

21 THE CONCEPT OF AUTONOMY OF EU LAW FROM THE COMPARATIVE PERSPECTIVE OF INTERNATIONAL LAW AND THE LEGAL SYSTEMS OF MEMBER STATES

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21.1 INTRODUCTION

It is remarkable that the notion of the ‘autonomy of European Union (EU) law’ has received, since its inception in the 1960s, relatively little academic attention compared to other basic EU law premises such as ‘supremacy’ or ‘direct effect’, particularly from the theoretical or conceptual angle.¹ The autonomous nature of this distinct body of law is taken for granted

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1 From recent EU law scholarship, however, see e.g. R. Barents, *The Autonomy of Community Law*, The Hague, Kluwer Law International, 2004; S. Szurek, ‘Du particularisme à l’autonomie? Esquisse des rapports du droit international et du droit communautaire’, 5 *Annuaire de droit européen* (2007), pp. 57-92; B. de Witte, ‘European Union Law: How Autonomous is its Legal Order?’, 31 *Zeitschrift für öffentliches Recht* (2010), pp. 141-155; N. Tsagourias, ‘Conceptualizing the autonomy of the European Union’ in R. Collins and N.D. White (eds.), *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order*, Oxford, Routledge, 2011, 339-351; J. Czuczai, ‘The autonomy of the EU legal order and the law-making activities of international organizations. Some examples regarding the Council most recent practice’, 31 *Yearbook of European Law* (2012), pp. 452-472; E. Dubout, ‘La relativité de la distinction des normes du droit de l’Union européenne et du droit international’, in de L. Burgorgue-Larsen, E. Dubout, A. Maitrot de la Motte and S. Touzé (eds.), *Les interactions normatives. Droit de l’Union européenne et droit international*, Paris, Editions A. Pedone, 2012, pp. 17-51; L. Kirchmair, ‘The ‘Janus Face’ of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order’s Relationship with International and Member State Law’, 4 *Goettingen Journal of International Law* (2012), pp. 677-691; R.A. Wessel and S. Blockmans, ‘Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations – An Introduction’, in R.A. Wessel and S. Blockmans (eds.), *Between Autonomy and Dependence. The EU Legal Order Under The Influence of International Organisations*, The Hague, T.M.C. Asser Press/Springer, 2013, pp. 1-9; J.W. van Rossem, ‘The Autonomy of EU Law: More is Less?’, in R.A. Wessel and S. Blockmans (eds.), *Between Autonomy and Dependence. The EU Legal Order Under The Influence of International Organisations*, The Hague, T.M.C. Asser Press/Springer, 2013, pp. 13-46; I. Pernice, ‘The Autonomy of the EU Legal Order – Fifty Years After Van Gend’, in A. Tizzano, J. Kokott and S. Prechal (eds.), *50ème Anniversaire de l’arrêt/50th anniversary of the judgment in Van Gend en Loos, 1963-2013, Actes du Colloque Luxembourg, 13 mai 2013 – conference proceedings Luxembourg, 13 May 2013*, Luxembourg, Office des publications de l’Union européenne, 2013, pp. 55-80 (http://curia.europa.eu/jcms/jcms/P_95693)

TAMÁS MOLNÁR

by many EU law scholars, and other related topics have rather been in the spotlight of academic research as demonstrated by the vast legal literature dealing with the legal effects of international law within the EU legal order² as well as the external relations law of the European Union.³ After Opinion 2/13 of the Court of Justice of the European Union (CJEU), delivered in December 2014,⁴ a new wave of scholarly writings has appeared focusing on the autonomy of EU law, but principally in connection with the Union's accession to the European Convention on Human Rights; commenting and analysing the Court's autonomy-related arguments in this context.⁵ Despite being a bit in the shadow

– last accessed on 1 August 2015); P. Eckhout, 'Human Rights and the Autonomy of EU Law – Pluralism or Integration?', 66 *Current Legal Problems* (2013), pp. 169-202.

- 2 See, for instance, C. Kaddous, 'Effects of International Agreements in the EU Legal Order', in M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals*, Oxford, Hart Publishing, 2008; P.J. Kuijper, 'Customary international law, decisions of international organisations and other techniques for ensuring the respect for international legal rules in European Community law', in J. Wouters, A. Nollkaemper and E. de Wet (eds.), *The Europeanisation of International Law. The Status of International Law in the EU and its Member States*, T.M.C. Asser Press, The Hague, 2008; E. Cannizzaro, P. Palchetti and R.A. Wessel (eds.), *International law as law of the European Union*, Boston/Leiden, Martinus Nijhoff Publishers, 2011; M. Benlolo-Carabot, U. Candas and E. Cujo (éds.), *Union européenne et droit international. En l'honneur de Patrick Daillier*, Paris, Editions A. Pedone, 2012; M. Mendez, *The Legal Effects of EU Agreements*, Oxford, Oxford University Press, 2013; R.A. Wessel, *Close Encounters of the Third Kind. The Interface between the EU and International Law after the Treaty of Lisbon* (SIEPS 2013:8), Stockholm, Swedish Institute for European Policy Studies, December 2013 (www.sieps.se/sites/default/files/2013_8_WEBB.pdf – last accessed on 1 August 2015); or in the Hungarian legal literature M. Szabó, 'Az európai jog és a nemzetközi jogrend – hierarchia és összefonódás', *LIII Állam- és Jogtudomány* (2012), pp. 191-211; Á. Mohay, 'A nemzetközi jog és az uniós jog kapcsolódási pontjai' *1 Scriptura* (2014), pp. 269-281 (<http://onszak.hu/folyoirat/wp-content/uploads/2014/06/12Mohay.pdf> – last accessed on 1 August 2015).
- 3 Almost all EU law textbooks devote a chapter to this issue, and there are many specific commentaries, monographs or handbooks published on this topic, too (e.g. J.-V. Louis et al., *Relations extérieures – Commentaire J. Mégret. Le droit de la CE et de l'Union européenne*, Bruxelles, Éditions de l'Université de Bruxelles, 2005; P. Koutrakos, *EU International Relations Law*, Oxford/Portland, Hart Publishing, 2006; M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals*, Oxford, Hart Publishing, 2008; P. Eckhout, *EU External Relations Law*, Oxford, Oxford University Press, 2011 (2nd edition); A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape*, Cambridge, Cambridge University Press, 2011; B. van Voren and R.A. Wessel, *EU External Relations Law. Text, Cases and Materials*, Cambridge, Cambridge University Press, 2014).
- 4 Opinion 2/13, *Draft agreement providing for the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454.
- 5 Vol. 16 of the *German Law Journal* has devoted a special section to comment and discuss the ramifications of the Opinion, composed of the following contributions: D. Halberstam, 'It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward', 16 *German Law Journal* (2015), pp. 105-146; Ch. Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13', 16 *German Law Journal* (2015), pp. 147-167; S.Ø. Johansen, 'The Reinterpretation of TFEU Art. 344 in Opinion 2/13 and Its Potential Consequences', 16 *German Law Journal* (2015), pp. 169-178; A. Lazowski and R.A. Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR', 16 *German Law Journal* (2015), pp. 179-212; S. Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare', 16 *German Law Journal* (2015), pp. 213-222. Consider also e.g. 'Editorial Comments', 52 *Common Market Law Review* (2015), pp. 1-16; P. Eckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?' *Jean Monnet*

21 THE CONCEPT OF AUTONOMY OF EU LAW FROM THE COMPARATIVE PERSPECTIVE OF INTERNATIONAL LAW AND THE LEGAL SYSTEMS OF MEMBER STATES

up until recently, ‘autonomy’ is undisputedly a fundamental and structural principle of the EU legal order since its judge-made creation, also believed to be now part of ‘the very foundations’ of the Union legal order.⁶ In essence, the concept of autonomy oversteps the traditional divide between international law and domestic law by giving birth to a new category of law, a ‘new legal order.’ In order that a normative system be autonomous, it is the fact not being subject to external legal norms.⁷ In the EU context, this line of reasoning is taken by the CJEU as follows: ‘the very nature of EU law [...] requires that relations between Member States be governed by EU law to the exclusion [...] of any other law.’⁸ Given the reflexive nature of the term ‘autonomy’, that is, to be self-standing/distinct from something and to be able to function separately, it should relate to one or more points of reference. If we assume these points of references in the form of legal orders, the autonomy of Union law can be basically conceived in two ways: *vis-à-vis* either international law (*external aspect of autonomy*) or the domestic legal systems of the Member States (*internal aspect of autonomy*). This kind of conceptualisation clearly appears in Opinion 2/13,⁹ and earlier the two dimensions of autonomy had already been identified by academia as well.¹⁰ Nevertheless, legal concepts, especially highly abstract ones, oftentimes have ‘open texture’ (using Hart’s terms), which is particularly true for the doctrine of the autonomy of EU law. As Odermatt observed, ‘the problem is that ‘autonomy’ is a notoriously vague and ill-defined concept and can be applied in a narrow or open fashion.’¹¹ Therefore this cornerstone principle is still a controversially discussed issue in EU law. In any event, the concept of autonomy can exhibit different features which will depend on the circumstances of the case.¹²

In this short piece, I will first analyse and clarify the meaning of the *two dimensions* of autonomy of EU law (*external and internal aspects*), also discussing the latest developments

Working Paper 01/15 (<http://jeanmonnetprogram.org/wp-content/uploads/2015/04/JMWP-01-Eeckhout1.pdf> – last accessed on 1 August 2015); or J. Odermatt, ‘A Giant Step Backwards? Opinion 2/13 on the EU’s Accession to the European Convention on Human Rights’, *Leuven Centre for Global Governance Studies Working Paper No. 150 – February 2015* (<https://ghum.kuleuven.be/ggs/wp150-odermatt.pdf> – last accessed on 1 August 2015).

6 Van Rossem, 2013, p. 18; Wessel and Blockmans, 2013, p. 1.

7 M. Troper, ‘La constitution comme système juridique autonome’, 34 *Droits* (2002), p. 66.

8 ECLI:EU:C:2014:2454, Para. 40.

9 ECLI:EU:C:2014:2454, Para. 170 (‘The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law...’). Advocate General Kokott equally made this distinction in her View delivered on 13 June 2014, when she opined that ‘autonomy is not only characteristic of the relationship between EU law and the laws of the Member States, but must be respected also *vis-à-vis* third countries and international organisations’ (ECLI:EU:C:2014:2475, Para. 159).

10 See e.g. J-C. Gautron and L. Grard, ‘Rapport général: Le droit international dans la construction de l’Union européenne.’ in SFDI, *Colloque de Bordeaux. Droit international et droit communautaire, perspectives actuelles*, Paris, Editions A. Pedone, 2000, p. 22; de Witte, 2010, p. 142; Tsagourias, 2011, p. 339-40; Kirchmair, 2012, pp. 678-679; Pernice, 2013, p. 57; Wessel and Blockmans, 2013, p. 1.

11 Odermatt, 2015, p. 12.

12 Van Rossem, 2013, p. 18.

TAMÁS MOLNÁR

in this respect, i.e. its apparently stronger constitutional role in EU public law architecture. In view of the limited length of this article, I will not dwell upon Opinion 2/13 in a detailed and in-depth manner, but I will only touch it upon to a necessary extent and to illustrate the evolution of the concept of autonomy against the backdrop of the CJEU's previous jurisprudence. Subsequently, the paper will compare the *different needs and challenges for preserving the autonomy* of the EU legal order from international law and the legal systems of the Member States. In doing so, the theoretical prerequisites of any 'legal order', including its autonomous regime of validity and its mechanism guaranteeing the unity of interpretation, will be shortly studied as well. Finally, after comparing the methods and requirements to protect the external and internal dimensions of the claimed autonomy, I will conclude that the fully-fledged autonomy of the EU legal order is *more dependent on its relation to the national legal orders* (which is factual and concrete) than to general international law (which is, to a large extent, principally conceptual).

21.2 EXTERNAL AND INTERNAL ASPECTS OF THE AUTONOMY OF EU LAW

1. As a starting point, the concept of autonomy is traditionally perceived in the context of *international law* as the famous judgments of the CJEU in *Van Gend en Loos*¹³ and *Costa v. E.N.E.L.*,¹⁴ followed by other less-known cases in the 1960s,¹⁵ have elaborated the doctrine in this respect. Positioning EU law in relation to international law as an initial step in this process is not surprising. The European regional economic – and now political – integration organization, whether it is called European (Economic) Communities or European Union, has always been and is still based on international treaties. As a result, the very existence and the general framework (including its modification regime) of this inter-governmental organization has been clearly rooted in international law.¹⁶ The CJEU, famous for its judicial activism, had first pronounced in the *Van Gend en Loos* judgement that the 'Community constitutes a *new legal order of international law* for the benefit of which Member States have limited their sovereign rights'¹⁷ (emphasis added – T.M.), which was

13 Case 26-62, *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Judgment of the Court of 5 February 1963, ECLI:EU:C:1963:1.

14 Case 6-64, *Flaminio Costa v. E.N.E.L.*, Judgment of the Court of 15 July 1964, ECLI:EU:C:1964:66.

15 For instance, Joined Cases 90-63 and 91-63, *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, Judgment of the Court of 13 November 1964, ECLI:EU:C:1964:80.

16 Similarly, see e.g. de Witte, 2010, pp. 141-155.

17 ECLI:EU:C:1963:1, Part II.B, Para. 4. In the original, French version of the text (at that time, the United Kingdom was not amongst the members of the European Economic Community (EEC), so English was not an official language of the EEC) it reads as follows: '*un nouvel ordre juridique de droit international au profit duquel les Etats membres ont limité leur pouvoirs souverains*'.

21 THE CONCEPT OF AUTONOMY OF EU LAW FROM THE COMPARATIVE PERSPECTIVE OF INTERNATIONAL LAW AND THE LEGAL SYSTEMS OF MEMBER STATES

later simply referred to as a ‘new legal order’¹⁸ and the mention of international law as its broader normative system of operation disappeared. These magic words have been then used slightly differently in *Costa v. E.N.E.L.* when the Luxembourg Court added that ‘by contrast with ordinary international treaties, the EEC Treaty has created *its own legal system*’ (emphasis added – T.M).¹⁹ It also pinpointed that EU law arose out of an ‘independent source of law’, which is not a fully accurate translation of the expression in the French original (*‘issu d’une source autonome’*).²⁰ It is true that the *Van Gend en Loos* and *Costa v. E.N.E.L.* rulings can be convincingly interpreted as relating to both the external and internal aspects of autonomy. In my understanding, though, there is a logical sequence between the two dimensions as they appear in the above decisions. First, the judges in Luxembourg had to emancipate EU law from international law. Only after preparing the ground such a way the CJEU could effectively argue that Member States are obliged to accept, within their own legal systems, the autonomous nature and operation of this body of law emanating from the founding Treaties (by means of direct effect, supremacy, pre-emption etc.). ‘To make certain key principles of EU law (including ‘primacy’ and ‘direct effect’) work, the EU needs to stress its autonomous relation *vis-à-vis* international law’ – argued similarly Wessel.²¹ Put it differently, if EU law is construed by the Court as something completely different and independent from international law, representing a wholly new category of law, then Member States cannot apply their ordinary legal techniques and arguments developed for the domestic reception of norms originating from international law when it comes to enforcing EU law in the national legal systems, including the legal effects they produce internally. Consequently I refer to these two hallmark judgments

18 Joined Cases 90-63 and 91-63, *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, Judgment of the Court of 13 November 1964, ECLI:EU:C:1964:80, p. 1232 (‘the [EEC] Treaty [...] establishes a new legal order’ or in the French original ‘*un ordre juridique nouveau*’). Not only was the expression of ‘international law’ omitted by the Court, but even the order of words has been changed compared to the *Van Gend en Loos* formula; then this shorter version was later echoed many times in subsequent jurisprudence, e.g. in Opinion 1/91, *Draft Agreement relating to the Creation of the European Economic Area*, Opinion of the Court of 14 December 1991, ECLI:EU:C:1991:490. In *Costa v. E.N.E.L.*, a slightly different formulation was used in the original French version to refer to this sui generis legal order, namely ‘*ordre juridique propre*’, which was translated in English as ‘its own legal system’ when English became an official language of the EEC.

19 ECLI:EU:C:1964:66, Para. 12. The original French version of the judgment applies the term ‘*un ordre juridique propre*’. For subsequent jurisprudence, see also Joined Cases 142/80 and 143/80, *Amministrazione delle Finanze dello Stato v. Essevi SpA and Carlo Salengo*, Judgment of the Court of 27 May 1981, ECLI:EU:C:1981:121, Para. 8 (‘Above all, it must be pointed out that in no circumstances may the Member States rely on similar infringements by other Member States in order to escape their own obligations under the provisions of the Treaty.’).

20 This ‘lost in translation’ phenomenon is also noticed by de Witte, 2010, p. 142. Other commentators do not consider it problematic; see P. Pescatore, ‘Van Gend en Loos, 3 February 1963 – A View from Within’, in M.P. Maduro and L. Azulai (eds.), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford, Hart Publishing, 2010, p. 5; Pernice, 2013, p. 56.

21 Wessel, 2013, p. 22.

TAMÁS MOLNÁR

throughout this subsection as predominantly (but not exclusively) articulating the *external dimension* of the autonomy of EU law.

It flows from the above analysis that the ground-breaking judgments in the 1960s, traditionally associated with the genesis of the doctrine of autonomy, had not expressly used this phrasing. The term ‘*autonomy of the Community legal order*’ was initially and explicitly applied by the Court in its *Opinion 1/91*²² and then subsequently echoed in other Opinions²³ as well as reiterated in ulterior landmark judgments, notably in *MOX Plant*,²⁴ then in the *Kadi I* ruling.²⁵ In these two judgments, the Court revitalized the external dimension of this notion by stating that ‘an international agreement cannot affect the allocation of responsibilities defined in the Treaties, and consequently, the autonomy of the Community legal system’²⁶ and strongly emphasised the ‘autonomous legal order of the Community’,²⁷ which is not to be prejudiced by international law. Lately, the CJEU has reaffirmed with particular vigour the importance of autonomy as a fundamental constitutional principle of EU law in its *Opinion 2/13* relating to the compatibility with EU law of the agreement for the accession of the European Union to the European Convention on Human Rights (ECHR). Here, after the restatement of the classics,²⁸ the Court went on giving an implicit definition of this controversial notion. It encapsulated the main features and building blocks of the autonomous nature of the EU legal order by specifying that ‘the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation.’²⁹ In the present state of affairs, the EU Court understands autonomy in a way that the European Union may be a construction of international law, but in its internal legal order its own rules replace the principles

22 ECLI:EU:C:1991:490, Paras. 30, 35 and 47.

23 *Opinion 1/92, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, Opinion of the Court of 10 April 1992, ECLI:EU:C:1992:189, Paras. 17-18, 22, 24, 29, 36; *Opinion 1/00, Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area*, Opinion of the Court of 22 April 2002, ECLI:EU:C:2002:231, Paras. 5-6, 12, 21, 26-27, 37, 46; *Opinion 1/09, Draft agreement – Creation of a unified patent litigation system – European and Community Patents Court*, Opinion of the Court (Full Court) of 8 March 2011, ECLI:EU:C:2011:123, Paras. 67, 76.

24 Case C-459/03, *Commission of the European Communities v. Ireland (MOX Plant)*, Judgment of the Court (Grand Chamber) of 30 May 2006, ECLI:EU:C:2006:345.

25 *Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment of the Court (Grand Chamber) of 3 September 2008, ECLI:EU:C:2008:461. For an overview of the *Kadi* saga, with rich bibliographical references, see C. Feinäugle, ‘Kadi Case’ in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008-, online edition (www.opil.ouplaw.com – article last updated: April 2014).

26 ECLI:EU:C:2006:345, Para. 123, then repeated in *Kadi I* (ECLI:EU:C:2008:461, Para. 282).

27 ECLI:EU:C:2008:461, Para. 317.

28 ECLI:EU:C:2014:2454, Para. 157.

29 ECLI:EU:C:2014:2454, Para. 158.

21 THE CONCEPT OF AUTONOMY OF EU LAW FROM THE COMPARATIVE PERSPECTIVE OF INTERNATIONAL LAW AND THE LEGAL SYSTEMS OF MEMBER STATES

and mechanisms of international law.³⁰ Further to that, in case of norm conflicts between its internal rules (*acquis communautaire*) and undertaken external obligations (international law binding the EU), primary EU law is given priority over conflicting international agreements and other international obligations. Some of these collision rules are laid down in the founding Treaties,³¹ some others have been developed by the European Court of Justice (with regard to certain general principles of EU law).³²

Borrowing van Rossem's words, the preservation of the 'external autonomy' of EU law has been understood by the CJEU, as voiced e.g. in its Opinions 1/91, 1/92 and 1/00,³³ to require two things:

[f]irst, that the essential character of the powers of the [EU] and its institutions remains unaltered by an international agreement. Secondly, that procedures for ensuring uniform interpretation of treaties, specifically procedures that involve an external judicial body, do not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law.³⁴

The *external dimension* of the autonomy of EU law thus indicates its emancipation from international law; therefore it applies in relation to third States and international organisations and the whole body of general international law as such. The EU Court left no doubt about this separation when postulated: 'Security Council resolutions and Council common positions and regulations originate from distinct legal orders.'³⁵ Nevertheless, the autonomous existence of EU law does not mean that 'the Community's' municipal legal

30 *Opinion 2/13 of the Court of Justice on Access of the EU to the ECHR – One Step ahead and Two Steps Back*. Blog entry of 31 March 2015 on <http://europeanlawblog.eu> (last accessed on 1 August 2015).

31 Arts. 216(2), 218(11) and 351 TFEU.

32 Case C-122/95, *Federal Republic of Germany v. Council of the European Union*, Judgment of the Court of 10 March 1998, ECLI:EU:C:1998:94; Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, Judgment of the Court of 16 June 1998, ECLI:EU:C:1998:293; Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment of the Court (Grand Chamber) of 3 September 2008, ECLI:EU:C:2008:461.

33 For the original appearance of these requirements see ECLI:EU:C:1991:490, Paras. 35, 39-42; afterwards echoed in subsequent opinions (ECLI:EU:C:1992:189, Paras. 17-22, 32, 41; ECLI:EU:C:2002:231, Paras. 11-13).

34 J. W. van Rossem, 'The EU at crossroads: a constitutional inquiry into the way international law is received within the EU legal order' in E. Cannizzaro, P. Palchetti and R.A. Wessel (eds.), *International law as law of the European Union*, Boston/Leiden, Martinus Nijhoff Publishers, 2011, p. 61. See also: R.A. Wessel and S. Blockmans, 2013, pp. 8-9.

35 Case C-548/09, *Bank Mellat v. Council of the European Union*, Judgment of the Court (Grand Chamber) of 16 November 2011, ECLI:EU:C:2011:735, Para. 100. In legal literature, see also Kirchmair, 2012, pp. 678-679.

TAMÁS MOLNÁR

order and the international legal order pass by each other like ships in the night.³⁶ The latter has definitely its place and role in the EU normative framework, likewise in national legal orders which accommodate international legal norms pursuant to their own constitutional requirements. But theoretically and dogmatically speaking EU law and international law are treated by the Court of Justice as forming two independent and parallel legal orders.

Surely, a purely conceptual notion of autonomy as has been elaborated by the CJEU is not enough in itself. It cannot exist in isolation, thus its embeddedness and concretisation in social reality is needed, too.³⁷ The claimed autonomy of EU law was not only emphasised and advocated by EU lawyers, but many *international law scholars* have also examined EU law's specific, autonomous character whether it qualifies or not as a 'self-contained regime' (as its best or closest example).³⁸ Yet, it is still disputed amongst legal scholars whether we can talk about an absolute (fully-fledged self-contained regime-like) or relative autonomy (EU law still keeping its umbilical ties with international law as one of its highly specialized sub-system).³⁹ Beyond academia, certain external actors in international law, notably *international judicial bodies and international organisations* have also recognized this self-proclaimed autonomy of EU law. The approach taken by the European Court of Human Rights (ECtHR),⁴⁰ or some arbitral tribunals⁴¹ illustrates it well. Similarly, this position is

36 Opinion of Advocate General Poireres Maduro delivered on 16 January 2008, ECLI:EU:C:2008:11, Para. 22.

37 See also, Dubout, 2012, p. 26.

38 See e.g. M. Sørensen, 'Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organisations in the World Legal Order' 32 *International and Comparative Law Quarterly* (1983), pp. 559-576; B. Simma, 'Self-Contained Regimes', XVI *Netherlands Yearbook of International Law* (1985), pp. 111-136; J.H.H. Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991), pp. 2403-2484; G. Conway, 'Breaches of EC Law and the International Responsibility of Member States', 13 *European Journal of International Law* (2002), pp. 679-695; B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', 17 *European Journal of International Law* (2006), pp. 483-529; A. Rosas, 'Relations entre les Etats membres de l'Union européenne: le droit international public y a-t-il encore sa place?', in *L'Etat souverain dans le monde d'aujourd'hui. Mélanges en l'honneur de J.-P. Puissechet*, Paris, Éditions A. Pedone, 2008, pp. 255-265. E. Klein, 'Self-Contained Regime', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, online edition (www.opil.ouplaw.com – article last updated: November 2006), Paras. 3, 15.

39 Similarly, see de Witte, 2010, p. 142 or the International Law Commission's 2006 report on the fragmentation of international law (*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Marti Koskeniemi*, UN Document A/CN.4/L.682, 13 April 2006, Paras. 8, 157, 218-219). Weiler and Haltern draw the attention to that fact that leading international law periodicals such as the *American Journal of International Law* or the *European Journal of International Law* do not consider, as a matter of principle, the law of the European Union as international law (J.H.H. Weiler and U.R. Haltern, 'Autonomy of the Community Legal Order – Through the Looking Glass' 37 *Harvard International Law Journal* (1996), pp. 421-422).

40 *Mousaquin v. Belgium* (Appl. No. 12313/86), Judgment of 18 February 1991, Para. 49; where EU law is referred to as a 'special legal order'. See also this approach in *Matthews v. United Kingdom* (Appl. No. 24833/94), Judgment of 18 February 1999.

41 Permanent Court of Arbitration, *Belgium/Netherlands (Iron Rhine Arbitration)*, Award of the Arbitral Tribunal of 24 May 2005, Paras. 101-103, where the Arbitral Tribunal recognized the EU's special judicial system, including the adjudicative autonomy of the CJEU; or Arbitral Tribunal Constituted Pursuant to Art.

21 THE CONCEPT OF AUTONOMY OF EU LAW FROM THE COMPARATIVE PERSPECTIVE OF INTERNATIONAL LAW AND THE LEGAL SYSTEMS OF MEMBER STATES

reflected in the practice of the Council of Europe (CoE) with the so-called ‘disconnection clauses’ used in many CoE conventions in order not to hinder EU legislative autonomy,⁴² followed by other international organisations for agreements drafted under their aegis.⁴³ Moreover, the legal solution adopted by the World Trade Organization (WTO), where the EU as a distinct entity – a regional economic integration organization forming a ‘single customs union’ – was admitted as a full WTO member since 1995,⁴⁴ shows this kind of recognition of the separateness of EU law from international law in the eyes of certain actors within the international legal sphere.

2. Secondly, the *internal aspect* of autonomy denotes the independence of European Union law from the *national legal systems of the Member States*. This inward-looking internal dimension is characterised principally by EU law self-integrating character into the national legal orders, and classic doctrines crystallized in the case law of the EU Court such as direct effect, supremacy or *effet utile*, coupled the CJEU’s monopoly of authentic interpretation of Union law, preventing national judicial organs to do so. Already the earlier findings of the then Court of Justice of the European Communities in 1963 made it clear – in line with the views expressed by Advocate General LaGrange in previous cases⁴⁵

287, and Art. 1 of Ann. VII, of UNCLOS for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea, *Ireland v. United Kingdom (The MOX Plant case)*, Order No. 3 of 24 June 2003, Para. 24: ‘[t]he Tribunal recognizes that the problems [...] relate to matters which essentially concern the internal operation of a separate legal order (namely the legal order of the European Communities).’ It should be noted, though, that the practice of arbitration tribunals varies and the picture is much more complex, with opposing standpoints from an ad hoc tribunal to another. This oscillation is well illustrated with a recent decision of an ICSID panel, which has plainly qualified EU law as part and parcel of international law (*Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision of 30 November 2012).

- 42 For a comprehensive account of this practice, with numerous examples, see Council of Europe, Committee of Ministers, Doc. CM(2008)164, 1044 Meeting, 10 December 2008, point 10 Legal Questions, 10.6 Committee of Legal Advisers on Public International Law (CAHDI) c. *Report on the consequences of the so-called ‘disconnection clause’ in international law in general and for the Council of Europe Conventions, containing such a clause in particular*. For more academic analysis, see e.g. A.G. Kolliopoulos and C.P. Economides, ‘La clause de déconnexion en faveur du droit communautaire: une pratique critiquable’ *CX Revue Générale de Droit International Public* (2006), pp. 273-302; M. Ličková, ‘European Exceptionalism in International Law’, 19 *European Journal of International Law* (2008), pp. 463-490; M. Cremona, ‘Disconnection Clauses in EC Law and Practice’ in Ch. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford, Hart Publishing, 2010, pp. 160-186.
- 43 For instance, the UN Economic Commission for Europe (UNECE) drafted a Protocol on Civil Liability for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, or the Convention concerning International Carriage by Rail (COTIF), both containing such disconnection clauses.
- 44 See, https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (last accessed on 1 August 2015).
- 45 E.g. Case 8-55, *Fédération Charbonnière de Belgique v. High Authority of the European Coal and Steel Community*, Opinion of Advocate General LaGrange of 12 June 1956, [1954-1956] ECR 261: ‘[A]lthough the Treaty, which the Court has the task of applying was concluded in the form of an international agreement and although it unquestionably is one, it is nevertheless, from a material point of view, the charter of the Community, since the rules of law which derive from it constitute the *internal law of that Community*.’ (emphasis added – T.M.).

TAMÁS MOLNÁR

– that ‘the municipal law of any Member State and Community law constitute two separate and distinct legal orders.’⁴⁶ This plainly excludes that then EC law could be considered to be part of national law, and underlines its special character. Afterwards, both the aforementioned *Van Gend en Loos* and *Costa v. E.N.E.L.* rulings had a powerful say on the relationship between EU legal order and the domestic legal systems of the Member States, stressing their independence from each other. In the former, the Luxembourg Court opined that ‘independently of the legislation of Member States, Community law [...] is also intended to confer upon [individuals] rights which become part of their legal heritage.’⁴⁷ In the latter, it was held that ‘the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States’,⁴⁸ then it added: ‘the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions [...] without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.’⁴⁹

Here, the famous formula of ‘independent source of law’ (*issu d’une source autonome*), which was already discussed above in relation to the external dimension of autonomy, not only relates to international law, but expresses EU law’s claim for autonomy *vis-à-vis* national law, too. It thus means that Union law is not dependent on Member States’ legal orders for its validity⁵⁰ and application at the domestic level, but EU law is valid and applicable in the territory of the Member States by virtue of this legal order alone. The wording in *Costa v. E.N.E.L.* made it clear that the concept of autonomy, implicitly appearing in the text, is to protect and preserve EU law from the possibility that domestic legislative measures adopted by Member States might adversely affect it.

46 Case 13-61, *Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn*, Judgment of the Court of 6 April 1962, ECLI:EU:C:1962:11.

47 ECLI:EU:C:1963:1, Part II.B, Para. 4.

48 ECLI:EU:C:1964:66, Para. 12.

49 ECLI:EU:C:1964:66, Para. 17.

50 This is entirely true for secondary EU law (acts of the Institutions). Concerning primary EU law (the founding Treaties and their amendments) the *national acts of ratifications* are the sources of validity both on the international plane and within Member State law, too. Nonetheless, if a Member State which follows a dualist-transformation technique for incorporating treaties has expressed its consent to be bound by the founding Treaties or their amendments (act of ratification is received by the depository), but fails to comply with its own constitutional requirements when doing so (e.g. the act of ratification is deposited by the Head of State without the authorization of the Parliament; or the validly ratified primary EU law, for some reason, is not promulgated in a piece of legislation), these deficiencies will not affect the domestic validity of the founding Treaties (Art. 46 of the 1969 Vienna Convention on the Law of the Treaties can hardly be invoked to invalidate the treaty in respect of that Member State). In other words, in such a case direct effect and supremacy of primary EU law provisions as well as the validity of secondary EU legislation cannot be challenged internally and national courts and authorities are bound, by EU law itself, to apply the rules of Union law.

21 THE CONCEPT OF AUTONOMY OF EU LAW FROM THE COMPARATIVE PERSPECTIVE OF INTERNATIONAL LAW AND THE LEGAL SYSTEMS OF MEMBER STATES

Overall, in my view, the references in these two leading cases visibly underpin that direct effect and supremacy logically stem from the broader concept of autonomy of EU law, and not the other way round. That is to say these two fundamental constitutional pillars of the EU legal order are conceptual derivations of its autonomous character.⁵¹ The *basic rationale* behind the internal aspect of the autonomy is different from that in case of its external dimension. With regard to international law, the European Union, and especially the CJEU, wants to remain in *full control of the interpretation and application* of EU legal norms as well as to make sure that international legal norms are not ‘allowed to make serious inroads into the rule of law underpinning the Treaties.’⁵² When it comes to autonomy *vis-à-vis* the legal systems of the Member States, the main motive is to keep and to protect the *unity* of the EU legal order and to avoid distortions and divergent application of Union law at the national level, in 28 different jurisdictions (need for uniformity).

3. Nowadays, autonomy has been construed as a legal concept of *constitutional character*, as expressed in newer CJEU case law, with the flagship judgments in the *MOX Plant* or *Kadi I* cases and most recently and overtly in *Opinion 2/13*. In *MOX Plant*, the Court stressed again that ‘an international agreement cannot affect the allocation of responsibilities defined in the Treaties, and consequently, the autonomy of the Community legal system.’⁵³ In addition to that, in the first judgment rendered by the CJEU in *Kadi*, which repeated the above passage from *MOX Plant*, it also was argued that ‘the review by the Court of the validity of any Community measure [...] must be considered to be the expression [...] of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system.’⁵⁴ Similarly, the resurfaced and seemingly stronger constitutional concept of autonomy represented the centre of gravity in the EU Court’s reasoning in its *Opinion 2/13*. The Opinion devoted a sub-section to ‘the specific characteristics and autonomy of EU law’,⁵⁵ which summarized the previous case law on the meaning and content of autonomy. The Court further held that ‘characteristics relating to the constitutional structure of the EU’ also include ‘specific characteristics arising from the very nature of EU law[, in] particular [...] EU law is characterised by the fact that it stems from an independent source of law.’⁵⁶ The elevation of the concept of autonomy to the level of the Union’s constitutional foundations explains specifically that ‘[t]he autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of [...] fundamental rights be ensured within the framework of the structure and objectives of the EU.’⁵⁷

51 This is also argued by Dubout, 2012, p. 27 and van Rossem, 2013, p. 18.

52 Van Rossem, 2013, p. 19; referring to the dictum in *Kadi I*.

53 ECLI:EU:C:2006:345, Para. 123.

54 ECLI:EU:C:2008:461, Para. 316.

55 ECLI:EU:C:2014:2454, Paras. 179-200.

56 *Ibid.*, Para 166.

57 *Ibid.*, Para. 170.

TAMÁS MOLNÁR

Stressing the autonomy of the EU legal order in this context can also be seen, as some scholars argue (e.g. van Rossem,⁵⁸ Koskenniemi⁵⁹ or Burgorgue-Larsen⁶⁰) as a *disguised claim to sovereignty*. In other words, the EU ‘envies’ its Member States in this respect, and autonomy for the EU legal order would be something axiomatic like sovereignty for the national legal systems. Along those lines, one can grasp EU law as ‘a *municipal legal order of trans-national dimensions*’ which description appeared in an opinion of Advocate General Maduro,⁶¹ and then it was apparently endorsed by the CJEU.

4. Against this backdrop, it is clear that there is a strong connection between the external and internal aspects of autonomy. Nevertheless a parallel and reflective examination of the content and ramifications of these two dimensions is still quite a *terra incognita* in academic research and scholarly writings. In the next section, I am going to examine the *different needs and challenges* for recognizing the autonomous nature of EU law when this special and original legal order tries to distinguish itself from international law and the domestic legal systems of the Member States.

21.3 RECOGNIZING THE AUTONOMY OF EU LAW VIS-À-VIS INTERNATIONAL LAW AND THE NATIONAL LEGAL SYSTEMS: DIFFERENT NEEDS, CHALLENGES AND ANSWERS

21.3.1 *Theoretical Prerequisites of a ‘Legal Order’*

1. When discussing the autonomy of EU law from the perspective of the international and the domestic legal orders, a preliminary issue of what is a ‘legal order’ arises. Historically speaking, the appearance of the idea of a legal order is a fairly recent one. As Pierre-Marie Dupuy points it out, the first commentators to invoke this idea emerged in the study of German public law in the first half of the 19th century, who were the successors of the political philosophy of Kant, Hegel and Schelling. The concept of legal order (*Rechtsordnung*) used to develop in tandem with the theory of rule of law (*Rechtsstaat*), with which it is frequently associated, and it referred to the idea of an organic and structural normative

⁵⁸ Van Rossem, 2013, pp. 25-27.

⁵⁹ M. Koskenniemi, ‘International Law: Constitutionalism, Managerialism and the Ethos of Legal Education’, 1 *European Journal of Legal Studies*, (2007), p. 1 (www.eljs.eu – last accessed on 1 August 2015).

⁶⁰ L. Burgorgue-Larsen, ‘Existe-t-il une approche européenne du droit international?’, in SFDI, *Journée franco-allemande. Droit international et diversité des cultures juridiques*, Paris, Editions A. Pedone, 2008, p. 263 (‘[l’]autonomie serait] à l’ordre juridique communautaire ce qu’est la souveraineté pour les ordres juridiques nationaux’).

⁶¹ Opinion of Advocate General Poires Maduro delivered on 16 January 2008 in Case C-402/05 P, Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities, ECLI:EU:C:2008:11, Para. 21.

21 THE CONCEPT OF AUTONOMY OF EU LAW FROM THE COMPARATIVE PERSPECTIVE OF INTERNATIONAL LAW AND THE LEGAL SYSTEMS OF MEMBER STATES

whole.⁶² The use of the term 'legal order' appears to be fairly technical, yet, it also has a metaphorical role as described by Timsit.⁶³ The notion of legal order is a representation seeking to conceive the functioning of law.⁶⁴ There is extremely abundant legal literature⁶⁵ on the meaning of the term 'legal order', so here it suffices to briefly highlight common elements identified in scholarly writings. These elements encompass, *inter alia*, the autonomous regime of validity; own sources of law; self-referential nature; and specific mechanisms guaranteeing the unity of interpretation of the rules belonging to the system. On the basis of those distinctive features, one can define a 'legal order' as an organized body of legal norms along a certain logic and structural principles, more than just a conglomerate of legal rules, and governing the concrete, real functioning of social, economic etc. relations and interactions, so its impact on social reality (its effectiveness) matters, too. Pierre-Marie Dupuy also concludes that although conceptions of a legal order vary significantly between authors, all agree that the expression refers to the organisation of a more or less complex system of norms and institutions intended effectively to apply to the constitutive subjects of a determined community.⁶⁶ In other words, it is not only a '*bric-à-brac*',⁶⁷ but a structured, deliberately built-up system. Moreover, its self-referential character is to be red-flagged as well, since through this feature a legal order is able to maintain its unity and its own existence.⁶⁸

2. Regarding the *EU's self-perception* concerning its own legal framework, it was as early as its first preliminary ruling the CJEU described Community law as a 'legal order'.⁶⁹ The Court did not dig deep in explaining which mechanisms are required so that a legal order emerges and what the belonging of norms to a given system of law means, it just plainly stated that the law stemming from the Treaties and that made by the Community institutions qualify as a legal order. The original version of the 1957 Treaty establishing the European Economic Community (TEEC) had not contained such a reference to the 'Community legal order', but due to subsequent treaty modifications, this expression was later inserted in Article 227 TEEC in connection with the situation of the outermost regions (Art. 299 as renumbered by the Treaty of Amsterdam). In the present state of affairs, a

62 P.M. Dupuy, 'A Doctrinal Debate in the Globalisation Era: On the 'Fragmentation' of International Law' 1 *European Journal of Legal Studies*, (2007), p. 1 (www.eljls.eu – last accessed on 1 August 2015).

63 G. Timsit, 'L'ordre juridique comme métaphore', 33 *Droits* (2001), pp. 3-18.

64 Dubout, 2012, p. 24.

65 For a good summary of the relevant scholarly writings, see e.g. Barents, 2004, p. 170-171 (footnotes 19-20).

66 P.M. Dupuy, *Droit international public*, Paris, Précis Dalloz, 8th ed, 2006, Paras. 15-27.

67 This term was used by Jean Combacau in relation to international law when he assessed whether the law of nations is a genuine system or just a random aggregation of norms of international origin (J. Combacau, 'Le droit international: bric-à-brac ou système' 31 *Archives de philosophie du droit* (1986), pp. 88-105).

68 Barents, 2004, p. 171.

69 Case 13-61, *Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn*, Judgment of the Court of 6 April 1962, ECLI:EU:C:1962:11.

TAMÁS MOLNÁR

reference to the ‘Union legal order’ can be found in Article 349 of Treaty on the functioning of the European Union (TFEU),⁷⁰ thereby continuously providing a solid positive law foundation of the term. If we take it for granted that EU law constitutes a legal order, it means that it cannot be subject to other external legal orders, thus it is self-standing and the source of validity of its rules (at least as concerns secondary EU law) can be found within this specific normative system (self-referential character). In the subsequent subsection, I will explore what kinds of requirements have been elaborated either by the EU legislator or the Court of Justice to make real this claim for being an autonomous legal order.

21.3.2 *Legal Techniques and Requirements to Preserve the Autonomy of EU Law from International Law*

After having outlined above the meaning and content of the external dimension of autonomy, now it is needed to elaborate more on those legal techniques and requirements which are indispensable to preserve the autonomous character and functioning of EU law from international law. Considering that the concept of (external) autonomy has never been mentioned in EU primary law, the case law of the CJEU gives us the most indications in this regard.

1. However, it is still worth beginning with black letter law, because there are some essential provisions in the founding Treaties which serve to protect the specificity and integrity of the EU legal order, mainly from external influences. *Article 344 TFEU* is such a clause, which enshrines the exclusive and compulsory jurisdiction of the EU Court in the following terms:

‘Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.’

This essential principle and self-limitation for Member States relating to their external action, had been recalled by the Court decades ago (for instance in *Opinion 1/91*),⁷¹ which is also understood since the *MOX Plant* case as a specific expression of Member States’ duty of sincere cooperation (loyalty) enshrined in Article 4(3) of the Treaty on the European Union (TEU).⁷² It flows from the Luxembourg jurisprudence that *dispute settlement procedures involving an external judicial body* (e.g. the Court of the European Economic Area, the WTO Dispute Settlement Bodies, or the European Court of Human Rights) *shall not*

⁷⁰ ‘The Council shall adopt measures [...] without undermining the integrity and the coherence of the *Union legal order...*’ (emphasis added – T.M.).

⁷¹ See also e.g. Gautron and Gard, 2000, p. 24.

⁷² ECLI:EU:C:2006:345, Para. 169.

21 THE CONCEPT OF AUTONOMY OF EU LAW FROM THE COMPARATIVE PERSPECTIVE OF INTERNATIONAL LAW AND THE LEGAL SYSTEMS OF MEMBER STATES

affect the powers of CJEU and the uniform, authentic interpretation of EU law. Van Rossem characterized it as the 'European legal order possessed an inner core – in particular the EC's unique judicial structure – that, save for treaty amendment, could not be touched by international law.'⁷³ Besides *MOX Plant*, which is the previous leading case in the regard, the freshest and very flagrant expression of this requirement has surfaced in *Opinion 2/13*, where the Court examined the ramifications of Article 344 TFEU and shed more light on the boundaries between lawful and unlawful external judicial control over EU law by an international court. As a matter of principle, it was set out that an international agreement cannot affect the autonomy of the EU legal system and the respective powers of the Court, a principle enshrined in Article 344 TFEU. This provision is specifically intended to preserve the exclusive nature of the procedure for settling those disputes within the EU, and in particular of the jurisdiction of the Court of Justice in that respect, and thus precludes any prior or subsequent external control.⁷⁴ However, the EU Court also restated its previous dictum that the creation of an external judicial body whose decisions are binding on the EU institutions, including the Court of Justice, is not, in principle, incompatible with EU law;⁷⁵ that is particularly the case where the conclusion of such an agreement is provided for by the Treaties themselves (see Art. 6(2) TEU laying down the obligation of the EU to accede to the ECHR).⁷⁶ If one takes a closer look at the evolution of this case law, it can be observed that originally, Article 344 TFEU has just been mentioned *en passant* in the CJEU autonomy-related pronouncements (e.g. in *Opinion 1/91*). The shift was brought by *MOX Plant*, which not only reaffirmed it as a manifestation of the autonomous nature of EU law, but discussed it more at length. By virtue of the judgment, given that the treaty at hand, the United Nations Convention on the Law of the Sea (UNCLOS)⁷⁷ makes it possible that the dispute resolution system under EU law takes precedence over the system established by Part XV of UNCLOS, the breach of the EU Court's exclusive jurisdiction under Article 344 TFEU is avoided.⁷⁸ In other words, here the threshold for complying with Article 344 TFEU is the *possibility of Member State compliance*.⁷⁹ However, the CJEU opted for a different reasoning in relation to another mixed agreement setting up an inter-party dispute settlement mechanism in *Opinion 2/13* by putting the bar of compliance higher. The Court declared that the *very existence of a possibility* to bring inter-States disputes

73 Van Rossem, 2013, p. 16.

74 ECLI:EU:C:2014:2454, Para. 210.

75 ECLI:EU:C:2014:2454, Para. 182; previously see in *Opinion 1/91*, EU:C:1991:490, Paras. 40, 70, and *Opinion 1/09*, EU:C:2011:123, Para. 74.

76 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.'

77 *United Nations Convention on the Law of the Sea*, signed on 10 December 1982 in Montego Bay, UNTS No. 31263, Vol. 1883, p. 3 (entered into force on 16 November 1994).

78 ECLI:EU:C:2006:345, Para. 124-125.

79 Johansen, 2015, p. 174.

TAMÁS MOLNÁR

before the Strasbourg Court is liable in itself to undermine the objective of Article 344 TFEU⁸⁰ and goes against the very nature of EU law.⁸¹ Consequently, ‘only the express exclusion of the ECtHR’s jurisdiction [...] over disputes between the Member States or between the Member States and the EU in relation to the application of the ECHR within the scope *ratione materiae* of EU law would be compatible with Article 344 TFEU.’⁸² As a result, the Court of Justice set a stricter limitation, clearly at odds with its earlier position in *MOX Plant*, whereby the Member States cannot even be given a theoretical possibility of breaching the Treaty article laying down the exclusive and compulsory jurisdiction of the CJEU.⁸³

2. Similarly, *Article 351 TFEU* embodies a further important guarantee in order to shield the autonomous legal order of the Union from international law, mainly from external treaty obligations. According to this provision,

[t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, *shall not be affected by the provisions of the Treaties.*

To the extent that such agreements are *not compatible with the Treaties*, the Member State or States concerned shall take *all appropriate steps to eliminate the incompatibilities* established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the *advantages accorded under the Treaties* by each Member State form *an integral part of the establishment of the Union* and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States. (emphasis added – T.M)

The rationale behind this conflict rule is twofold.⁸⁴ On the one hand, it represents an escape clause for some pre-Community/Union international agreements concluded by Member States with third parties. In this sense, Article 351 TFEU protects third States’ reliance interests that their agreements with EU Member States can stand, from the perspective of

80 ECLI:EU:C:2014:2454, Para. 208.

81 ECLI:EU:C:2014:2454, Paras. 207, 212-124. For a detailed summary of the Opinion, see Á. Mohay, ‘Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR – Case note’, 2 *Pécs Journal of International and European Law* (2015), pp. 29-36.

82 ECLI:EU:C:2014:2454, Para. 213.

83 See also Johansen, 2015, pp. 170, 175.

84 See e.g. Ph. Léger (éd.), *Commentaire article par article des traités UE et CE*, Bâle/Genève/Munich, Helbing et Lichtenhahn, 2000, pp. 1937-1944 (Art. 307).

21 THE CONCEPT OF AUTONOMY OF EU LAW FROM THE COMPARATIVE PERSPECTIVE OF INTERNATIONAL LAW AND THE LEGAL SYSTEMS OF MEMBER STATES

EU law, in accordance with the international law principle *pacta tertiis nec nocent nec prosunt*. On the other hand, Article 351 TFEU was crafted to gently and gradually eliminate conflicting agreements with the founding Treaties.⁸⁵ As for the first, traditional function of this treaty provision, the EU Court drew the boundaries of the exception protecting third parties' rights in the 2008 *Kadi I* judgment when it explained that Article 351 TFEU 'does not apply when at issue are the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in [the Treaty] as a foundation of the Union'⁸⁶ and likewise it 'may under no circumstances permit any challenges to the principles that form part of the very foundations of the Community legal order.'⁸⁷ Thus in the post-*Kadi* period, this conflict rule has sharper teeth in protecting the autonomous nature of the EU legal order than before, allowing for much narrower derogations under primary law via Member States' international obligations undertaken before the creation of/accession to the European Union (or its predecessors). In a similar manner, recent approaches of the European Commission (e.g. requiring the termination of bilateral investment treaties (BITs) between EU Member States and third States which are in conflict with EU law)⁸⁸ point to the same direction. These attempts are about restricting the first function of Article 351 TFEU (i.e. its non-affected clause character for international obligations undertaken towards third parties) and stressing its second function, thus shielding the autonomy of EU law from international law.

3. If we turn our attention to the requirements of preserving the autonomy of EU law elaborated by the CJEU itself, its jurisprudence is far richer than codified EU law in this regard. As the EU Court first stressed in *Opinion 1/91*, then in the *MOX Plant* and *Kadi I* cases, the *essential characters of EU powers, the allocation of competences and responsibilities of institutions defined in the founding Treaties shall be unaltered* by subsequent international agreements. It is interesting to see the evolution of this jurisprudence, slowly but surely enlarging the scope of those requirements to different kinds of international obligations. First, in *Opinion 1/91* a specific category of international treaties was at stake (the first version of the EAA Agreement), which contained substantive rules having been almost identical to norms of Community law and which was meant to transplant some aspects of the Community model to the international plane as well as to create an international

85 For more on the significance and implications of this treaty provision, see J. Klabbers, *Treaty Conflict and the European Union*, Cambridge, Cambridge University Press, 2009.

86 ECLI:EU:C:2008:461, Paras. 301 and 303.

87 ECLI:EU:C:2008:461, Para. 304.

88 See the *proposal for a Regulation establishing transitional arrangements for bilateral investment agreements between Member States and third countries* (COM(2010)344 final, Brussels, 7.7.2010), which aims at, *inter alia*, empowering Member States to amend BITs in order to remove incompatibilities with EU law. As for academic commentaries of the new approach, see e.g. J.P. Terhechte, 'Article 351 TFEU: The Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties', in Ch. Herrmann and J.P. Terhechte, (eds.), *European Yearbook of International Economic Law 2011*, Berlin/Heidelberg, Springer, 2011, pp. 79-93.

TAMÁS MOLNÁR

(regional) court to supervise that. Similar agreements have then been drafted relating to the establishment of a European Civil Aviation Area and the European and Community Patents Courts, both of which triggered Opinions of the CJEU that echoed the same requirements. A next level was reached with the *MOX Plant* case, where the treaty at issue was totally different from the previous international instruments.⁸⁹ It was a multilateral treaty of universal character, namely the UNCLOS, to which the European Community (now European Union) is also a party, alongside with Member States (from the perspective of the EU treaty practice, this is called a ‘mixed agreement’). This character of the UNLCOS, however, did not prevent the CJEU from invoking the autonomy of EU law: it first echoed previous jurisprudence that an ‘international agreement cannot affect the allocation of responsibilities defined in the Treaties’, then the Court went on concluding that it could not tolerate the ‘manifest risk that the jurisdictional order laid down in the Treaties and, consequently, the autonomy of the Community legal system may be adversely affected.’⁹⁰

4. Finally, in the first *Kadi* judgment (2008), the judges in Luxemburg *further expanded* the eventual scenarios where the external dimension of autonomy comes into play. The case was peculiar in the sense that neither is the EU a member of the United Nations (UN) or an addressee of UN Security Council resolutions adopted under Chapter VII of the UN Charter (in absence of an international obligation binding the Union), nor was there a competing jurisdiction of another international court with that of the CJEU. At this time, it was not actually the need to protect the competences of the institutions, including the Court’s exclusive jurisdiction from external actors that triggered the recourse to the ‘autonomy argument’, but a more general and more profound concern for the *constitutional integrity of the EU legal order*⁹¹ (notably the protection of fundamental rights and the rule of law, including the judicial review of Union acts in all circumstances by the CJEU). As a result, autonomy as a constitutional principle is not only opposed to international treaties and other international obligations binding on the EU, but it was stretched beyond that circle and is applied to the whole body of international law, regardless of its binding force on and legal effects towards the European Union. Some commentators assess it extremely far-reaching,⁹² even the then Court of First Instance (now General Court) expressed its scepticism in the 2010 *Kadi II* decision: ‘the Court of Justice thus seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of international law – in this case the law deriving from the Charter of the United Nations.’⁹³

89 Also noticed by van Rossem, 2013, p. 16.

90 ECLI:EU:C:2006:345, Paras. 123 and 154.

91 Van Rossem, 2013, p. 17.

92 See e.g. G. de Búrca, ‘The European Court of Justice and the International Legal Order After *Kadi*’, 51 *Harvard International Law Journal* (2010), pp. 1-49; Dubout, 2012, p. 29.

93 Case T-85/09, *Yassin Abdullah Kadi v. European Commission*, Judgment of the General Court (Seventh Chamber) of 30 September 2010, ECLI:EU:T:2010:418, Para. 119.

21 THE CONCEPT OF AUTONOMY OF EU LAW FROM THE COMPARATIVE PERSPECTIVE OF INTERNATIONAL LAW AND THE LEGAL SYSTEMS OF MEMBER STATES

5. No matter how far the CJEU seems to have gone, if we get back to the basics in terms of the origins and existence of the EU legal order, even the position taken by the Court in *Kadi I* can be considered logical and somehow necessary. It should be admitted that the prime rationale behind autonomy of EU law is to separate and distinguish it from international law as much as possible. EU law has originally been created within the realm of international law and the ‘fatherhood’ of the latter can never be denied. EU’s legal architecture was and still is founded on ordinary international treaties governed by the international law of the treaties. The autonomy of the EU legal order represents, using Schilling’s words, a sort of ‘*derivative autonomy*’,⁹⁴ which means the there is another legal order in relation to which this autonomy is claimed and its degree is assessed. Once it has been set up, it is independent from the contents of the original legal order i.e. public international law. By contrast, the autonomous character of the national legal orders goes without saying. It is uncontested and does not need any justification at all as widespread domestic and international practice indicates so. Some refer to it as ‘*original autonomy*’,⁹⁵ indicating that the national legal systems are ultimately created by their original constituent powers. They are *ab ovo* distinct from each other and, at least from the dualistic point of view, from the international legal order, too (according to the voluntarist theory, the latter is the creation of the formers). But owing to the fact that EU law is undeniably rooted in international law, this quest for autonomy was, naturally, first and foremost directed towards the original framework of reference, the international legal order, and it resembled a ‘like father like son’ situation. Summing it up, one can see a full circle here: the more extreme position is taken by the EU Court, the more likely this emancipation could effectively be realized and be endorsed by the international community.

21.3.3 *Methods and Requirements to Preserve the Autonomy of EU Law from the National Legal Orders of Member States*

1. Despite the forgoing conclusion, from a conceptual point of view, I submit that the *degree of emancipation* of EU law from other legal regimes is tested the best against the *national legal systems*. The reason for that is, in my view, that these latter provide the genuine ‘reality check’ for the autonomous functioning of the EU legal order. If this emancipation (autonomy) of EU law is accepted by the national legal orders and is reflected

94 T. Schilling, ‘The Autonomy of the Community Legal Order: An Analysis of Possible Foundations’ 37 *Harvard International Law Journal* (1996), pp. 389-390. Pernice introduced the category of ‘embedded autonomy’ in the context of EU law, highlighting its relative and not absolute character towards both national legal systems and international law. He submits that ‘it must be open and accommodate [...] to normative claims and limitations originating from national constitutions as well as from internationally recognised principles’ (Pernice, 2013, p. 80).

95 Schilling, 1996, p. 389.

TAMÁS MOLNÁR

in the practice of domestic institutions (especially courts), we can establish the indispensable ‘rule of recognition’ (as Hart calls it⁹⁶) with regard to EU law as a self-standing and self-referential legal order.⁹⁷ The reason behind the prevalence of national law over international law when assessing the autonomy of EU law originates in its need for effectiveness and the very purpose of the European integration through law. In the following the principal arguments will be briefly discussed why national legal orders of the Member States serve as the best point of reference and constitute the authentic ‘reality check.’

First, although the legal order flowing from the EU Treaties is of supranational character,⁹⁸ its level of operation is primary *the domestic legal sphere*, aiming at regulating domestic social, economic and like affairs and private transactions as well. This is also the very purpose of the European integration, creating a body of law which by its very existence penetrates into the national legal orders and produces legal effects therein, as well as applied directly – in parallel with domestic law – by national courts and other authorities.

Secondly, there is a connected phenomenon that the *application and implementation* of EU law is mainly carried out by *domestic organs*.⁹⁹ Unlike in the United States or in other federal countries, we cannot talk about executive federalism in the EU context. After making EU law in a centralized way, that law, in principle, is not enforced by EU agencies or EU decentralized administrative structures and supranational courts, parallel to those of the Member States. EU legislation, for its enforcement, essentially relies on the public administrations and judicial systems of the Member States, who act on behalf of this *sui generis* organization, as the ‘agents’ of the European Union when implementing EU law. As a consequence, autonomy, representing the specific characteristics of this legal order, cannot be fully enforced in the national context by the EU itself, which does not possess the tools to do so, mostly due to the relative incompleteness of the Union judicial system.¹⁰⁰

96 H.L.A. Hart, *The Concept of Law*. Oxford, Oxford University Press, 1994 (2nd edition), pp. 100-110.

97 Cf., Dubout, 2012, p. 31.

98 For a great overview on supranational law, see e.g. A. Skordas, ‘Supranational Law’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008-, online edition (www.opil.ouplaw.com – article last updated: May 2014).

99 For more on this issue, see e.g. A.G. Ibanez, *The Administrative Supervision and Enforcement of EC Law. Powers, Procedures and Limits*, Oxford, Hart Publishing, 1999.

100 E. Dubout, ‘Le “contentieux de la troisième génération” ou l’incomplétude du système juridictionnel communautaire’, 43 *Revue trimestrielle de droit européen* (2007), pp. 427-443; Dubout, 2012, p. 34. I concur with this view notwithstanding the CJEU’s stipulation about ‘the complete system of legal remedies’ under EU law (Case 294/83, *Parti écologiste ‘Les Verts’ v. European Parliament*, Judgment of the Court of 23 April 1986, ECLI:EU:C:1986:166, Para. 23), which includes effective remedies at the national level, too; considering national courts to be part of the EU judicial system. However, this dictum concerns first and foremost legal remedies against the *legal acts of the EU institutions* and not the review of conformity of domestic judgments with EU law. Furthermore, in reality, from a sociological point of view, the *degree of harmonisation* of national procedures and remedies is not sufficient yet, so the required level of uniformity in the national implementation of EU law is still lacking, and as a result EU rights could be weakened in the domestic context.

21 THE CONCEPT OF AUTONOMY OF EU LAW FROM THE COMPARATIVE PERSPECTIVE OF INTERNATIONAL LAW AND THE LEGAL SYSTEMS OF MEMBER STATES

Thirdly, in the present state of affairs of the European integration process, EU norms are integrated into the domestic legal orders, thanks to their *self-integrating character*, and they maintain very intense and complex, multi-level relations with the national legal systems, directly addressing individuals etc. As mentioned above, EU law stands for a ‘municipal legal order of trans-national dimensions’, so it endeavours to operate in a similar manner as domestic legal orders function. So much so that municipal law, with its tools and legal techniques and doctrines, is a ‘role model’ for EU in various aspects and represents a great significance for it. This it completely in contrast with the classic approach of international law, being indifferent to municipal law, which was famously expressed by the Permanent Court of International Justice in the *Case concerning certain German interests in Polish Upper Silesia*: ‘[f]rom the standpoint of International Law [...], municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.’¹⁰¹ This traditional ignorance holds by no means true for the European Union when it comes to the relevance of municipal law in the eyes of the EU law.

Lastly, a further factor has made it more challenging for EU law to be recognized by national laws of Member States as a fully autonomous legal order. This is the so-called ‘original autonomy’ attributed to *international law*, which is actually questioned by no one (irrespective of the monism-dualism debate) and which is seen by individual States as *auto-poetic and self-explanatory*.¹⁰² Despite the ever tangible ‘internationalisation’ of domestic laws¹⁰³ and the by nature easier domestic application of some sub-systems of international law such as international human rights law, trade law or investment law, international law is still considered, from within the sphere of national legal orders, somewhat far from everyday socio-legal reality, which only has limited impact in the municipal law’s empire. It is mainly conceived as something which predominantly plays a role on the international plane, in traditional inter-State relations. Therefore it has almost nothing to do neither with the social, economic and other relations within a State; nor with interactions and legal transactions between private parties. In contrast with that, the ultimate goal of EU law is *to be applied at the national level* (this is EU law’s ‘natural habitat’), both vertically and horizontally, and to produce legal effects in the tissue of Member States’ legal systems according to its particular techniques of operation. Surely, domestic legal systems used to be rather reluctant to get used to this ‘interference’ and to

101 *Case concerning certain German interests in Polish Upper Silesia (The Merits) (Germany v. Poland)*, Judgment No. 7, 25 May 1926, P.C.I.J. Series A, No. 19, Para. 52. For more, see e.g. C. Santulli, *Le statut international de l'ordre juridique étatique: étude du traitement du droit interne par le droit international*, Paris, Editions A. Pedone, 2001.

102 Dubout, 2012, p. 34.

103 See e.g. M.D. Varela, *Internationalization of Law. Globalization, International Law and Complexity*. Berlin/Heidelberg, Springer, 2014.

TAMÁS MOLNÁR

accommodate themselves to these needs coming from an 'alien' legal order, to the detriment of their sole imperium.

In my view, all this illustrates pretty well why the *recognition* of the autonomy of EU law by Member States was of utmost importance with a view to concretizing this principle in domestic law and practice.

2. In the following, an overview will be presented about the various methods and requirements helping to preserve the autonomous nature of EU law from the domestic legal orders of the Member States; then I will observe how these requirements differ from those needed for an effective separation from international law.

Let me start by underlining an important premise, namely that the *domestic reception of EU norms* by Member States shall be independent from their doctrinal views (monism or dualism) and legal techniques used (transformation or adoption) in relation to international law.¹⁰⁴ EU law might be characterised as a legal system whose norms do prescribe the domestic mode of interactions (see e.g. direct applicability, direct effect and supremacy), whereas normally the international legal norms leave the mode of reception and interactions to States. It means that even in Member States which follow a dualist-transformation practice for the reception of norms of international law origin, secondary EU legislation, with the entry into force, *ipso facto* becomes part of the law of the land (self-integrating character), and no transformation or further incorporation is permitted at all.¹⁰⁵

Equally important in this respect is the *recognition by Member States of the special structural features* of EU law. However, it should be highlighted that recognizing merely the specificity of the Union legal order is not enough in itself. A domestic legal order can recognize the sui generis, even autonomous character of EU law, but nothing prevents it from assigning EU norms a less favorable place in the internal hierarchy of norms, compared to purely domestic legal rules. In some countries, for instance, this is the case with regard to international law: the distinct and autonomous nature of international law is far from being challenged, but still those international norms are ranked inferior to domestic statutes, thus depriving them from their full effectiveness. In other words, the acceptance of the specific, autonomous character as such is not a guarantee for a desired rank and status in the internal hierarchy of norms. What is also required is the *foundation* on which the recognition is based.¹⁰⁶ These foundations encompass the traditional structural and constitutional principles of EU law, such as its self-integrating character, supremacy, direct effect

104 See also e.g. D. Simon, 'Rapport général: Les fondements de l'autonomie du droit communautaire', in SFDI, *Colloque de Bordeaux. Droit international et droit communautaire, perspectives actuelles*, Paris, Editions A. Pedone, 2000, pp. 236-237.

105 The mere reproduction of the text of regulations in a national Official Gazette is also prohibited, see e.g. Case 34-73, *Fratelli Variola S.p.A. v. Amministrazione delle finanze dello Stato*, Judgment of the Court of 10 October 1973, ECLI:EU:C:1973:101; Case 272/83, *Commission of the European Communities v. Italian Republic*, Judgment of the Court of 28 March 1985, ECLI:EU:C:1985:147.

106 Dubout, 2012, p. 35.

21 THE CONCEPT OF AUTONOMY OF EU LAW FROM THE COMPARATIVE PERSPECTIVE OF INTERNATIONAL LAW AND THE LEGAL SYSTEMS OF MEMBER STATES

(both vertical and horizontal), pre-emption, as well as the CJEU's monopoly of interpretation of EU law. All those can actually guarantee a privileged standing and are able to make the concretisation of EU law in social reality happen. The point of view of the organs charged with the domestic application of EU law is of paramount importance: they choose under which legal order they classify a given legal norm.

The decentralized application of European Union law, mainly through national courts acting as components of the EU judicial system, entails in itself a major risk of divergent interpretation and application of EU law in different Member States.¹⁰⁷ The CJEU's monopoly of authentically interpreting EU law could not work effectively without a mechanism which formally links national courts as 'EU courts' to the ultimate arbitrator of EU law, the Luxembourg Court. As a consequence, a system of reference to the Court of Justice of the EU by the national courts was originally set up by the founding Treaties. This is the procedure regulated in *Article 267 TFEU*, under which *preliminary rulings* may be obtained from the EU Court, before the referring national court, handling the individual case, takes its final decision. This mechanism proved to play a cardinal role in the construction of the EU legal order and was of paramount importance for the uniform interpretation and application of EU law throughout all Member States of the Union. The preliminary ruling procedure has at least *two major functions* with the view to preserving the internal autonomy of EU law. First, it ensures uniformity in the interpretation of EU law in the domestic context. Variations in interpretation could arise not only between different courts in a given Member State, but also in the interpretations given to Union law in various Member States. Such situations would lead to the fragmentation of EU law and could end up causing structural incoherencies and finally the breakdown of the EU legal system. Secondly,

the system of preliminary rulings facilitates the application of [EU] law by assisting the national courts in overcoming the difficulties they encounter when applying [EU] law. If national courts had to apply [EU] law completely by themselves they might be inclined to shy away from doing so in order to avoid the difficult problems of applying a legal order unfamiliar to them.¹⁰⁸

These functions of the preliminary ruling procedure undoubtedly resonate to the needs for the autonomous functioning of the EU legal order within the domestic legal systems. The CJEU also linked implicitly the mechanism set up by *Article 267 TFEU* to safeguarding the autonomous nature of EU law in the *Second Rheinmühlen* judgment. In the Court's

¹⁰⁷ H.G. Schermers and D. Waelbroeck: *Judicial Protection in the European Union*, The Hague, Kluwer Law International, 2001, p. 227 (Para. 446).

¹⁰⁸ Schermers and Waelbroeck, 2001, p. 228 (Para. 467).

TAMÁS MOLNÁR

view, the preliminary ruling procedure ‘is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community.’¹⁰⁹ This institutionalized communication and cooperation mechanism between the national jurisdictions and the CJEU, established by Article 267 TFEU, is therefore indispensable to effectively protect the specific features of the Union legal order (‘the Community character of the law’) by ensuring its uniform interpretation and application in the Member States, including the final say of the EU Court on the validity of the legal acts of the Institutions.¹¹⁰

Further to that, *Member States’ belief* in the autonomous legal quality of EU law cannot be neglected either. The crucial element for the actual acceptance of this autonomy is thus the *attitude* of the national legislatures, administrations and judiciaries.¹¹¹ It is nicely illustrated by the so-called ‘EU’ or ‘integration’ clauses in many national constitutions¹¹² and the self-limitation of some respected constitutional courts in respect of EU law, including the express recognition of this peculiar and distinct nature of the Union legal order. National constitutional courts have frequently and consistently treated EU law differently from ordinary international treaties and from the decisions of other international organizations. This situation is quite obvious in Member States using a dualist-transformation system with regard to international law.¹¹³ The Italian Constitutional Court (*Corte costituzionale*), back in 1965, had already argued that an alien legal order, such as the law of the European Coal and Steel Community, is characterized by its own rules; which was correspondingly recognized with regard to the EEC Treaty in *Frontini*¹¹⁴ (concluding that Community norms cannot be considered as sources of international law, neither foreign law, nor domestic law). Then again in 1984 in the *Granital* case¹¹⁵ this court ruled that the Italian and the Community legal orders constitute two autonomous and separated legal orders. The case law of the German Constitutional Court (*Bundesverfassungsgericht*) is very illustrative as well: suffice to mention the famous *Solange I* judgment from 1974,¹¹⁶ which adhered to the view ‘that Community law is neither a component part of the national

109 Case 166/73, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Judgment of the Court of 16 January 1974, ECLI:EU:C:1974:3, Para. 2.

110 Similarly, see also e.g. Gautron and Grard, 2000, pp. 23-24.

111 For early problems see e.g. J. Mégret, ‘La spécificité du droit communautaire’, 19 *Revue internationale de droit comparé* (1967), p. 576.

112 See e.g. Art. 2/A of the former Hungarian Constitution; or Art. E) in the Fundamental Law of Hungary, in force since 1 January 2012 (in English available at www.kormany.hu/en/news/the-new-fundamental-law-of-hungary – last accessed on 1 August 2015).

113 Weiler and Haltern, 1996, p. 421 and footnote 44. The sources of the below examples from the three jurisdictions are Weiler and Haltern, 1996, p. 421, footnote 44; Simon, 2000, pp. 234, 236 and Barents, 2004, pp. 178-179.

114 *Corte costituzionale*, 27 December 1973 (Guir. Cost., 1973).

115 *Corte costituzionale*, 18 June 1984 (Guir. Cost., 1984).

116 BVerfGE 37, 271 2 BvL 52/71 *Solange I*-Beschluss, 29 May 1974.

21 THE CONCEPT OF AUTONOMY OF EU LAW FROM THE COMPARATIVE PERSPECTIVE OF INTERNATIONAL LAW AND THE LEGAL SYSTEMS OF MEMBER STATES

legal system nor international law, but forms an independent system of law flowing from an autonomous legal source.¹¹⁷ It was confirmed in this ruling that it follows from the autonomy of the Community legal order that the European Court of Justice is responsible for controlling the validity of EC law, while as far as their application within the German legal order is concerned these acts might be subject to the control of the Constitutional Court. The same approach has been chosen by the French Constitutional Council (*Conseil constitutionnel*), too, which stipulated that EU law can be described as an independent legal order, and not belonging to the institutional structure of the French Republic.¹¹⁸ In its decision assessing the constitutionality of the (now defunct) Treaty establishing a Constitution for Europe (2004), it stated that the French Constitution recognized the existence of the Community legal order, which is integrated in the domestic legal order and distinct from the international legal order.¹¹⁹ Likewise, the Hungarian Constitutional Court (*Alkotmánybíróság*) had also opined that the founding Treaties and secondary EU legislation are not considered as international law in the exercise of the its competences,¹²⁰ and later added that ‘despite its international law origin, the Community legal order is a sui generis legal order.’¹²¹ Therefore this apex court also recognized the sui generis character of EU law and did not assimilate these norms either with international law, or domestic law. Although it is true that every treaty constituting an international organisation endows it with certain autonomy¹²² and creates a somewhat sui generis and ‘autonomous’ internal law of that organization, the degree of the autonomy of EU law is much higher than that of any other similar organisation (not to say unprecedented). It explains why the Hungarian Constitutional Court has taken this view solely in relation to European Union law (and not in relation to e.g. the law emanating from the United Nations, the NATO or the WTO). A report prepared by the Registry of the EU Court 20 years ago eloquently summed up the essence of the above depicted sociological component, which I could not but agree with: ‘the success of Community law in embedding itself so thoroughly in the legal life of the Member States is due to its having been perceived, interpreted and applied by the

117 Translation available at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588> (last accessed on 1 August 2015).

118 *Conseil constitutionnel*, Décision no. 92-308 DC du 09 avril 1992, Para. 34.

119 *Conseil constitutionnel*, Décision no. 2004-505 DC du 19 novembre 2004, Para. 11, quoted by de Witte, 2010, p. 149.

120 Decision of the Constitutional Court of 1053/E/2005 (16 June 2006), ABH 2006, p. 1828.

121 Decision of the Constitutional Court of 32/2008 (III. 12.) AB (12 March 2008), ABH 2008, p. 325.

122 International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, ICJ Rep. 1996, p. 75: ‘the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain *autonomy*’ (emphasis added – T.M.). In the legal literature, consider e.g. R. Collins and N.D. White (eds.), *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order*, Oxford, Routledge, 2011.

TAMÁS MOLNÁR

nationals, the administrations and the courts and tribunals of all the Member States as a uniform body of rules upon which individuals may rely in their national courts.¹²³

Last but not at least, when the national courts and authorities implement EU law, as described above, they act in the national legal framework, which may give rise to *possible tensions*, with the eventual consequence that applying EU law can become uncomfortable and might lead to discouraging domestic organs to enforce or give effect to EU norms. In order to overcome this situation capable of weakening the autonomous character of EU law, some techniques have been elaborated so as to take into account the essential specificities of national laws, namely the *procedural autonomy of Member States* (implying the dual requirement of equivalence and effectiveness) as elaborated by the CJEU¹²⁴ and the *respect of national (constitutional) identities* (as enshrined in Art. 4(2) TEU).¹²⁵

21.4 CONCLUDING REMARKS

After having clarified and explained the different meaning of the external and internal dimensions of the autonomy of EU law and having discussed its various implications, it can be observed that these intrinsically linked aspects of autonomy have been in the forefront with *different intensity* throughout various periods of the European integration process. Following the foundational times when the external aspect had first been emphasized in order to parallel claim it internally, towards Member State law, the *internal aspect* of the principle become dominant for a while during which EU legal order consolidated and got more robust. Along with the constitutionalization of the EU legal order, after the 1990s, triggered by the EU's increasing and expanding activities on the international plane, the *external dimension* of autonomy was put in the focus in the CJEU jurisprudence and academic discourse, too; culminating in Opinion 2/13.

In this short overview, apart from understanding the different requirements for preserving the external and internal autonomy, my thesis was that the reason behind the prevalence of national law over international law when assessing the degree of the autonomy of EU law can be found in its need for effectiveness and the very purpose of the European integration through law. To verify this hypothesis, it was necessary to compare the external

123 *Report of the Court of Justice on Certain aspects of the application of the Treaty on European Union*, May 1995, p. 2; quoted by B. de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, Oxford, Oxford University Press, 1999, p. 193.

124 For a monographic assessment of Member States autonomy when enforcing EU law on the national level, see B. de Witte and H.W. Micklitz (eds.), *The European Court of Justice and the Autonomy of the Member States*, Cambridge/Antwerp/Portland, Intersentia, 2012.

125 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.'

21 THE CONCEPT OF AUTONOMY OF EU LAW FROM THE COMPARATIVE PERSPECTIVE OF
INTERNATIONAL LAW AND THE LEGAL SYSTEMS OF MEMBER STATES

and internal aspects of the claimed autonomy in order to demonstrate that the fully-fledged autonomy of the EU legal order is *more dependent on its relation to the national legal orders* (which is predominantly factual and tangible) than to general international law (which is rather conceptual, with sporadic contacts between the two through cases before international judicial bodies). It is unsurprising in the light of the level of operation of Union law, which is within the domestic legal orders, and to a much lesser extent on the international scale (though the expansion of EU external relations shall be acknowledged). It stems from the above that the real playing field for EU law is the *domestic legal sphere* of Member States, therefore this *terrain d'arbitrage* is regarded more serious in the eyes of this relatively 'new legal order' than the international law governed inter-State relations. Furthermore, if autonomy is fully recognized by national legal systems and internal actors, it results in considering EU law as a new kind of legal order, which 'originality' separates it not only from their domestic law, but also from international law. As a consequence, keeping the validity and application of the EU legal order distinct from the national legal systems builds up its so-called 'original autonomy' (parallel with its transformation into a constitutional order),¹²⁶ and this recognition by Member States will indirectly contribute to reinforce its separateness from international law as well. In other words, one can witness here a 'two in one' scenario. The 'original autonomy' of EU law enjoyed *vis-à-vis* the Member States will simultaneously and effectively trigger the wider and firm acceptance of the 'derivative autonomy' of the legal order created by the European integration process *vis-à-vis* international law. More than 50 years after its foundation, at a time of consitutionalization of the supranational public authority called EU, the significance of the concept of autonomy in the EU legal architecture is not to be underestimated, since this has been coded in its legal DNA. What is more, according to Kovar expressive wording, '[I] *acte fondateur de l'ordre juridique de la Communauté a été l'affirmation de sa spécificité et de son autonomie.*'¹²⁷ Let us hope that in the future more EU and international law scholars will keep an eye on it. If nothing else, Opinion 2/13 has planted the seeds for prospective academic discourses on the multifaceted fundamental concept called 'autonomy of EU law.'

126 See also Weiler and Haltern, 1996, p. 420.

127 R. Kovar, 'La contribution de la Cour de Justice à l'édification de l'ordre juridique communautaire. Cours général de droit communautaire', in Academy of European Law (ed.), *Collected Courses of the Academy of European Law*, Florence, European University Institute, 1993, IV/1, p. 25.