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INSIGHTS

QUESTIONING EUROPEAN (UNION) SOVEREIGNTY

edited by Ségolène Barbou des Places

EU AUTONOMY: JURISDICTIONAL SOVEREIGNTY BY A DIFFERENT NAME?

CHRISTINA ECKES*

ABSTRACT: Despite all rhetorical references to European sovereignty, the EU cannot make a convincing claim to sovereignty *under international law*. International law does not vest non-state actors with sovereignty. What the EU can do and what it also does is that it *acts as if it was a sovereign entity* and *claims certain rights that are considered core elements of State sovereignty*. This paper sheds light on the meaning of the notion of sovereignty in the specific context of the EU's *external legal relations*. It argues that the Court of Justice's conception of the autonomy of the EU legal order provides the EU *de facto* with a core element of State sovereignty, namely a form of (negative) jurisdictional sovereignty that otherwise only States can claim. Under international law, a State's exclusive right to decide what acts shall be given effect on its territory is virtually undisputed. It is the core of the external aspect of negative sovereignty and functions as an independent, overriding justification to keep external influences out. The Court's autonomy conception serves the same purpose. The Court's broad conception of external influences that could threaten the EU's autonomy has in the past jeopardized international cooperation plans of the political institutions of the EU. Yet, shutting out external interference is also a necessary precondition for positive sovereignty, i.e. the ability to determine one's own course of action as a polity, as well as democratic legitimacy.

KEYWORDS: sovereignty – autonomy – Court of Justice – jurisdiction – opinion 2/13 – *Kadi*.

I. INTRODUCTION

The use of the term sovereignty in politics is soaring: not just in the national context – most prominently in the context of Brexit¹ – but also in relation to the EU.² Since 2017,

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¹ The “take back control” slogan of the Vote Leave campaign confirms how sovereignty can capture the public imagination.



French President Emmanuel Macron has repeatedly and provocatively stated in slightly different formulations that “only Europe can [...] guarantee *genuine sovereignty* or our ability to exist in today’s world to defend our values and interests”.³ The Commission President Jean-Claude Juncker entitled his last State of the Union in September 2018 “The Hour of European Sovereignty”.⁴ He had a clear external relations focus, advocating the Union’s global responsibility and added value in the current geopolitical situation.

Despite all rhetorical references to European sovereignty, the EU cannot make a convincing claim to sovereignty *under international law*. International law does not vest non-state actors with sovereignty. What the EU can do and what it also does is that it *acts as if it was a sovereign entity and claims certain rights that are considered core elements of State sovereignty*. Yet from a strictly legal perspective, neither international organisations nor the EU Member States formally accept the EU’s claims. This paper studies how the Court of Justice, while it has never literally claimed “sovereignty” for the EU, conceives of itself as a domestic court and claims, in spite of the EU’s contested status, sovereign rights for the EU under international law. The question of whether its claims are or should be recognized by other actors must be left aside in this short contribution to the debate.

This *Insight* argues that the Court’s conception of the autonomy of the EU legal order⁵ provides the EU *de facto* with a core element of State sovereignty, namely a form of (negative) jurisdictional sovereignty that otherwise only States can claim. By doing so, it aims to shed light on the meaning of the notion of sovereignty in the specific context of the EU’s *external legal relations*.⁶ Under international law, a State’s exclusive right to decide what acts shall be given effect on its territory is virtually undisputed. It is the core of the external aspect of negative sovereignty and functions as an independent, overriding justification to keep external influences out.⁷ Negative external sovereignty in this sense is consciously disconnected from the ability to govern, which is here understood as positive in-

² See M. LEONARD, J. SHAPIRO, *Empowering EU Member States with Strategic Sovereignty*, in M. LEONARD, J. SHAPIRO (eds), *Strategic Sovereignty: How Europe Can Regain the Capacity to Act. European Council on Foreign Relations Policy Brief*, 2019, p. 5 *et seq.*

³ Sorbonne speech of Emmanuel Macron, 26 September 2017 (emphasis added), available in English at: international.blogs.ouest-france.fr. Macron reiterated these ideas in his address to the European Parliament on 17 April 2018, available at: europarl.europa.eu.

⁴ European Commission, *State of the Union 2018: The Hour of European Sovereignty, Speech of the President of the European Commission*, 12 September 2018, ec.europa.eu.

⁵ See e.g., Court of Justice, opinion 2/13 of 18 December 2014 and opinion 1/17 of 30 April 2019; see also earlier: Court of Justice, opinion 1/09 of 8 March 2011 and opinion 1/91 of 14 December 1991. See also: Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat International Foundation v. Council and Commission*.

⁶ The terms “external relations” (emphasis on the law and political interaction between international actors) and “external actions” (emphasis on the Union’s participation and contribution in this), while expressing a different nuance, are used interchangeably.

⁷ See also: M. KOSKENNIEMI, *From Apology to Utopia. The Structure of International Legal Argument*, Cambridge: Cambridge University Press, 2005, p. 237.

ternal sovereignty. One could even argue that this justification of shutting others out is one of the very purposes of using the notion of sovereignty under international law. It explains the frequent use of the notion before the International Court of Justice.

Section II unpacks the meaning of jurisdictional sovereignty. It explains why the concept is such a central element in the concept of sovereignty. It briefly distinguishes between the negative and positive, internal and external dimensions of sovereignty. Section III examines how the Court construes the autonomy of the EU legal order as a self-contained and self-referential legal system distinguishable and independent from national and international law. Section IV explains how this autonomy conception of the Court provides the EU with one core element of (State) sovereignty, namely *jurisdictional sovereignty*. Section V engages critically with the Court's conception and reflects more broadly on European sovereignty.

II. JURISDICTIONAL SOVEREIGNTY: A CORE ELEMENT OF AN ELUSIVE CONCEPT

The disagreement on sovereignty runs deep.⁸ It extends not only to the scope of the concept and conditions for being sovereign but also to the justification of the concept itself.⁹ Martti Koskenniemi distinguishes two irreconcilable positions of conceptualizing sovereignty: the legal approach that understands sovereignty as established and confined within the law and the pure fact approach conceptualising sovereignty as a normative fact which the law must accommodate. The two approaches go back to Hans Kelsen and Carl Schmitt, respectively. The core difference between the two approaches is how they understand the relationship between law and politics: each conferring primacy to one of them. Koskenniemi successfully demonstrates that both positions are necessary to avoid collapsing the concept of sovereignty by reducing it either to its legal or its factual political dimension, neither of which can by and of itself grasp the concept's meaning and force. What we can learn from this is that the combination of the two dimensions is what allows sovereignty to bridge facts and norms and vest it with force beyond the purely legal or purely factual context.

⁸ D. LOICK, *Kritik der Souveränität*, Frankfurt: Campus Verlag, 2012; D. GRIMM, *Souveränität – Herkunft und Zukunft eines Schlüsselbegriffs*, Berlin: Berlin University Press, 2009; R. JACKSON, *Sovereignty*, Cambridge: Polity Press, 2007; U. HALTERN, *Was bedeutet Souveränität?*, Tübingen: Mohr Siebeck, 2007; M. KOSKENNIEMI, *From Apology to Utopia*, cit., pp. 224-302; J. AGNEW, *Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics*, in *Annals of the Association of American Geographers*, 2005, p. 437 et seq.; N. MCCORMICK, *Questioning Sovereignty*, Oxford: Oxford University Press, 2008; R. JACKSON, *Quasi-States: Sovereignty, International Relations and the Third World*, Cambridge: Cambridge University Press, 1990; H. KELSEN, *Das Problem der Souveränität und die Theorie des Völkerrechts*, Tübingen: Mohr, 1928.

⁹ Koskenniemi made an enlightening contribution as to some of the roots of disagreement by tracing the opposition between the legal and the pure fact approach to sovereignty under public international law: M. KOSKENNIEMI, *From Apology to Utopia*, cit., pp. 224-302; H. KELSEN, *Allgemeine Staatslehre*, Tübingen: Mohr Siebeck, 2019, p. 102 et seq.

In addition, I would like to add that neither the legal approach nor the pure fact approach gives sufficient attention to the emotional and socially construed “imaginaries” of sovereignty, which transcends the legal and factual political dimension, speaks to the imagination, and is one of the reasons why politicians use and abuse the notion of sovereignty.¹⁰ Furthermore, what scholars see in sovereignty is at least also coloured by their disciplinary background. Legal scholars emphasise the relevance of law in determining scope and conditions.¹¹ Social scientists often focus on the factual condition of being sovereign in a globalised world.¹² Scholars of the humanities when engaging with sovereignty often highlight that it is (also) a social construction that creates an emotive connection to culturally conservative values related to the image of self-rule as a group that can be contrasted with others.

I can here only focus on exclusive jurisdiction as a central element of what sovereignty is usually understood to at least also entail. This element can be better understood by distinguishing between a negative and positive, as well as in internal and external dimension of sovereignty. Positive sovereignty speaks to the ability to determine one’s own course of action. It depends amongst other things on negative sovereignty that is being able to shut external interference out. Both negative and the positive sovereignty are necessary to make the concept of sovereignty meaningful.¹³

They both have external and internal aspects. The negative external dimension has been summarised as “having a license from the international community to practice as an independent government in a particular territory”.¹⁴ Judge Huber of the Permanent Court of International Justice put it even more eloquently in the *Island of Palmas* case in the following way: “Sovereignty in the relations between States signifies independence, independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of the State”.¹⁵ Within law, this negative external function is highly important but I do by no means claim that it exhausts the meaning of sovereignty.

Jurisdictional sovereignty relates to the sovereign entity’s formal legal ability to construct and maintain a legal order. It plays a role in the positive and negative, internal and external dimensions of sovereignty. Positive jurisdictional sovereignty is the sovereign entity’s ability to set norms and ensure compliance within its own jurisdiction. It

¹⁰ The term is taken from: J. KOMÁREK, *European Constitutional Imaginaries: Utopias, Ideologies and the Other*, University of Copenhagen Faculty of Law Research Paper, no. 2020/88, 2019.

¹¹ D. GRIMM, *Souveränität*, cit., but also already: H. KELSEN, *Das Problem der Souveränität*, cit.

¹² J. AGNEW, *Sovereignty Regimes*, cit.

¹³ This is perhaps best argued based on an analogy with individual freedom, see: R. NOZICK, *Anarchie, Staat, Utopia*, Olzog: München, 2011 and C. TAYLOR, *What is Wrong with Negative Liberty?*, in D. MILLER (ed.), *Liberty*, Oxford: Oxford University Press, 1991, p. 141 *et seq.*

¹⁴ P. TAYLOR, *The United Nations in the 1990s: Proactive Cosmopolitanism and the Issue of Sovereignty*, in R. JACKSON (ed.), *Sovereignty at the Millennium, Political Studies* Oxford: Wiley-Blackwell, 1999, p. 538 *et seq.*

¹⁵ International Court of Justice, *Island of Palmas Case* (Netherlands v. USA), judgment of 4 April 1928.

boils down to realizing law's ability to structure society and guide behaviour and is traditionally exercised by the legislative. Negative jurisdictional sovereignty is a sort "legal keep out sign". It gives the sovereign entity the monopoly or final say about the legal norms applicable within the domestic legal order. While it is often exercised by domestic judges (giving or not giving effect to international norms) the ground rules of jurisdictional sovereignty may also be defined within a polity's constitution. Jurisdictional sovereignty does not speak to the entity's *international* legal obligations, that is the international legal norms that it is bound to respect.

External negative sovereignty is a general departure point for public international law.¹⁶ This is also sometimes summarized as "*Lotus* presumption", based on the Permanent Court of International Justice's reasoning in the *Lotus* case,¹⁷ holding that legal "[r]estrictions on the independence of States cannot... be presumed".¹⁸ Besides all potential factual implications, in its core, the *Lotus* presumption of the Permanent Court expresses jurisdictional sovereignty: it entails that the application of international law within the domestic legal systems may be determined by the latter, in principle in "*complete freedom*".¹⁹

III. EU AUTONOMY AS CONSTRUED BY THE COURT OF JUSTICE

The EU cannot make a plausible claim to sovereignty under international law. International and national courts largely classify EU law as international law and by doing so deny the EU's status as a domestic legal order, which would vest it with jurisdictional sovereignty and allow it to shut out external influences from its jurisdiction. In other words, the EU does not naturally enjoy this privilege. The Court of Justice had to actively claim it in order to construe the EU legal order as domestic. This is what its autonomy doctrine does: it aims to achieve in legal practice a situation that allows the EU to enjoy the privilege of jurisdictional sovereignty, that is of shutting out external influences as all States may naturally do because they are States.

¹⁶ H. HANDEYSIDE, *The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?*, in *Michigan Journal of International Law*, 2007, p. 71 *et seq.*

¹⁷ Permanent Court of International Justice, *S.S. Lotus* (France v. Turkey), judgment of 7 September 1927.

¹⁸ *Ibidem.*

¹⁹ A. CASSESE, *International Law*, Oxford: Oxford University Press, 2005, p. 219. See also J. D'ASPROMONT, F. DOPAGNE, *Kadi: The ECJ's Reminder of the Elementary Divide Between Legal Orders*, in *International Organizations Law Review*, 2008, p. 371 *et seq.*; A. NOLLKAEMPER, *National Courts and the International Rule of Law*, Oxford: Oxford University Press, 2011; J. CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford: Oxford University Press, 2012, p. 50; M. MENDEZ, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, Oxford: Oxford University Press, 2013, p. 58; J. ODERMATT, *The Court of Justice of the European Union: International or Domestic Court?*, in *Cambridge Journal of International and Comparative Law*, 2014, p. 696 *et seq.*, p. 701 and A. KACZOROWSKA-IRELAND, *Public International Law*, London: Routledge, 2015, p. 128.

The autonomy of the EU legal order as construed by the Court expresses that EU law is for its validity *not depending on national or international law*²⁰ but that it “stems from an *independent source of law*”.²¹ Maintaining this independence in practice depends on the Court’s jurisdictional authority as the final authority within this complete epistemic system.²² At the same time, the autonomy doctrine ensures that the Court remains the final authority. It allows the Court to protect the EU legal order from normative interference that could be “liable to adversely affect the specific characteristics of EU law and its autonomy”.²³ The Court’s broad understanding of an interference that is liable to have adverse effects has stood at several occasions in the way of international cooperation, most notably when the Court rejected EU accession to the ECHR under the carefully agreed conditions in opinion 2/13.²⁴

The Court attaches great relevance to upholding of its final jurisdictional authority within the EU legal order. This seems plausible in light of the fact that the very structure of modern law (EU, national or international) is at a doctrinal level based on a positivist epistemology that draws justification from coherence.²⁵ Hence, ensuring justification through coherence (on its own terms) is a logical priority of the Court of a “new legal order”.²⁶ Epistemological independence is what makes EU law a (domestic) legal order that has to answer to legitimacy question on its own terms.

The Court’s autonomy doctrine does not speak to or even consciously disregards the *positive, factual or political dimensions of autonomy or sovereignty*. It does not address any of the political or emotional elements of sovereignty or even allude to the ability to govern. In fact, by not mentioning the concept of sovereignty, the Court avoids the ambiguous and loaded connotations that this term may invoke. Several reasonable points can be raised to demonstrate that the EU’s autonomy is not only factually limited (as the ability of any polity in an interconnected world) but also institutionally and legally limited because of its particular nature as a multilevel and polyarchic construction that seems at times construed with the specific aim of avoiding clear hierarchies. The prime example is the joint and, in this way, mutually restrained power of all 27 Member States to amend the EU Treaties, including the powers of the Court. However, any of these factual, political, and legal limitations do not challenge the *epistemologically autonomous status* of the EU legal order ensured by protecting the Court’s monopoly of (final) interpretation.

²⁰ Opinion 1/17, cit., para. 109.

²¹ Opinion 2/13, cit., para. 166 (emphasis added). See also already: Court of Justice, judgment of 15 July 1964, case 6/64, *Costa v. ENEL*.

²² I fully develop this argument at: C. ECKES, *The Autonomy of the EU Legal Order*, in *Europe and the World: A Law Review*, 2020, scienceopen.com.

²³ Opinion 2/13, cit., para. 178.

²⁴ *Ibid.*, para. 177 *et seq.*

²⁵ C. ECKES, *The Autonomy*, cit.

²⁶ Ever since Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*, but also e.g. in opinion 2/13 cit., para. 57.

IV. JURISDICTIONAL SOVEREIGNTY OF THE EU AS A LEGAL CONSTRUCTION

Francis Jacobs, former Advocate-General of the Court, spoke in 2006 about “the sovereignty of law”.²⁷ As a starting point, he concludes that “sovereignty is no longer a viable concept for explaining either the role of the State in international affairs or the internal arrangements of a modern State”.²⁸ He then demonstrates how both the ECHR and EU law shape the deep structures of the national legal orders. This builds to up to his suggestion of reading the rule of law as embodying the supremacy of law, including over the sovereign.²⁹ Within Koskeniemi’s distinction, Jacobs falls squarely under the legal approach, which also seems to be the position of the Court. This also corresponds to the reading of the EU as a legal framework of mutual restraint aimed at reigning in national sovereign excesses.³⁰

Leaning towards a strong legal approach to sovereignty is common within the epistemic community of EU law. It seems to correspond to the relevance of law for the coming into being of the EU.³¹ Law has set and continues to set the framework for EU integration. The Union is created by means of international treaties, which formally establish the EU institutions and determine the limits of their competences. Legal scholars, social scientists, and historians have argued that law has been and continues to be a driving force of EU integration.³² The Court has and continues to play a pivotal role in this respect; some even speak of judicialization of politics.³³

The preliminary reference procedure is the “keystone” of the EU’s judicial enforcement system, “which, by setting up a dialogue between one court and another, [...] has the object of securing uniform interpretation of EU law [...], thereby serving to ensure its consistency, its *full effect* and its *autonomy* as well as, ultimately, the *particular nature* of

²⁷ F. JACOBS, *The Sovereignty of Law: The European Way*, Cambridge: Cambridge University Press, 2006.

²⁸ *Ibid.*, p. 4.

²⁹ *Ibid.*, p. 49.

³⁰ P. CAPPS, *Human Dignity and the Foundations of International Law*, London: Hart Publishing, 2009, p. 127 characterises law as such as a framework of mutual restraint.

³¹ D. GRIMM, *The Democratic Costs of Constitutionalisation: The European Case*, in *European Law Journal*, 2015, p. 460 *et seq.*; J.H.H. WEILER, *The Transformation of Europe*, in *Yale Law Journal*, 1991, p. 2403 *et seq.*; S. SCHMIDT, *The European Court of Justice and the Policy Process*, Oxford: Oxford University Press, 2018; R.D. KELEMEN, *Eurolegalism: The Transformation of Law and Regulation in the European Union*, Cambridge: Harvard University Press, 2011; R.D. KELEMEN, *On the Unsustainability of Constitutional Pluralism*, in *Maastricht Journal of European and Comparative Law*, 2016, p. 136 *et seq.*; A. VAUCHEZ, *Brokering Europe*, Cambridge: Cambridge University Press, 2015.

³² *Ibid.*

³³ E. STEIN, *Lawyers, Judges, and the Making of a Transnational Constitution*, in *The American Journal of International Law*, 1981, p. 1 *et seq.*; J.H.H. WEILER, *The Transformation of Europe*, *cit.*; K. ALTER, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford: Oxford University Press, 2001; A. STONE SWEET, *The Judicial Construction of Europe*, Oxford: Oxford University Press, 2004.

the law established by the Treaties".³⁴ It is a formalized cooperation mechanism between the Court and national courts that allows the Court to reach within national legal orders. The relationship is not hierarchical in a way that the Court could repeal rulings of national courts. It hence depends on national courts' willingness to cooperate and comply. Member States also hold the power to refer repeatedly and potentially in order to enter into a debate on the right outcome.³⁵ This also explains the Court's willingness to protect the independence and the functioning of the national judiciary as a necessary element to a functioning EU legal order.³⁶

In the particular context of the EU as a legal construction that is strongly built on judicial cooperation, the Court's conception of the autonomy of the EU legal order gains great significance. National courts accept it as part of the judicial cooperation. The autonomy conception is the presumption on the basis of which the Court claims its right to determine what norms are valid and have effects within the EU legal order. When national courts accept the Court's rulings, they accept this presumption by acting in practice as if it was valid.³⁷ However, the Court cannot force national or international courts to accept its interpretation of EU law as autonomous and the EU legal order as domestic. It depends on their acceptance of this presumption for its own ability to claim the rights associated with jurisdictional sovereignty.

The Court also needs the autonomy conception to take a dualist approach *vis-à-vis* international law.³⁸ Without the autonomy conception, EU would lose its ability to claim certain rights that are usually associated with State sovereignty: the domestic and constitutional (supreme) nature of the State's law within its jurisdiction, the ability of its courts to uphold domestic law, including when it conflicts with international norms and including when these norms undermine domestic legal guarantees *vis-à-vis* individuals.³⁹ To make this more concrete: in the event of conflict of EU law with decisions of the UN collective security system, the Court would have to take a position similar to the Eu-

³⁴ Opinion 2/13, cit., para. 176 (emphasis added). Earlier, in opinion 1/09, cit., paras 77 *et seq.*: the Court rejected an international court or tribunal – the formation of the European and Community Patent Court – because it considered that the mechanism was susceptible of adversely affecting the position and powers of national courts within the preliminary ruling procedure.

³⁵ See e.g. Court of Justice, judgment of 8 September 2015, case C-105/14, *Taricco and others (Taricco I)* and judgment of 5 December 2017, case C-42/17, *M.A.S., MB (Taricco II)*.

³⁶ Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses*; Court of Justice, judgment of 24 June 2019, case C-619/18, *Commission v. Poland*.

³⁷ Valid in the sense of practical reasoning not in the sense of true (compare e.g., R. ALEXY, *Theorie der juristischen Argumentation*, Frankfurt: Suhrkamp Taschenbuch Wissenschaft, 1983).

³⁸ See for a distinction of internal and external autonomy: J. ODERMATT, *The Principle of Autonomy: an Adolescent Disease of EU External Relations Law?*, in M. CREMONA (ed.), *Structural Principles in EU External Relations Law*, Portland: Hart Publishing, 2018, pp. 291-316.

³⁹ Compare *Kadi*, cit.

ropean Court of Human Rights for example in *Loizidou* and *Al-Jedda*, in which the European Court submitted the ECHR to the overarching authority of the UN.⁴⁰

From the standpoint of national and international law, the EU's ability to take a dualist approach to international law is far from uncontested. Both national courts and international courts have disagreed in different ways with the Court's autonomy conception. National constitutional courts adhere to a conception of sovereignty that is necessarily and inextricably connected to statehood. The German Federal Constitutional Court is traditionally the most vocal national constitutional court in explicating limits to EU integration as it sees them to flow *from the German Constitution*.⁴¹ Other national courts however are even more adamant than the German Constitutional Court.⁴² International courts classify EU law as international law and consider the Court as an international court.⁴³ The different views all challenge that EU law stems from an independent source of law and is neither dependent on national nor international law for its validity and interpretation. They submit it to either national or international law.

The Court's autonomy conception is nothing more or less than an alternative conceptual reading what the nature of EU law is. This reading is from the outset neither more or less convincing than the reading of national or international courts. One could perhaps say that it is less conventional and that the international and national standpoints long predate the Court's autonomous new legal order. Yet, it is necessary for the EU legal order to claim jurisdictional sovereignty, which in turn protects its epistemological independence from international and national law.

V. CONCLUDING REFLECTIONS ON THE COURT'S AUTONOMY CONCEPTION IN CONTEXT

States enjoy negative external jurisdictional sovereignty, that is recognition of their right to determine what external legal norms take effect within the internal legal order and end the internal effect of external norms at any point in time (even if this is in breach of inter-

⁴⁰ European Court of Human Rights: judgment of 18 December 1996, no. 15318/89, *Loizidou v. Turkey*, paras 52-56; judgment of 7 July 2011, no. 27021/08, *Al-Jedda v. United Kingdom*.

⁴¹ See above all German Federal Constitutional Court, judgment of 30 June 2009, 2 BvE 2/08, *Lisabon-Urteil*.

⁴² E.g., Supreme Court of Denmark, decision of 6 April 1998, case 361/1997, *Maastricht* (summary translated in *Common Market Law Review*, 1999, p. 854); See also for further examples European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *National Constitutional Avenues for Further EU Integration* – Study by L. BESSELINK, M. CLAES, Š. IMAMOVIĆ, J.H. REESTMAN, Brussels: European Union, 2014; Spanish Constitutional Tribunal, declaration 1/2004, case no. 6603-2004, *Constitutional Treaty*, available at: tribunalconstitucional.es.

⁴³ European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, para. 154, and following case law: the European Court of Human Rights sees the EU as an "international organization" to which States "have transferred part of their sovereignty" and EU law as an "international obligation" of the Member States.

national law). With its conception of the autonomy of the EU legal order, the Court claims the rights associated with *negative* external jurisdictional sovereignty, namely the right to formally legally keep external norms out. This is the very foundation of the Court's claim that the EU constitutes a new legal order, which can determine in its domestic law what is valid within its jurisdiction and what status external norms have. This autonomy of EU law from external domination is in turn the foundation of any claim to be a polity that can claim legitimacy based on internal coherence, objectives, and democratic structures.

In addition, the EU holds a considerable ambition to *positive* external sovereignty. The TEU details an extensive and ambitious catalogue of foreign policy objectives. These objectives presume that the EU is an international actor in its own right and with its own agenda.⁴⁴ Regularly after *Kadi* and after opinion 2/13, scholars speculated whether the Court's conception of autonomy weakened the positive dimension of autonomy, that is the EU's capacity and influence as an international actor. They argued that the Court's strong emphasis on autonomy (understood by the Court as negative external jurisdictional sovereignty) makes the rule-based multilateral cooperation to which the EU is committed⁴⁵ more difficult for the EU.⁴⁶

Many contemporary theorists agree that individual freedom in order to be meaningful requires both a negative and positive dimension.⁴⁷ Sovereignty equally requires both, a negative and a positive dimension, to be meaningful.⁴⁸ A similar argument can be made for the autonomy of the EU legal order. It is a *judicial doctrine*, developed in response to the question of what norms can have force within the EU legal order without undermining its foundations – not more but also not less. It is sharply limited to the formal legal sphere. This is not to say that the consequences of the Court's autonomy conception do not carry beyond the technical legal realm and affect the EU's positive autonomy in a broader, including factual sense – on the contrary.

Shutting out external influences, as the Court does, may not seem to create incentives for others to cooperate. Establishing international courts and tribunals are attempts to strengthen multilateral rule-based systems, which is a form of governance to which the EU strongly commits.⁴⁹ However, the EU can only take an influential role in any such multilateral system if it can also submit to the jurisdiction of any such court or

⁴⁴ See in particular Arts 3, para. 5, and 21 TEU.

⁴⁵ See e.g., Communication COM(2017) 240 of 10 May 2017 from the Commission, *Reflection Paper on Harnessing Globalisation*.

⁴⁶ E.g., C. ECKES, *EU Powers under External Pressure*, Oxford: Oxford University Press, 2019, p. 219.

⁴⁷ R. NOZICK, *Anarchie*, cit.; C. TAYLOR, *What is Wrong*, cit., read the well-known essay by I. BERLIN, *Zwei Freiheitsbegriffe*, in I. BERLIN (ed.), *Freiheit. Vier Versuche*, Frankfurt: Fischer, 1995 in light of his later writings (I. BERLIN, *Freedom and its Betrayal. Six Enemies of Human Liberty*, Princeton: Princeton University Press, 2002).

⁴⁸ M. RONZONI, *Zwei Konzeptionen staatlicher Souveränität und ihre Implikationen für die Gestaltung globaler Institutionen*, in P. NIESEN (ed.), *Transnationale Gerechtigkeit und Demokratie*, Frankfurt: Campus, 2012, p. 60 *et seq.*

⁴⁹ Communication COM(2017) 240.

tribunal. It seems hence plausible that the Court's strict conception of autonomy, which has made it repeatedly impossible for the EU to submit to international courts and tribunals, limits the EU's options and also affects its international influence.

At the same time, positive sovereignty also depends on negative sovereignty. Only an entity that can shut out external influences can possess the ability to determine its own course of action and to ensure not being hijacked by national or international agendas. For the EU, creating some stable distance both to national and international law has been a struggle, predominantly because the very objective – not just in the Court's case law but also in the objectives and structures of the EU Treaties – is to set up a new legal order that enjoys an unprecedented level of independence of both. The Court has the mandate to protect the EU legal order, normative autonomy, and also the autonomy of its institutions. Law, including EU law, can only be understood as an expression of the legitimate will of those governed by it if it enjoys autonomy from external domination.⁵⁰ In other words, the autonomy of law is a necessary – albeit not sufficient – condition for the (democratic) legitimacy of this law.

⁵⁰ Law as an expression of the autonomy of its subjects is probably best explained by J. HABERMAS, *Faktizität und Geltung – Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates*, Frankfurt: Suhrkamp, 1994.