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A HermenEUtical Approach to Jurisidiction, Autonomy and Public Power (in progress)

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Karina und Erich Schumann Centre for Advanced International Legal Studies

Working Paper Series

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Abstract

The answer of the CJEU to the question of the perimeter of its jurisdiction when EU law and a third law cooperate in a matter is not fully satisfactory. Departing from the traditional approach, both cases in which EU law is applied in close connection to international law, and also those in which it is applied in connection to national law should be considered because both are expressions of the same problem, namely: the trend of the Court to unionize third law, and on that ground to extend its jurisdiction beyond a straight reading of EU primary law and international law practice. The delimitation of its jurisdiction that the CJEU provides in these cases is neither precise, nor safe. Above all, the underlying assumption that EU law is just as autonomous as national law has to be scrutinized, as this is the starting point of the Court's reasoning. Perhaps EU law is different than accepted and needs to be re-explained as a law essentially interwoven with others. The challenge lies in reconciling its unity with its compound character. This attempt should shed light also on another aspect of legal protection: the exercise of power by different national administrations within the same procedure. The connection between the two issues is the fact that EU law and the exercise of EU power depend existentially on the contribution of national ones.

Die Antwort des EuGH auf die Frage seiner Zuständigkeit im Zusammenwirken von EU-Recht und Drittstaatenrecht ist nicht vollumfänglich zufriedenstellend. Entgegen dem konventionellen Ansatz sollten sowohl die Konstellation der Anwendung des EU-Rechts im Kontext des Völkerrechts wie auch dessen Anwendung in Verbindung mit nationalem Recht gemeinsam betrachtet werden, da beiden Konstellationen dasselbe Problem zugrunde liegt. Namentlich nämlich die Tendenz des EuGH, Drittrecht zu vereinheitlichen und auf dieser Grundlage seine Zuständigkeit über eine wörtliche Auslegung des EU-Primärrechts und die Völkerrechtspraxis hinaus zu erweitern. Die Umgrenzung seiner Zuständigkeit, die der EuGH in diesen Fällen vornimmt, ist weder präzise noch rechtssicher. Zu hinterfragen ist also allen voran die zugrundeliegende Prämisse, dass das EU-Recht ebenso autonom ist wie das nationale Recht. Denn diese Prämisse ist der Ausgangspunkt der Argumentation des Gerichtshofs. Womöglich gilt es aber, das EU-Recht anders als bisher angenommen als mit anderen Rechtsordnungen wesentlich verwoben zu verstehen. Die Herausforderung besteht darin, seine Einheit mit seinem zusammengesetzten Wesen in Einklang zu bringen. Dieser Ansatz soll auch einen anderen Aspekt des Rechtsschutzes beleuchten: die Kompetenzausübung durch unterschiedliche nationale Verwaltungsbehörden innerhalb desselben Verfahrens. Der Konnex beider Fragen besteht darin, dass das EU-Recht und die Ausübung der europarechtlichen Hoheitsrechte existenziell von ihren nationalen Pendants abhängen.

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Working Paper No. 2022/1 | Administrative Editor: Christian Johannes Wahnschaffe

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Certainly, many scholars have analyzed the problem of the limits of the jurisdiction of the CJEU in matters in which both EU law and non-EU law are involved, but without an overarching scope. The connection that this research wants to establish between matters that combine EU and international law and matters that combine EU and national law, is difficult to identify in the literature. There is a considerable number of texts that analyze case law in which the relation between the jurisdiction of the CJEU and that of international courts is at stake[1], and similarly, there are many texts that analyze the issue of legal protection in EU composite administrative procedures in which the relation between the jurisdiction of the CJEU and that of national courts is relevant[2]. Yet,

[1] The number of titles that can be included under the subject "the relation between the CJEU and international courts" is large since beyond general approaches there exist many that analyze a much more specific aspect of that relation; for instance, that existing between the CJEU and the ECtHR, or between the CEJU and arbitral courts. Examples of the former approach are Tobias Lock, *The European Court of Justice: What are the Limits of Its Exclusive Jurisdiction?*, 16 MAASTRICHT J. EUR. & COMP. L. 291 (2009); MARISE CREMONA & ANNE THIES, THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW (2014), and; MARISE CREMONA & RAMSES A. WESSEL, THE EUROPEAN UNION AND INTERNATIONAL DISPUTE SETTLEMENT (2017). Examples of the latter are Astrid Epiney, *Zur Stellung des Völkerrechts in der EU Zugleich Besprechung von EuGH, EuZW 1998, 572 – Hermès und EuGH, EuZW 1998, 694 – Racke*, EUZW (1999) 5; Inge Govaere, *Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order, in* MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD 189 (Panos Koutrakos & Christoph Hillion eds., 2010); Eleanor Spaventa, *A Very Fearful Court: The Protection of Fundamental Rights in the European Union after Opinion 2/13*, 22 MAASTRICHT J. EUR. & COMP. L. 35 (2015); Piet Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?*, 38 FORDHAM INT'L L.J. 955 (2015); Karine Caunes, *La protection des droits fondamentaux dans l'Union européenne: Retour vers le futur de l'avis 2/13 de la Cour de justice, de l'adhésion de l'UE à la CEDH et de l'Union européenne elle-même*, 16 ERA FORUM 459 (2015), and; Christian Riffel, *The CETA Opinion of the European Court of Justice and its Implications–Not that Selfish After All*, 22 J. INT'L ECON. L. 503 (2019).

[2] Again, the number of titles is vast. Examples are: Mario P. Chiti, *I procedimenti composti nel diritto comunitario e nel diritto interno, in* ATTIVITÀ AMMINISTRATIVE E TUTELA DEGLI INTERESSATI. L'INFLUENZA DEL DIRITTO COMUNITARIO. A CURA DELL'UFFICIO STUDI E DOCUMENTAZIONE DEL CONSIGLIO DI STATO, 55 (Carlo Anelli et al. 1997);

to find an analysis of the conceptual link between both is no easy task. A large number of texts on the autonomy of EU law is also available, but the relation between the assumptions underlying the conception of autonomy of EU law of the CJEU and the extent to which this court draws the limits of its jurisdiction in any matter involving a third non-EU law, is likewise difficult to find in these texts.

The current situation undermines the legal security of interested parties (a subjective negative effect) and the EU's own constitutional equilibrium (an objective negative effect). The alternative that this research suggests is to inquire about what is implicit in the proposition that the EU legal order is autonomous. Is it helpful to qualify EU law as an autonomous legal order that has a unified structure and traits that resemble national legal orders, or could this be misleading? The response should inform the existing doctrine and suggest options for progress.

The uncertainty surrounding the scope of the jurisdiction of the CJEU in cases in which EU law and a third law are both applicable to the same matter, remain without resolution. The fact that in these cases the jurisdiction of the CJEU has progressively expanded *vis-à-vis* that of national and international courts and coupled with the murkiness of the definition of its limits, indicates that further discussion is needed. The

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Gernot Sydow, *Die Vereinheitlichung des Mitgliedstaaten Vollzugs des Europarechts in Mehrstufigen Verwaltungsverfahren*, 34 DIE VERWALTUNG 517 (2001); HANS P. NEHL, EUROPÄISCHES VERWALTUNGSVERFAHREN UND GEMEINSCHAFTSVERFASSUNG – EINE STUDIE GEMEINSCHAFTSRECHTLICHER VERFAHRENSGRUNDSÄTZE UNTER BESONDERER BERÜCKSICHTIGUNG «MEHRSTUFIGER» VERWALTUNGSVERFAHREN (2002); Sabino Cassese, *European Administrative Proceedings*, 68 LAW & CONTEMP. PROBS. 21 (2004); Rainer Pitschas, *Europäisches Verwaltungsverfahrensrecht und Handlungsformen der gemeinschaftlichen Kooperation*, in EUROPÄISCHES VERWALTUNGSVERFAHRENSRECHT – BEITRÄGE DER 70. STAATSWISSENSCHAFTLICHEN FORTBILDUNGSTAGUNG VOM 20. BIS 22. MÄRZ 2002 AN DER DEUTSCHEN HOCHSCHULE FÜR VERWALTUNGSWISSENSCHAFTEN SPEYER (Rainer Pitschas & Hermann Hill eds., 2004); JENS HOFMANN, RECHTSSCHUTZ UND HAFTUNG IM EUROPÄISCHEN VERWALTUNGSVERBUND (2004); Herwig C. H. Hofmann, *Decision Making in EU Administrative Law – The Problem of Composite Procedures*, 61 ADMIN. L.REV. 199 (2009); Javier Barnes Vázquez, *Towards a third generation of administrative procedures*, in COMPARATIVE ADMINISTRATIVE LAW 336 (Susan Rose-Ackerman, Peter L. Lindseth, and Blake Emerson eds., 2010); Mariolina Eliantonio, *Judicial Review in an Integrated Administration: the Case of "Composite Procedures"*, 7 REV. EUR. ADMIN. L. 65 (2014); SERGIO ALONSO DE LEÓN, COMPOSITE ADMINISTRATIVE PROCEDURES IN THE EUROPEAN UNION (2017), and; Filipe Brito Bastos, *Derivative Illegality in European Composite Administration*, 55 CM L.REV. 101 (2018).

issue has been partially analyzed, but not its deeper roots, and the reasoning of the Court remains to a large extent unchallenged while the problems stemming therefrom continue unsolved[3]. The conceptualization of EU law as an autonomous legal order is key to understanding why this might be the case.

The doctrine of the CJEU on its jurisdiction in cases in which EU law and a third law are combined in the same matter

The question about the criteria to discern the limits of the jurisdiction of the CJEU in cases combining EU law and a third law is both abstract and practical. On several occasions, the Court was faced with the uncertainty of the extent of its jurisdiction in this context[4], and more than once has its answer been criticized for adopting an

[3] The number of titles that can be included under the subject "the relation between the CJEU and international courts" is large since beyond general approaches there exist many that analyze a much more specific aspect of that relation; for instance, that existing between the CJEU and the ECtHR, or between the CEJU and arbitral courts. Examples of the former approach are Tobias Lock, *The European Court of Justice: What are the Limits of Its Exclusive Jurisdiction?*, 16 MAASTRICHT J. EUR. & COMP. L. 291 (2009); MARISE CREMONA & ANNE THIES, THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW (2014), and; MARISE CREMONA & RAMSES A. WESSEL, THE EUROPEAN UNION AND INTERNATIONAL DISPUTE SETTLEMENT (2017). Examples of the latter are Astrid Epiney, *Zur Stellung des Völkerrechts in der EU Zugleich Besprechung von EuGH, EuZW 1998, 572 – Hermès und EuGH, EuZW 1998, 694 – Racke*, EUZW (1999) 5; Inge Govaere, *Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order, in* MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD 189 (Panos Koutrakos & Christoph Hillion eds., 2010); Eleanor Spaventa, *A Very Fearful Court: The Protection of Fundamental Rights in the European Union after Opinion 2/13*, 22 MAASTRICHT J. EUR. & COMP. L. 35 (2015); Piet Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?*, 38 FORDHAM INT'L L.J. 955 (2015); Karine Caunes, *La protection des droits fondamentaux dans l'Union européenne: Retour vers le futur de l'avis 2/13 de la Cour de justice, de l'adhésion de l'UE à la CEDH et de l'Union européenne elle-même*, 16 ERA FORUM 459 (2015), and; Christian Riffel, *The CETA Opinion of the European Court of Justice and its Implications–Not that Selfish After All*, 22 J. INT'L ECON. L. 503 (2019).

[4] Examples in the realm of mixed agreements are case C-53/96, Hermès International v. FHT Marketing Choice BV, 1998 E.C.R. I-03603 ("Hermès"); Parfums Christian Dior SA v. Tuk Consultancy BV (C-300/98) & Assco Gerüste GmbH v. Rob van Dijk (C-392/98), 2000 E.C.R. I-11307 ("Dior"); case C-459/03, Commission of the European Communities v. Ireland, 2006 E.C.R. I-04635 ("Mox Plant"), and; case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, 2011 E.C.R. I-01255.

expansive approach based on a confounding argumentation[5]. Similarly, the Court has invoked its jurisdiction to fend off international courts[6] on several occasions, which sparked criticism for what has been referred to as a distortion of the relation between EU law and international law[7].

The first consequence of the evolution of case law of the CJEU regarding the extent of its jurisdiction *vis-à-vis* that of international courts demands analysis. It would include the opinions of the CJEU on the prospect of binding the EU to an international system[8] and the judgments in which the CJEU has reflected on its jurisdiction when an arbitral tribunal concurs[9]. The evolution of case law of the CJEU regarding its jurisdiction *vis-à-vis* that of national courts in these types of cases has to be analyzed too; and this refers mainly to the matters in which the Court has considered the limits of its jurisdiction when ruling on composite administrative procedures. Notwithstanding the above and as previously mentioned, joint analysis on the limits of the jurisdiction of the CJEU both in matters that can fall within the scope of international courts and in matters that can

[5] See the arguments in Cessare Romano, *EC Treaty Article 292 – Euratom Treaty Article 193 – Commission of the European Communities v. Ireland Case C-459/03*, 101 AM. J. INT'L L. 171 (2007); Nikolaos Lavranos, *The Epilogue in the MOX Plant Dispute: An End Without Findings*, 18 EUR. ENE. & ENV. L.REV. 180 (2009); Panos Koutrakos, *Interpretation of Mixed Agreements, in* MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD 116, 117-123 (Panos Koutrakos & Christoph Hillion eds., 2010), and; Stefan Lorenzmeier, *Artikel 218 AEUV, in* DAS RECHT DER EUROPÄISCHEN UNION para. 72 (Martin Nettesheim ed., 2021).

[6] A prominent example is Opinion 2/13 (Dec. 18, 2014), http://curia.europa.eu/juris/recherche.jsf?language=en.

[7] In regards to Opinion 2/13, see Bruno de Witte & Šejla Imamović, *Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court*, 40 EUR. L.R. 683 (2015); Dimitry Kochenov, *EU Law Without the Rule of Law: Is the Veneration of Autonomy Worth It?*, 34 YB. EUR. L. 74 (2015); Steve Peers, *The EU's Accession to the ECHR: The Dream Becomes a Nightmare*, 16 GERMAN L.J. 213 (2015); Stian Ø. Johansen, *The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Possible Consequences*, 16 GERMAN L.J. 169 (2015); Fisnik Korenica & Dren Doli, *Not Taking Rights Seriously: Opting for the Primacy of EU Law over Broader Human Rights Protection*, 15 HUM. RTS. L.REV. 485 (2015); Jed Odermatt, *A Giant Step Backwards - Opinion 2/13 on the Accession to the European Convention of Human Rights*, 47 N.Y.U. J. INT'L L. & POL. 783 (2015).

[8] Opinion 1/76 (Apr. 16, 1977), 1977 E.C.R. I-00741; Opinion 1/91 (Dec. 14, 1991), 1991 E.C.R. I-06079; Opinion 1/92 (Apr. 10, 1992), 1992 E.C.R. I-02821; Opinion 2/94 (Mar. 28, 1996), 1996 E.C.R. I-01759; Opinion 1/09 (Mar. 8, 2011), 2011 E.C.R. I-01137; Opinion 2/13 (Dec. 18, 2014), http://curia.europa.eu/juris/recherche.jsf?language=en; Opinion 1/17 (Apr. 30, 2019), http://curia.europa.eu/juris/recherche.jsf?language=en.

[9] Case C-284/16, Slovak Republik v. Achmea BV (Mar. 6, 2018), http://curia.europa.eu/juris/recherche.jsf?language=en

fall within the scope of national courts is difficult to find. Any study of case law should assess whether and to what extent the CJEU behaves protectively when drawing the limits of its jurisdiction, and if and to what extent the CJEU has overreached its jurisdiction.

The implicit in Autonomy – a hermeneutical approach

The principle of autonomy of EU law is the constitutional assertion upon which the CJEU defines and exerts its jurisdiction. The CJEU sees itself as the highest judicial authority to interpret the law of a separated legal order – EU law – which is not international law, nor national law, and declares itself the power to preserve such autonomy. The power of the CJEU and autonomy are intimately linked: a threat to the jurisdiction of the CJEU is a threat to the autonomy of EU law and to the EU. Very recently, however, the CJEU has shown itself open to some nuance regarding the rigidity of the identity between jurisdiction and autonomy by stating its tacit acceptance in the CETA opinion[10] that it may share its jurisdiction with an international court[11].

The principle of autonomy has been the object of abundant research[12]; the purpose of which has mostly been to understand what the CJEU means when it invokes autonomy.

[10] Opinion 1/17.
[11] A recent contribution reflects the recent readjustment of the CJEU in this regard. *See* Koen Lenaerts, José A. Gutiérrez-Fons, Stanislas Adam, *Exploring the Autonomy of the European Union Legal Order*, 81 ZaöRV 47 (2021).
[12] Among many others, *see* Léontin Constantinesco, *La spécificité du droit communautaire*, 2 RTDEur. 1 (1966); Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 Har. Int'l. L. J. 389 (1996); Joseph H. H. Weiler & Ulrich Haltern, *The Autonomy of the Community Legal Order – Through the Looking Glass*, 37 Har. Int'l. L. J. 411 (1996); Anne Peters, Elemente einer Theorie der Verfassung Europas 242-295 (2001); René Barents, The Autonomy of Community Law (2004); Bruno de Witte, *European Union Law: How Autonomous is its Legal Order?*, 65 ZÖR 141 (2010); Piet Eeckhout, *Human Rights and the Autonomy of EU Law: Pluralism or Integration?*, 66 Current Leg. Prob. 169 (2013); Jan Willem van Rossem, *The Autonomy of EU Law: More is Less? The Court of Justice and the Design of International Dispute Settlement Body Beyond the European Union, in* Between Autonomy and Dependence (Ramses A. Wessel & Steven Blockmans eds., 2013); Bruno de Witte, *A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Body Beyond the European Union, in* The European Court of Justice and External Relations Law – Constitutional Challenges (Marise Cremona & Anne Thies eds., 2014); Benedikt H. Pirker & Stefan Reitemeyer, *Between Discursive and Exclusive Autonomy – Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law*, 17 Cambridge Yb. Eur. Legal Stud. 168 (2015); Piet Eeckhout, *Opinion 2/13 on EU Accession to the ECHR*

Some explanations underscore that the CJEU uses autonomy as a concept to build itself and EU law as sovereign[13]; while others underscore that it does allow EU law and the CJEU a margin of interaction with other legal systems and courts[14]. The discussion in this research, however, is to what extent the conceptualization of EU law as an autonomous legal order obviates the fact that EU law depends on national laws to a degree that no national law depends on other legal orders. Yes, EU law is a different, identifiable, legal order, but genetically and in its implementation, it needs national law in a way that no national legal order needs any other alien legal order. Furthermore, its constitutional link to international law integrally binds both EU law and international law[15]. Hence, the CJEU may need to nuance its rationalization of the structure of EU law. This seems like a more certain attempt at defining the limits of the jurisdiction of the CJEU more clearly and fairly.

Despite the fact that the main purpose of this research is EU law, the question on how EU law can be explained as a separate legal order which at the same time depends existentially on national law, is in reality the same question as asking how the EU can be characterized as *separate from yet dependent* on national systems. Thus the underlying philosophical problem (the problem of participation, the whole and its parts,

and Judicial Dialogue: Autonomy or Autarky?, 38 FORDHAM INT'L L.J. 955 (2015); Katja S. Ziegler, *Beyond Pluralism and Autonomy: Systemic Harmonization as a Paradigm for the Interaction of EU Law and International Law*, 35 YEL 667 (2016); Cristina Contartese, *The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: from the "Essential" to the "Specific Characteristics" of the Union and Back Again*, 54 CM L.REV. 1627 (2017); Koen Lenaerts, *The autonomy of European Union Law*, I POST AISDUE 1 (2019); Christopher Vajda, *Achmea and the Autonomy of the EU Legal Order*, 1/2019 LAWTTIP Working Papers (2019); Cécile Rapoport, *Balancing on a Tightrope: Opinion 1/17 and the ECJ's Narrow and Tortuous Path for the Compatibility of the EU's Investment Court System (ICS)*, 57 CM L.REV. 1725 (2020); Maria Fanou, *The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17–A Compass for the Future*, 22 CAMBRIDGE YB. EUR. LEGAL STUD. 106 (2020); Wolfgang Weiß, *Die externe Autonomie des Unionsrechts als Schranke für den Investitionsschutz und weit darüber hinaus? – Zum CETA-Gutachten des EuGH als Ursprung einer überschießenden verfassungsrechtlichen Anforderung*, EuR 621 (2020); Alan Hervé, *Défendre l'ordre juridique de l'Union en exportant ses valeurs et instruments fondamentaux – Commentaire sous l'avis 1/17 de la Cour de justice de l'Union européenne*, RTDEUR. 101 (2020); Lenaerts & Gutiérrez Fons, *supra* note 11.

[13] *See* van Roseem, *supra* note 12, at p. 13.

[14] *See* Lenaerts & Gutiérrez Fons, *supra* note 11; Pirker & Reitemeyer, *supra* note 12.

[15] Article 3.5 TEU.

unity and plurality or diversity, the one and many)[16] cannot be avoided. The research cannot devote excessive attention to finding the answer without considering existing philosophical approaches. The expectation is that from a deeper reflection on the intrinsic plural structure of EU law, an upgraded idea of EU law autonomy will flow, as well as a different understanding of the relationship between the CJEU and national and international courts. Foreseeably, understanding EU law as a more complex unity than the simplified unity that the CJEU traditionally and currently sees as EU law, will encourage the CJEU to allow international courts to participate in the interpretation of EU law, as it purportedly started to accept in the CETA opinion.

As of now the above indicates that conceiving the EU legal order as one with a particular composite structure would complicate its comprehension and would question the statement according to which EU law is to be considered as *another* autonomous legal order. It would also require a renewed explanation of the limits of the jurisdiction of the CJEU because the assumption that the CJEU is the court of a legal order with a unified structure would no longer be precise. In fact, it may be the case that when the CJEU portrays EU law as a unified whole, it is portraying its own jurisdiction but not that of EU law–. Redefining the limits of the jurisdiction of the CJEU would entail consequences for the cases on which the research is focused, i.e., cases in which EU law and a third law are closely intermingled. For instance, the current reasoning of the CJEU according to which it can extend its jurisdiction to the whole matter because it is a matter mainly of EU law, would seem highly imprecise and, therefore, more difficult to admit currently than ever before. But perhaps, paradoxically, a more complex idea of EU law clarifies and tightens the definition of the limits of the jurisdiction of the CJEU; one of the main questions being which rules set those limits when it is expressly admitted that the law of the case is an inseparable mixture of different laws (EU and third).

[16] A similar approach has been adopted in regards to international law. *See*, MARIO PROST, THE CONCEPT OF UNITY IN INTERNATIONAL LAW (2012).

An additional field of enquiry: the structure of EU public power

Though not obvious at first sight, the elaboration on the uncommon structure of EU law, and the deeper reflection on the uncommon structure of what is qualified as pertaining to the EU, opens a second diverging question that could be the object of a second study on its own, namely that of the structure of EU public power. In comparison to the amount of work devoted to the characteristics of the public power that the State wields (*öffentliche Gewalt*), very few authors have devoted their attention to the characteristics of the public power wielded by the EU[17], thereby pointing to a field that *Staatsrecht* scholarship could undertake. As with the analysis of the nature of EU law, the analysis of the nature of EU public power has both a theoretical and practical dimension.

The latter lies in the increasing amount of administrative action brought about by EU law in which more than one public power (usually administrations) act sequentially within the same procedural frame (again, composite procedures). A significant amount of the scholarly literature has analyzed this mode of public action and unanimously point to the fact that the judicial protection of the interested parties involved is not ideal. Recent work serves as a reminder of the fact that the topic remains relevant[18].

In this context it may be worth exploring the idea that EU public power has an uncommon structure resembling that of a composite formed by the powers of the national administrations. Just as EU law has a particular nature engraved with the special traits of anything that pertains to the EU, so could the public power that the EU exercises be conceptualized. The proposition could be a first theoretical step to building a framework that is more simplified than the existing one. The new approach on the public power of

[17] *See* Carl Friedrich Ophüls, *Staatshoheit und Gemeinschaftshoheit – Wandlungen des Souveränitätsbegriffs, in* RECHT IM WANDEL – BEITRÄGE ZU STRÖMUNGEN UND FRAGEN IM HEUTIGEN RECHT – FESTSCHRIFT HUNDERTFÜNFZIG JAHRE (Carl Herman Ule *et al.*, 1965); WILFRIED BÜNTEN, STAATSGEWALT UND GEMEINSCHAFTSHOHEIT BEI DER INNERSTAATLICHEN DURCHFÜHRUNG DES RECHTS DER EUROPÄISCHEN GEMEINSCHAFTEN DURCH DIE MITGLIEDSTAATEN (1977); UTZ SCHLIESKY, SOUVERÄNITÄT UND LEGITIMITÄT VON HERRSCHAFTSGEWALT – DIE WEITERENTWICKLUNG VON BEGRIFFE DER STAATSLEHRE UND DES STAATSRECHTS IM EUROPÄISCHEN MEHREBENEN SYSTEM (2004).

[18] *See* Special Issue, *supra* note 3.

the EU could ultimately mean that a citizen involved in an administrative action involving EU and national administrations in the same procedure would in reality be dealing with the EU as a composite power. In other words, the EU public power is integrated with several powers acting within the same framework and unified in fact but not in form. It can be argued then that citizens lack judicial protection in these cases and that better support could be provided. For example, if the citizen is affected by EU public power, regardless which specific administration(s) he or she is dealing with, the citizen should have access to a unitary, coordinated judicial answer. This should be no different to a situation where a citizen challenges the illicit action of several different organs of a single national power, and can access one judicial instance that reviews the action of all of those different national organs. The classical discussion in German doctrine on the unitary v. composite character of state power will certainly shed light in this regard (*Einheit der Staatsgewalt*[19], *gemeinsame Staatsgewalt*[20], *geteilte Souveränität*[21], *Staatsgewalt als Zusammenwirken der Gewalten*[22]).

[19] *See* FRIEDRICH JULIUS STAHL, STAATSLEHRE (1910); OSKAR GEORG FISCHBACH, TEORÍA GENERAL DEL ESTADO (1926); GEORG JELLINEK, ALLGEMEINE STAATSRECHTSLEHRE (1960).

[20] *See* GEORG WAITZ, GRUNDZÜGE DER POLITIK (1862).

[21] *See* HELMUT QUARITSCH, STAAT UND SOUVERÄNITÄT, BAND 1 (1970).

[22] *See* GEORG MEYER, GRUNDZÜGE DES NORDDEUTSCHEN STAATSRECHTS (1868).