n 16) 73.

[22] See eg Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 *Journal of Public Policy* 139.

questions of distribution. Rather, they attend to risk-regulation in matters such as product and environmental standards where expert knowledge is paramount, and where accountability, it is argued, is best served by administrative law measures aimed at transparency and enhanced participation in decision-making by interested and knowledgeable parties rather than the volatile preferences of broad representative institutions.

What we see in Majone, and various other gradualist conceptions, is a movement from a narrowly economic delegation model to a somewhat broader 'demarcation'[23] model. Legitimation still flows primarily through the authorization of Member States, but that authorization increasingly tends to be indirect rather than direct. What is stressed is some combination of the modesty, relative non-contentiousness, specialist requirements and containable character of the supranational remit. The EU is treated variously, and often cumulatively, as the recipient and 'trustee' of a clearly delimited mandate,[24] as the disinterestedly efficient or expert 'technocratic'[25] instrument for the realization of common commitments, as a transnationally pooled extension of the modern administrative state,[26] or as the indispensable and relatively uncontroversial transnational means to pursue a range of the shared interests of national states and citizens towards a positive net 'output'.[27]

3. The Philosophical Reflections on Maturity

Yet the adequacy of these justificatory models—both those, like Weiler's, that stress the legitimating force of an original mission embracing economic convergence as just one part of a wider polity vision; and those, like Majone's, that stress the containable and largely consequential and derivative nature of the growing non-economic agenda—is challenged by the relentlessly expansionary dynamic of the Union.[28] They have become less plausible claims in a supranational polity with a broader and deeper policy agenda, with a bureaucracy and agency structure increasingly distant from national control, with a membership that has risen from an original six to twenty eight, with multiple veto points that work against any rolling back of community legislative reach still less constitutional competence, and

[23] Neil Walker, 'Surface and Depth: The EU's Resilient Sovereignty Question' in J. Neyer and A. Wiener (eds), *Political Theory of the European Union* (2011) Ch 10, 101.

[24] See eg Majone, 'Delegation of Powers and the Fiduciary Principle' in his *Dilemmas of European Integration* (2005).

[25] Christopher Lord and Paul Magnette, 'E Pluribus Unum? Creative Disagreement about Legitimacy in the EU' (2004) 42 *Journal of Common Market Studies* 183.

[26] Lindseth (n 10).

[27] As in Fritz Scharpf's 'output legitimacy' *Governing in Europe: Effective and Democratic?* (1999).

[28] A point Weiler himself recognized in due course; see eg Joseph Weiler, 'Integration Through Fear' (2012) 23 EJIL 1–5.

which is, consequently, faced with the erosion of a comfortable 'permissive consensus'[29] amongst key national elites across Europe. In short, the very conditions that demand a higher threshold of legitimation of common action have tended to leave the Union less favourably placed to reach that threshold. For as the EU increasingly sought market-making or market-correcting interventions involving politically salient choices, it simultaneously reduced the capacity of states to act independently in these policy areas. The robust legal protection of the single market, which acted as a guarantor of wider and narrower visions of the economic polity, was suited to a formative context where market-making measures impinged only lightly on other social policy objectives; or, at least, where states retained the procedural means to prevent politically controversial collective commitments in pursuit of these other objectives, and so were slow to make such commitments in situations with obvious winners and losers. But the expansion of negative integration beyond the narrow market-making sphere, and the concomitant growth of positive integration to fill the policy gap, altered the dynamics of collective action. In particular, the Single European Act and the Treaty reforms of the 1990s cumulatively advanced the twin strategy of expanding the scope of supranational competence into traditional statist strongholds of monetary, social and security policy and providing new qualified majoritarian means to facilitate the exercise of that expanded jurisdiction. And compounding the potential of this development to jeopardize specific national interests, the post-Cold War Enlargement programme reduced the specific weight of particular national voices—especially smaller and medium size states—in the formation of coalitions that could confidently endorse the direction of the new policy lines.

These legitimacy-challenging considerations, which also supply the rudiments of the recent euro crisis, have provoked two further categories of response in terms of the general justification of EU authority. Again, the distinction between structural and substantive considerations is pertinent, as is the distinction between more or less federalist responses to the structural question.

(a) The New Structural Agenda—Integration or Disaggregation?

In the first place, at the structural level, there is a renewed stress on viewing the overall legitimacy of the EU in original rather than derivative terms—as a self-justifying rather than a state-dependent entity. This new emphasis, in turn, divides into *integrated* and *disaggregated*[30] approaches. The *integrated* approach, with its revival of a neo-federal agenda, has been more prominent, both in the academy and as a matter of public philosophy. Here the independent authority of

[29] See eg Liesbet Hooghe and Gary Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus', (2008) 39 *British Journal of Political Science* 1–23.

[30] Walker (n 23) 103.

the EU is understood in terms of a notion of constituent power[31] that may revert more or less explicitly to a statist template of understanding.[32] The EU may not have been born free, but at a certain point of its development of an increasingly capacious and contentious agenda for the allocation of rights, risks and resources, the key to its legitimacy, has come to lie with the collective self-determination of all whom this agenda affects.

The justification of the EU, therefore, has begun to be understood as depending upon a process of democratic reflexivity—a collective self-homologation, related to but going beyond the self-norming that supplies the generative code of the legal order. This democratization process has often been linked to a 'deliberate political act to re-establish Europe', as Joschka Fischer put it in his famous Humboldt speech in 2000—widely acclaimed as a key catalyst for the subsequent Constitution-making project. And in addition to, and often seen as flowing from this kind of meta-democratic constitutional commitment,[33] a legitimating form of democratic reflexivity also requires robust representative institutions at the quotidian level of political decision making.

But a full-blown democratic approach to the justification of supranational authority is vulnerable to various objections. One questions its basic plausibility, insisting upon the resilience of the so-called democratic deficit. This challenge to the democratic credentials of the Union stresses the record of voter apathy and weak transnational political party organization, notwithstanding progressive empowerment of the European Parliament over 30 years, indicates the continuing marginalization of national Parliaments despite recent subsidiarity-inspired reforms, emphasizes the limited transparency and poor accountability of Council and Commission, and, at the meta-democratic level, cites the failure of quasi-populist initiatives such as the (Constitutional) Convention on the Future of Europe to nurture a fertile democratic subsoil. On this view, the lack of a European *demos,* culturally self-understood as such, means that the motivation for a committed, contestatory democracy remains significantly deficient.[34]

A second objection recalls the theme of the EU as a dependent polity, questioning the normative appropriateness of a solution that foregrounds democracy. A key danger of supranational democratic overreach is that euro-democracy stands in a negative-sum relationship with—and so risks curtailing and chilling—democracy

[31] See eg Hans Lindahl, 'The Paradox of Constituent Power: The Ambiguous Self-Constitution of the European Union' (2007) 20 *Ratio Juris* 485.

[32] See eg Federico Mancini, 'Europe: The Case for Statehood' (1998) 4 ELJ 29–42; E. Eriksen, *The Unfinished Democratisation of Europe* (2009).

[33] But by no means necessarily so. See eg Simon Hix, *What's Wrong with the European Union and How to Fix it* (2008).

[34] See eg Andrew Moravcsik, 'What Can we Learn from the Collapse of the European Constitutional Project?' (2006) 47 *Politische Vierteljahresschrift* 2.

in its culturally more appropriate forum of the nation state(s).[35] Take the recent debate over the single currency, sovereign debt, and the relationship between monetary and fiscal integration, in which the social legitimacy of the EU has been more profoundly challenged than ever before. This deep controversy turns on the legitimate boundaries of supranational policy intervention into traditional areas of national democratic competence through regulatory mechanisms that themselves lack the courage of collective democratic conviction. Instead, they rely upon intrusive forms of 'executive federalism'[36] and a culture of 'integration through fear',[37] which, in a vicious circle, further undermines the capacity of the European level to attract democratic support.

A third and related objection revisits the demarcation argument. It holds that in its appeal to the trumping authority of the collective will, the case for democracy fails to capture the more limited and specialist mandate of the EU. Given its location in the overall architecture of national, continental and global political authority, the argument for a thoroughgoing democratic ethos suited to an entity whose *raison d'être* is one of collective self-determination should not apply, even if some aspects of the EU's authority do require democratic legitimation.[38]

The *disaggregated* model takes a very different approach to democratic reflexivity. Democracy becomes an adjective rather than a noun—a mobile virtue of policy communities of discrete practical engagement where people have the knowledge and motivation to put things in common, rather than a holistic virtue of the large community of the 'demos'. What we need, on this view, is not mass ballot-box democracy, but a multiplicity of finely grained engagements of knowledgeable and mutually responsive constituencies aimed at providing context-specific optimizations of the common good. And if we look closely, it is argued, we can find such contexts in the EU across many different policy areas and mediated through such deliberative mechanisms as Comitology[39] and the Open Method of Co-ordination.[40]

But there is a level of analysis problem here. Democracy can certainly be disaggregated, often doing its best work in local micro-contexts. However, unless we hold that there are no mutual 'externalities' between discrete policy areas which require trans-contextual evaluation; that there should be no broader conception of the public interest (distributive fairness, equal rights protection etc) guiding individual sectoral choices; and that, underpinning these other concerns, there is no

[35] See eg Dieter Grimm, 'Integration by Constitution' (2005) 3 *International Journal of Constitutional Law* 193.

[36] Jurgen Habermas, *The Crisis of the European Union: A Response* (2012).

[37] Weiler (n 28). [38] See eg Moravcsik (n 34).

[39] See eg Christian Joerges, 'Deliberative Political Processes Revisited: What we have Learnt about the Legitimacy of Supranational Decision-Making' (2006) 44 *Journal of Common Market Studies* 779.

[40] See eg Charles Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimental Governance in the European Union' (2008) 14 *European Law Journal* 271.

need for, or no threat to, the constitutive public goods of trust, respect, solidarity and mutual tolerance in the disaggregated approach, then there is something lacking. In particular, the disaggregated approach disregards the twofold quality of the 'demos'; that it represents a shorthand for those constitutive goods—respect, trust, solidarity and tolerance—which by their input not only make the broader democratic framework possible in terms of providing its motivational wherewithal, but are also among its greatest accompanying virtues and outputs. So, the fact that we find alternative routes to democratic practice at disaggregated sites despite the absence of these constitutive goods as motivational impulses at the input stage, only addresses one half of the problem. It can do nothing to cure or compensate for the absence of these constitutive goods as independently virtuous companions and dividends of the democratic process.

The structural debate about the appropriate democratic philosophy of the European Union remains very much alive. The integrated and disaggregated approaches each arguably needs the other to help address its own shortcomings. There remains a deep-rooted sociological problem about the conditions for democratic motivation, and a susceptibility to resort to a circular or boot-strapping approach, in which the capacity to achieve the institutional conditions of democratic maturity seems to depend upon a common political commitment that is elusive in the absence of just such a prior institutional achievement. There also remains a deeper normative question, trailed in the third critique of the integrated approach, concerning the appropriate centrality of the democratic ideal supranationally.

In this complex terrain, the idea of a 'right to justification'[41] has recently been mooted to allow a more context-sensitive justificatory methodology for different sectors and levels of supranational decision. On this view, voice may be more or less appropriate than say, output efficiency or expertise, as a way of justifying common action at different levels and different sectors. So, provided we respect that logic of appropriateness, we need not make rigid choices for or against the priority of democracy in general or in particular institutional contexts. Such an approach, however, for all its promise, still cannot easily overcome the sociological deficit of supranational democracy, however qualified, or resolve the meta-question of who gets to decide what pattern and degree of democracy is appropriate and sufficient in fulfillment of the right to justification.[42]

[41] See Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (2007); and as specifically applied, with some variation, to the EU, see Jurgen Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (2012).

[42] See eg Neyer, 'Justice, not Democracy; Legitimacy in the European Union' (2010) 48 JCMS 903–921; and (from a critically democratic perspective), see Danny Nicol's reply, and the riposte by J. Neyer (2012) 50 *JCMS* 508–522, 523–529. See also Forst 'Transnational Justice and Democracy' *Normative Orders Working Paper 4/11.*

(b) The New Substantive Agenda: The Return to Ideals

Turning, more briefly, to new substantive approaches, we encounter arguments that address the problem of authority in the post-foundational phase neither by dismissing the very idea of mission legitimacy as an anachronism for a mature polity nor by viewing democratic process as a sufficient alternative. Rather, they adjust the mission to the demands of the twenty-first century. On one view, indeed, the historical problem of the EU lies neither in the rigidity of its mission nor in its having become stale or exhausted, but in an abiding failure to treat seriously enough the development of a deep and distinctive purpose and set of guiding values.[43] Candidates for a renewed substantive mission include a globalized peace agenda, emphasis upon human rights and the rule of law, and a more expansive notion of freedom based upon material capacity rather than non-interference.[44] All of them seek to track, reinforce or reshape current trends in EU law and policy. Within the last sub-category, one approach that has achieved particular prominence since the onset of the financial crisis sets out to correct a historically 'unbalanced' preference for economic rights over social solidarity and collective provision.[45]

Additionally, the increasingly outward-looking perspective of the EU—witnessed in its Enlargement programme, its Neighbourhood Policy, its foreign and defence policy and its closer engagement with the processes and consequences of globalization generally, has meant that much of the intense engagement with a value-based *raison d'être* has been in this area.[46] The idea of 'normative power Europe',[47] for example, champions an approach to the spreading of influence that leads by continental example and via conditional agreements rather than through military or other more coercive forms of authority. The structural model of supranationalism itself may be presented as a template of co-operative transnational government for emulation in other regions.[48] And by taking a prominent role in matters such as climate change, global health, development aid and anti-terrorism, the EU promotes its contribution to these substantive global goods as a defining feature of its mandate.[49]

[43] See eg Andrew Williams, *The Ethos of Europe* (2010) esp. Ch 7; Philp Allott, *The Crisis of European Constitutionalism: Reflections on the Revolution in Europe* (1996) 34 *Common Market Law Review* 339.

[44] See eg Williams (n 43) Chs 2–6.

[45] Mark Dawson and Floris De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 *Modern Law Review* 817; see also Andrea Sangiovanni, 'Solidarity in the European Union: Problems and Prospects' in J. Dickson and P. Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (2012) 384.

[46] Gráinne de Búrca, 'Europe's Raison D'Etre' in Dimitry Kochenov and Fabian Amtenbrink (eds) *The European Union's Shaping of the International Legal Order* (2013).

[47] Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235.

[48] See eg Rachel Kleinfeld and Kalypso Nicolaidis, 'Can a Post-Colonial Power Export the Rule of Law? Elements of a General Framework' in G. Palombella and N. Walker (eds), *Relocating the Rule of Law* (2009) 139.

[49] See eg de Búrca, (n 46).

III. The Interpretation of EU Law

Issues of underlying mission and purpose lead naturally to the question of how EU law should be approached as an object of interpretation. A major area of recent development in legal philosophy concerns the role of the judge or other privileged interpreter in deciding disputes under the law. Positivist and non-positivist theories offer differing answers. Positivists treat the law as a matter of rules derived from the socially acknowledged authoritative sources of the legal order in question, and so understand legal interpretation as the proper application of these rules. Non-positivists understand law, and its interpretation, as extending beyond the 'posited' materials of a legal system to include background principles or other independent moral or ethical considerations.[50] In EU law, this basic philosophical distinction is not insignificant, yet has been less crucial than in many settings in producing distinctive understandings of the limits of legal interpretation. This is partly a reflection of the comparatively recent emergence of this kind of inquiry in the EU context. This is due, in turn, not only to the relative novelty of EU law itself and its attendant legal-philosophical scholarship, but also to the formalist emphasis of the civilian tradition—the prevalent legal tradition throughout the EU—on the importance of a closed system of authority in which all legal questions are resoluble by means of resources and styles of reasoning internally prescribed by law. Yet the limited resonance of the positivist/non-positivist divide in accounting for the role of the EU judge also has to do with the creative way in which the language of sources has been used to allow broader consideration of the basic goods of the legal order to be entertained within legal interpretation.

Of central significance here is the emphasis on general principles of EU law. This is the register in which both external discussion and insider (in particular judicial) contemplation of the key interpretive guides to EU law takes place. In the academic literature, general principles are categorized in different ways,[51] but again we may usefully draw on the distinction between structure and substance. Structural principles are those such as primacy, attribution of competences, institutional balance, subsidiarity and sincere co-operation. Each is structural in the sense that it reflects and addresses the peculiar architecture of the EU as an entity that is horizontally and vertically dispersed—both multi-institutional and allocated across state and

[50] For a useful analysis of these background theoretical orientations in the EU context, see George Letsas, 'Harmonic Law: The Case against Pluralism' in J. Dickson and P. Eleftheriadis, (eds) (n 45) 77; see also Julie Dickson and Pavlos Eleftheriadis, 'Introduction: The Puzzles of European Law' 1, also in Dickson and Elepftheriadis (n 45).

[51] For a full overview of these categorizations, see Takis Tridimas, *The General Principles of EU Law* (2nd ed, 2006) Ch1; see also Armin von Bogdandy, 'Founding Principles' in A. von Bogdandy and J. Bast (eds) *Principles of European Constitutional Law* (2010).

inter-state levels. What we are concerned with here is the internal articulation of those normative premises that, in combination, give detailed shape to the EU as a 'supranational' ideal in the broader structural sense conveyed in the previous section. In the second place, substantive principles refer to supposedly 'compelling'[52] or 'axiomatic'[53] legal principles somehow inherent in the idea of legal order. These include the rule of law itself, but also fundamental rights protection, equality, proportionality, legitimate expectations and rights of legal defence.

While there is some agreement over the broad content of these principles, various tensions in their treatment reflect underlying philosophical disagreement. To begin with, and bearing upon the distinction between positivist and non-positivist understandings, the increasing prominence of general principles in the interpretation of EU law is a consequence both of a more candid acceptance of the compelling force of certain self-standing moral and ethical ideas in the interpretation of EU law, and of the expansion, since the Treaty of Maastricht, of the already strong strain of formalism towards an explicitly textual approach to the recognition of general principles. Understood as causal forces, these two phenomena are mutually supportive, yet this leaves unresolved the matter of which provides the authoritative basis for general principles. Whether we are discussing, say, the relationship between the Charter of Fundamental Rights and the general recognition of rights as fundamental to the EU legal order, or the relationship between general ideals of solidarity or equality and their various articulations in the preambles and texts of European Treaties and laws, the question of whether the enactment is the source of the principle in question or merely a medium for recognizing its prior existence remains.

Secondly, there is a tension between 'bottom-up' and 'top-down' understandings of general principles. Whereas the structural principles are viewed as *sui generis*, the substantive principles are understood as of broader origins and significance. On the one hand, there has long been a strong emphasis upon the 'common constitutional traditions' of the Member States as a source of inspiration and comparative learning both within the jurisprudence and in the academic commentary.[54] On the other hand, stress is often placed upon the universal significance of the rule of law and associated values, in some case associated with a natural law conception of their foundations.[55] Again, these approaches can be understood as mutually supportive in practice, but there remains an underlying difference—at least of emphasis. On one side, the accent is on the common legal-ethical horizon of a small group of Western European states gradually extended to Central Europe. On the other

[52] H. G. Schermers and D. Waelbroeck, *Judicial Protection in the European Union* (6th ed, 2001) 28.
[53] G. Issac, *Droit Communautaire General* (3rd ed, 1992) 145.
[54] See eg Tridimas (n 51) 5–11.
[55] See eg Schermers and Walebroeck (n 52) 28–30.

side, the emphasis is upon moral principles that transcend and should engage any conceivable legal order.

Thirdly, and finally, there is tension over the extent to which the general principles of the legal order—whether 'posited' or not and whether 'bottom-up' or 'top-down'—should be understood as permanent or long-term ideals set apart from the vicissitudes of the EU as a political order, or as sensitive to the changing role and purpose of the EU political order. On one view, the confident maturity of the legal order is indicated in its relative autonomy from these circumstances. On another view, the restricted purview of the discussion of general principles is instead a reflection and indictment of what—to recall discussion in the previous section—is seen as the broader failure of the EU to develop a forthright and morally defensible mission for the twenty-first century.[56] From that perspective, the relative autonomy of the legal order from deeper ethico-political concerns is understood as a symptom of, and apology for, that broader moral shortcoming, rather than accepted in general terms as the self-standing virtue of any legal order seeking to protect itself from undue political influence.

IV. The Efficacy of EU Law

Leaving behind the question of ideal interpretation, which bites most deeply in the 'hard case', let us turn to the general efficacy of EU law. Given what we know about the foundation of the EU and its claim to authority, on what basis, and with what consequences for the overall supranational project, does EU law operate as binding law? And in what sense, if at all, are these operative conditions distinctive to EU law? Here we find a number of different theoretical positions, corresponding to familiar philosophical strains of how law operates as a form of practical reason. These strains are in turn, instrumental, formal, congruent and constitutive. They need not be incompatible, but different approaches to the general efficacy of EU law will emphasis one or more strains over others, and perhaps at the expense of others.

In the first place, we must recognize the force of the instrumental argument for law as the basic motor of supranationalism—the key means to the end of European integration. Writing in the early 1980s, before the gradual development of Qualified Majority Voting (QMV) and the Treaty-based expansion of legislative jurisdiction beyond the market-making core, Weiler drew attention to the 'dual character of

[56] Williams (n 43) Ch 7.

supranationalism'[57] as a key evolutionary dynamic. At that stage, developed legal supranationalism in the internal market, particularly the Court of Justice's assertion of the formal properties of the EU as an autonomous legal system, stood in stark contrast to a modestly conceived political supranationalism. Yet the two were strategically related. The early prominence of legal supranationalism did not occur in spite of political underdevelopment, but was encouraged or acquiesced in precisely *because* political supranationalism remained so modest, with the Member States retaining a veto power in most areas of European policy making. The persistence of the national veto in supranational forms of legislative integration also provided reassurance to those who might otherwise have been concerned that legal constitutionalism offers too much encouragement to a federalist vision. The most basic key to the attractiveness of law as the agent of supranationalism, therefore, lay in the fine balance that is struck. It depended on its regulatory capacity to steer, to consolidate and, typically through judicial recognition of the claims of private litigants, to guarantee positive-sum intergovernmental bargains across wide-ranging aspects of economic integration and other more limited aspects of market-correcting regulation, *yet* to do so without threatening key national political prerogatives. More specifically, the law's instrumental value was twofold. It provided a legible and stable method of charting and co-ordinating the supranational settlement. Additionally, in a context of market making where the temptation for each national member of the continental trade-liberalizing cartel to engage in protectionism while exploiting the general opening of the markets of the other national members posed a significant collective action problem, it performed a vital disciplining function. The consistent application and enforcement of the rules of the game by independent legal institutions was crucial in forestalling free-riding and rendering common commitments more credible.[58]

Structural factors reinforced the instrumental attractiveness of legal constitutionalism. The empowerment of the Court of Justice responded to a conception of the supranational settlement understood, in the language of organizational economics, as an incomplete contract. Framework texts, even the relatively detailed codes of successive EU treaties, allow a degree of open texture. In so doing, they lower the bar of prerequisite consensus and allow judicial adaptation of the text to changing conditions without new resort to the drawing board. The resulting margin of judicial manoeuvre is key to reconciling stability and flexibility in any constitutive context; all the more so in the EU, where the political conditions for regular textual reform were for long unfavourable. The Court of Justice, then, became a vital mechanism to avoid conflict or gridlock arising from the divergence

[57] Weiler, 'The Community System: The Dual Character of Supranationalism', (1981) *Yearbook of European Law* 267.

[58] Martin Shapiro, 'The European Court of Justice', in P. Craig and G. de Búrca, *The Evolution of EU Law* (1st ed, 1999) 321.

of national political interests. As a 'trustee court'[59] delegated significant power to bind its national principals and to expand its zone of discretion, it could 'complete' the supranational contract in incremental fashion. It would do so both by advancing the material agenda of integration case by case and by adjusting the balance, so sensitive in the mixed polity context, in boundary conflicts over the powers of the diversely-sourced institutions.[60]

The fiduciary role of a trustee court in the making of a legal constitution, however, is not legitimated solely through considerations of system functionality. Performative factors also matter, and here the tradition of legal formalism, underpinned by the predominately civilian roots of the Member States, is significant. A position of judicial neutrality, assiduously cultivated in the context of a Court composed of senior jurists from all Member States and delivering judgment in a typically laconic and scrupulously non-partisan 'legalese', has lent cumulative authority to the Court's decision making.[61] The fact that so much of the jurisdiction of the EU and its judicial organs could be articulated in terms of (primarily economic) rights has reinforced this formalist mindset and self-presentation. It has meant that the Court of Justice, for all that it inevitably retained a considerable margin of discretion in the polity-building phase, could nevertheless lay the constitutional foundation stones in a manner closely associated with its own ostensibly apolitical authority as an adjudicatory organ—in the language of individual rights and remedies so familiar from the historical lexicon of modern European domestic adjudication.[62]

The prominent success of EU law as part of the European project also depends upon a basic congruence between many of the earlier and predominantly economic understandings of the logic of integration and the basic modality of law. As already noted, for the ordoliberals, the Treaty of Rome supplied Europe with its own economic constitution, a supranational market–enhancing system of rights whose legitimacy *required* the absence of democratically responsive will formation and consequential pressure towards market-interfering socio-economic legislation at the supranational level, a matter best left instead to the Member States. Ordoliberal theory, then, provides a classic model of how an autonomous legal order, through generating and ring-fencing a framework of economic exchange centred on the four freedoms, provides a platform for the efficient operation of a capitalist economic logic. And Ipsen's theory, to which Majone's contemporary regulatory approach is a notable successor, also continues to operate within a logic of demarcation. In drawing a sharp distinction between the value-judgments of

[59] Alec Stone Sweet, 'The European Court of Justice' in P. Craig and G. de Búrca (eds.) *The Evolution of EU Law* (2nd ed, 2011) 121.

[60] See eg Shapiro (n 58) 321–322; Fritz Scharpf ,'Legitimacy in the Multilevel European Polity' in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (2010) 89.

[61] See eg Weiler, (n 5) Ch.5.

[62] See eg Stone Sweet (n 59); Scharpf (n 60).

distributive politics and narrower expert or stakeholder dominated areas of risk regulation and cost-benefit analyses, these approaches were bound to favour a specifically *legal* decision-making method—a technique well versed and widely validated both in the jurisdictional matter of drawing and protecting the boundaries of the non-political and in the development of process rights and responsibilities within that non-political sphere.

As we have already seen, however, the conditions that placed law—understood in instrumental, formal or congruent terms—at a premium in an earlier phase of European integration, are challenged in a polity more broadly and transparently concerned with the negative-sum allocation of risks and resources. Legal instrumentalism becomes less attractive when the ends become more controversial. Legal formalism, too, becomes less adequate the more the law is implicated in controversial policies of positive integration. The idea of congruence between the demarcation-dependent methodologies of European integration and law's boundary-maintenance attributes fades as the supranational agenda becomes more open ended. As these strands have weakened, however, another way of conceiving of law in the EU has obtained a new prominence. Increasingly, what has been sponsored in recent years is the idea of law as somehow constitutive of the political conditions necessary to overcome the crisis of legitimacy of a polity unable to bear the social consequences of its distributive logic.

For some time, this brand of thinking was closely tied up with the idea of a new constitutional founding. Yet, as we have seen, the notion of a written constitution as a kind of meta-democratic catalyst, working through the symbolic force, the participatory breadth and epistemic depth of its settlement terms, foundered in *fact* on the practical failure of the 2005 Constitutional Treaty and *in theory* on the tendency to assume as a constitutional *precondition* the common social commitment that could not emerge other than as a constitutional dividend.[63] Today, in consequence, the constitutional language is more muted, but there remains a strain of constitutive theory, closely associated with Habermas, that continues to invest in the solidarity-generating potential of law.[64]

This argument depends upon drawings clear distinction between the condition of *Sittlichkeit*, understood as an embedded form of common ethical life, and *solidarity,* understood as an active ethical bond entered into 'on the expectation of reciprocal conduct—and on confidence in this reciprocity over time'.[65] Whereas the former relies on a pre-political community of attachment, the latter does not. What matters, instead, is the fair appeal to mutual interests inscribed in the substantive

[63] See eg Neil Walker, 'Europe's constitutional momentum and the search for polity legitimacy' (2005) 3 *International Journal of Constitutional Law* 211–238; Moravcsik (n 34).

[64] See eg Habermas (n 36); see also his 'Democracy, Solidarity and the European Crisis' *Social Europe Journal* 07/05/2013 http://www.academia.edu/4259473/Democracy_Solidarity_And_The_European_Crisis_By_J%C3%BCrgen_Habermas.

[65] Habermas, 'Democracy, Solidarity and the European Crisis' (n 64).

terms of the bond and the belief of each party in the long-term credibility of the commitment of all others. Even if a widely negotiated written constitutional settlement were a feasible option, therefore, to the extent that it declares as a symbolic dividend the prior affinity of 'We the People', it may be unnecessary, and arguably inappropriate as a solidarity platform. What would be both appropriate and necessary, however, and what has been conspicuous by its absence in the euro crisis, with its accelerating grant of discretionary powers to executive bodies intended to shore up a historically compromised model of monetary stability,[66] is an inclusive and transparent form of law making producing general norms that speak explicitly, and with settled commitment, to a renewed reciprocity of interests among all Member States. In this broader sense, law's constitutive function depends much more on the substance of what is agreed than on the legal style in which it is agreed.

V. The Systemic Character of EU Law

Legal philosophers have long been interested in the idea of legal system, and for obvious reasons. We all recognize that one of the distinguishing features of the law, indeed what makes the law 'the law' and not just a bundle or jumble of 'laws', concerns how it hangs together as a whole. Legal system, or legal order, or even legal jurisdiction, then, are all at root metaphors we use to explore that holistic sense of law. Granted, the systemic quality will be more important for some than for others. Legal positivists, with their stress on the authoritative sources of law, are likely to see the relevant tests of the law's validity and bindingness for most if not all intents and purposes as being 'jurisdiction-relative'.[67] Yet even natural lawyers, on the one hand, who may take a less bounded view of law's moral writ,[68] or legal realists or pragmatists on the other, who may, by contrast, take a more context-specific approach to legal justification, are bound to acknowledge something significant for our understanding of law in law's systematic capacity for self-organization in terms of rule hierarchies and interlocking institutions of law creation, law application and law adjudication.

If legal system is so important, however, then the EU poses an obvious puzzle. The EU, with its partial jurisdiction, its Treaty-dependent foundations and its reliance on state institutions for much of the enforcement and some of the basic

[66] See eg Dawson and De Witte (n 45); Damian Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 *European Law Journal* 667.

[67] Neil MacCormick, *Questioning Sovereignty* (1999) 14.

[68] See eg John Finnis, 'The Truth in Legal Positivism' in J. Finnis, *The Philosophy of Law* (2011) 174.

legislative elaboration of its normative order, lacks the comprehensiveness of reach, original and unchallenged supremacy, and wide capacity to absorb other legal materials on its own terms that the typical state-centred legal system has.[69] Even in its own internal framework, it may lack the institutional and normative integrity of a fully coherent legal system, an argument particularly pronounced in the immediate post-Maastricht era with the introduction of an institutional division between mainstream internal market law, Justice and Home Affairs and common foreign and defence policy in the so-called Three Pillar system.[70] And the EU's credentials as a coherent legal whole are all the more challenged externally, where we contemplate considerable intersection and complex interdependence with the laws of the Member States.

Does this mean that the EU has no legal system, or at least no independent legal system of its own, but is merely a satellite or extension of the 28 Member State legal systems? Or is the EU part and parcel of one large, conglomerate legal system also embracing the legal systems—or rather sub-systems—of all the Member States? Or is the EU best viewed as possessing its own legal system, distinct from those of the Member States even though densely interconnected with them?[71]

Those who pursue the first option, stress the sovereignty in the last instance of the states as 'Masters of the Treaties', often invoking in justification of this reading their primary democratic credentials.[72] Those who pursue the second option tend, conversely, towards a monistic understanding of the supranational order, accepting the self-understanding of the EU legal order, with its pivotal doctrines of supremacy and direct effect and its claim to an overarching standard of legal certainty, as the best overall conception of the relationship between European law and national law.[73] Those who pursue the third option, often called constitutional pluralists, stress the co-existence of national and supranational systems with overlapping and interlocking jurisdictions, note the absence of any general hierarchical rule or other method for resolving the relationship between these orders, and urge some other method of reconciling the different legal systems.[74] On normative grounds,

[69] See eg Joseph Raz *The Authority of Law* (2nd ed, 2009) 116–120.

[70] See eg Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *Common Market Law Review* 1.

[71] Julie Dickson, 'Towards a Theory of European Union Legal Systems' in J. Dickson and P. Eleftheriadis (eds) (n 45) 25, 47.

[72] See eg Grimm (n 35).

[73] See eg Julio Baqero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14 *European Law Journal* 389.

[74] See eg Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317; Miguel Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N. Walker (ed) *Sovereignty in Transition* (2003) 532; Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262. See also, M. Avbelj and J. Komarek (eds) *Constitutional Pluralism in the European Union and Beyond* (2012).

they might query the trumping significance of the state's claim to democratic priority on the one hand, or the necessity of the EU's unqualified claim to an umbrella legal certainty on the other. In addition, on descriptive grounds, often pointing to well-known cases of tension between national constitutional courts and the Court of Justice over the extended jurisdictional ambition of the EU post-Maastricht, they claim the structural inevitability of an unresolved relationship of authority between national and supranational levels. In other words, regardless of the desirability of a pluralist starting point, in the special circumstances of the EU it may simply be unavoidable.

The pluralist hypothesis provokes two key sets of questions. First, if we accept its diagnosis as persuasive, how do we treat the heterarchical space between legal systems? Here the options include: so-called 'radical pluralism',[75] in which the solutions are strategic rather than legal, or at least follow no context-independent legal formulae beyond the particular bridging mechanism agreed between the discrete legal systems in question; 'contrapunctual law',[76] where the law between systems develops, through inter-court and other inter-institutional dialogue, as a kind of melodious blend from different starting points; and an abstract-normative approach, where brokering ideas such as legality, due process, subsidiarity and respect for fundamental rights are elevated to the status of trans-systemic, 'cosmopolitan' principles.[77]

This last approach, with its emphasis upon a generally applicable normative solution, already stretches our sense of systemic pluralism. This leads to a second and more fundamentally challenging question voiced by those who are sceptical of pluralism's basic premises. On this sceptical view, pluralism offers an unhelpful or at least an inadequate conceptual framework. In one variant of scepticism, pluralism is inadequate because, by concentrating so much on the authoritative foundations and co-ordinates of discrete systems, it fails to appreciate that the character of EU law is best grasped precisely in the interaction between systems—in 'relations, of mutual reference, between EU institutions and Member State institutions which share and exchange norms and normative powers to create, apply and enforce norms'.[78] On this account, the coherence of EU law is captured by focusing not on the institutional dimension of the relevant legal systems in play, which in a multi-system environment is apt instead to reveal disorder and incoherence, but on

[75] See in particular, Neil MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 *European Law Journal* 259. He later modified this position: see in particular, MacCormick, *Questioning Sovereignty* (1999) Ch 7.

[76] Maduro (n 74).

[77] Mattias Kumm, 'The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection' in J. Dickson and P. Eleftheriadis (eds) (n 45) 216.

[78] Keith Culver and Michael Giudice 'Not a System but an Order: An Inter-Institutional View of European Union Law' in J. Dickson and J. Eleftheriadis (eds) (n 45) 54, 68.

the emergent coherence of the inter-institutional dynamics themselves, in this way characterizing the EU as a 'distinct non-systemic legal order'.[79]

A second critique of pluralism is still more radical, and goes directly to its positivist foundations. On this view, once we overcome the positivist preoccupation with the sources and pedigree of different systems of rules, then it no longer makes sense to treat the relationship between national and European courts over the jurisdictional limits and proper meaning of EU law as one where different authoritative sites compete and require to be reconciled. Instead, if we see law as providing a form of practical reason in which the right answers depend upon an appropriate consideration of the normative materials regardless of *who* decides, rather than upon the authority of the decision-maker, then there is nothing to prevent us from looking at the European case as a form of 'harmonic law',[80] with all parties engaged in a common and cumulative interpretive exercise.

Disagreement persists over the value of the pluralist perspective and is unlikely to be resolved. This is so because pluralist and non-pluralist perspectives alike rest their case not only on the explanatory adequacy of their positions, but also on their ability to provide a normatively attractive picture of a legal configuration that is still in the process of becoming. The argument, then, is not just about the best account of how the world is, but also about how through that construction we can also influence and aid the *reconstruction* of a distinctive, in some respects even unprecedented, and certainly unsettled model of legal authority.

The debate over the systemic character of EU law is an appropriate place to conclude our discussion. It illustrates well both the interconnectedness of our various philosophical questions and the fertile relationship between the philosophy of EU law and the philosophy of law more generally. As regards the first point, the pluralist debate is clearly bound up with controversies over how we resolve the basic structural question of the kind of authority-claiming entity or polity the EU is. Additionally, by casting doubt upon the idea of EU law as a single interpretive community, the pluralist understanding suggest possible objections or limits to the idea of European law as a distinct and integrated forum of principle. And by indicating that European law is not necessarily to be understood in singular terms, the pluralist perspective may also help us to refine our understanding of the success or otherwise of some of the ways—whether instrumental, formal, congruent or constitutive—that law is modelled as a form of practical reasoning in the European case. As regards the second point, more clearly than the other themes we have examined, the debate over legal pluralism and legal system in the supranational context not only highlights how EU law offers a new site for the hosting of older and wider debates within legal philosophy, but may also prompt us to consider afresh the terms of these older debates and the answers provided by them.

[79] Culver and Giudice (n 78) 76.

[80] Letsas (n 50), and in the same volume, Pavlos Eleftheriadis, 'Citizenship and Obligation' 159.

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