

University of Groningen

Essays on Autonomy, Legality and Pluralism in European law

Lindeboom, Justin

DOI:
[10.33612/diss.111447089](https://doi.org/10.33612/diss.111447089)

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2020

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):
Lindeboom, J. (2020). *Essays on Autonomy, Legality and Pluralism in European law*. [Groningen]: University of Groningen. <https://doi.org/10.33612/diss.111447089>

Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

Essays on Autonomy, Legality and Pluralism in European Law

Justin Lindeboom

ISBN 978-94-034-2247-3 (printed version)
978-94-034-2246-6 (electronic version)

Printing Ridderprint



university of
 groningen

Essays on Autonomy, Legality and Pluralism in European Law

PhD thesis

to obtain the degree of PhD at the
 University of Groningen
 on the authority of the
 Rector Magnificus Prof. C. Wijmenga
 and in accordance with
 the decision by the College of Deans.

This thesis will be defended in public on

Monday 6 January 2020 at 14.30 hours

by

Justin Lindeboom

born on 19 April 1990
 in Sneek

Supervisors

Prof. L.W. Gormley
Prof. D. Kochenov

Assessment Committee

Prof. S.H. Ranchordás
Prof. G.T. Davies
Prof. S. Enchelmaier

O, wij namen wraak, wij leerden talen, waarvan zij de namen nooit gehoord hadden en wij lazen boeken waar zij niets van konden begrijpen, wij doorleefden gevoelens waarvan zij het bestaan niet vermoedden. 's Zondags liepen wij uren en uren ver over wegen, waar zij nooit kwamen, en op kantoor dachten wij aan de slootjes en de weilanden, die wij gezien hadden en terwijl de heeren ons bevalen dingen te doen waarvan wij 't nut niet begrepen, dachten wij er aan, hoe Zondagavond de zon was ondergegaan achter Abcoû. En hoe wij woordeloos 't heelal doordacht hadden, hoe God ons hoofd, ons hart en ons ruggemerg gevuld had en hoe mal zij zouden kijken, als wij hun dat zouden zeggen. En hoe zij met al hun geld en hun reizen naar Zwitserland en Italië en Godweetwaarheen en met al hun knapheid en bedrijvigheid dat nooit zouden kunnen beleven.

Nescio, *Titaantjes* (1915)

Acknowledgements

In the first episode of *The Big Bang Theory*, Leonard and Sheldon invite their new neighbour Penny for dinner. After entering Leonard and Sheldon's apartment, Penny is heavily impressed by the equations on Sheldon's whiteboard – 'just some quantum mechanics, with a little string theory doodling around the edges' – in turn making Leonard eager to impress Penny with the depth of his equations as well. The following conversation unfolds:

Leonard: I have a board. If you like boards, this is my board.

Penny: Holy smokes!

Sheldon: If by 'holy smokes' you mean a derivative restatement of the kind of stuff you can find scribbled on the wall of any men's room at MIT, sure.

Leonard: What?

Sheldon: Oh, come on. Who hasn't seen this differential below 'here I sit broken hearted?'

[Meanwhile, Penny has lost all interest and sits down to unpack their takeaway food]

Leonard: At least I didn't have to invent twenty-six dimensions just to make the math come out.

Sheldon [agitated]: I didn't invent them, they're there!

Leonard: In what universe?!

Sheldon: In all of them, that is the point!

Penny: Uh, do you guys mind if I start [eating]?

As exciting as scientific research is to those who are engaged in its business, surely the 'pleasure of finding things out' – to speak with Feynman – and the equivalent joy of never-ending discussions about the nitty-gritty of our fields of inquiry usually remain obscure to the outside world. Worse so, this abstrusity of academic life – most accurately captured by the familiar question 'so what do you actually *do* at work?' – usually combines with the beguilements of our (sometimes parochial) conundrums and quibbles. Academic interests easily turn into obsessions of the mind which degrade 'normal life' to a matter of secondary importance. At least I gather that this is not *entirely* a matter of personal idiosyncrasy. Regardless, first and foremost I want to express my gratitude to my family and friends who,

notwithstanding frequent puzzlement as to what I do and why on earth someone would spend so much time on this, have borne with me for the past four years. They know who they are.

This collection of essays is the result of four happy years of thinking and writing. I am greatly indebted and deeply thankful to my two PhD supervisors, Professor Laurence Gormley and Professor Dimitry Kochenov, for continuous support, subtle guidance and sharp criticism, and for always giving me the freedom to pursue my own intellectual interests. It has been a great privilege and joy to read for a PhD under their supervision.

Chapters 5, 7 and 8 in this dissertation are co-authored papers. I want to thank Dr. Lorenzo Squintani, my co-author for Chapter 5, and Professor Dimitry Kochenov, with whom I co-authored Chapters 7 and 8, for inspiring and fruitful collaboration. Glancing over these pages brings back several memories, ranging from the fascinating, and at times bizarre, interviews which Dimitry and I conducted with the key players involved in the *Zhu and Chen* case, to numerous hours of discussion with Lorenzo about the doctrinal rationale and graphical representation of the case law on direct effect of directives. It is a great pleasure and honour that this dissertation is partly a collective effort.

I also want to express my gratitude to the members of the reading committee, Professor Sofía Ranchordás, Professor Gareth Davies, and Professor Stefan Enchelmaier, for taking the time to read my papers. This dissertation would not have been possible without them.

The Department of European and Economic Law has been a splendid working environment and I am very happy to have been surrounded by all my colleagues, many of whom I consider friends. Should an anthropologist ever conduct fieldwork in our corridor, I leave open the possibility that (s)he might not automatically recognise the social phenomena as ‘work’ (and surely room 13.15.483 would not be recognised as an ‘office’). I greatly cherish this fact, however, which is only made possible by the collective effort of many colleagues to take ourselves as seriously as is needed, but not more.

I have been fortunate enough to spend part of my graduate studies abroad. I am grateful to the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, the European University Institute in Florence and University College London for hosting me, and want to thank all colleagues and friends at those institutions for interesting exchanges and discussions. This has been a true enrichment of my PhD research.

Finally, I am greatly indebted to ‘the Senator’, who shall remain anonymous, for sharing deep insights – throughout many years – into *καλοκάγαθία*, *ἀρετή* and, most importantly, *εὐδαιμονία*.

Abbreviated Table of Contents

<i>Acknowledgements</i>	vii
1. Introduction.....	1
PART I: FOUNDATIONS OF THE EU LEGAL SYSTEM	
2. Why EU Law Claims Supremacy	31
3. Legality and Autonomy of EU Law: You'd Better Believe It.....	67
PART II: AUTONOMY AND LEGALITY IN SUBSTANTIVE LAW	
4. Interpreting the EU Internal Market	111
5. (with Lorenzo Squintani) The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions	151
PART III: THE MORALITY OF JURISPRUDENCE IN THEORY AND PRACTICE	
6. In Search of Foundations: Ethics and Metaethics in Constitutional Adjudication	219
7. (with Dimitry Kochenov) Pluralism Through its Denial: The Success of EU Citizenship 255	
8. (with Dimitry Kochenov) Breaking Chinese Law – Making European One: The Story of <i>Chen</i> , Or: Two Winners, Two Losers, Two Truths	281
9. Conclusions.....	307
<i>Table of Cases</i>	319
<i>Bibliography</i>	331
<i>Nederlandse samenvatting</i>	373

Full Table of Contents

<i>Acknowledgements</i>	vii
-------------------------------	-----

1. Introduction.....	1
I. Some Peeks at the Cathedral.....	1
II. The Themes of this Dissertation	2
III. Overview of the Chapters	15
IV. Methodology	20

PART I: FOUNDATIONS OF THE EU LEGAL SYSTEM

2. Why EU Law Claims Supremacy	31
I. Introduction.....	31
II. Farewell to the Dworkinian Court	33
III. The Construction of the EU Legal System	39
IV. Mimesis, Solipsism, and Pluralism.....	56
V. Conclusion	63
3. Legality and Autonomy of EU Law: You'd Better Believe It.....	67
I. Introduction.....	67
II. From Teleological Interpretation to the Autonomy Thesis.....	70
III. From Effectiveness to the Internal Point of View.....	77
IV. How to Recognize 'a New Legal Order'	83
V. The Autonomy Thesis and the Doctrines of Direct Effect and Supremacy.....	92
VI. Playing the Game	98
VII. Conclusion	106

PART II: AUTONOMY AND LEGALITY IN SUBSTANTIVE LAW

4.	Interpreting the EU Internal Market	111
I.	Searching for Reasonableness in the Autonomous Legal System	111
II.	The Autonomy of EU Law and the Mythology of Regulatory Autonomy	115
III.	A Rule in Search of its Meaning	119
IV.	The Elephants in the Room	130
V.	The Charms of the Lorelei	137
VI.	Keeping Calm and Carrying On	148
5.	(with Lorenzo Squintani) The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions	151
I.	Introduction	151
II.	Setting the Context: Direct effect and Directives	155
III.	Mere Adverse Repercussions and the Prohibitions of Horizontal and Inverse Vertical Direct Effect	172
IV.	Existing Theories of Direct Effect of Directives and the Distinction between Direct Obligations and Mere Adverse Repercussions	180
V.	The Normative Impact of Invoking Directives	193
VI.	The Preliminary Reference Procedure and the Borderline between Direct and Indirect Effect	204
VII.	Conclusions	214

PART III: THE MORALITY OF JURISPRUDENCE IN THEORY AND PRACTICE

6.	In Search of Foundations: Ethics and Metaethics in Constitutional Adjudication	219
	Moral Argument in Legal Reasoning	220
	Realism and Objectivity in Morality	223

Three Types of Ethical Argument	226
Confidence and Reflection as Metaethical Theory	241
Confidence and Reflection in Constitutional Ethics	248
Concluding Remarks	252
7. (with Dimitry Kochenov) Pluralism Through its Denial: The Success of EU Citizenship	255
I. Introduction	255
II. Pluralism as ‘Anything Goes’	256
III. Pluralism as the Federal Balance	260
IV. The Transformation of Citizenship in Europe	264
V. Pluralism as a Self-perpetuating Value in EU Citizenship Law	272
VI. Conclusion	277
8. (with Dimitry Kochenov) Breaking Chinese Law – Making European One: The Story of <i>Chen</i> , Or: Two Winners, Two Losers, Two Truths	281
I. Introduction: Taking a Flight to Europe to Break the Law	281
II. The Law: <i>Chen</i> ’s Legacy, Added Value and Implications	283
III. What Mrs Chen Was Running Away From: China’s One-Child-Policy	285
IV. Pursuing Catherine’s Best Interests: The Story of Breaking and Making the Law	288
V. Conclusion	303
VI. Postscript	305
9. Conclusions	307
<i>Table of Cases</i>	319
<i>International Courts and Tribunals</i>	319

<i>Court of Justice of the European Union</i>	319
<i>Canada</i>	326
<i>Czech Republic</i>	327
<i>Denmark</i>	327
<i>Estonia</i>	327
<i>France</i>	327
<i>Germany</i>	327
<i>Ireland</i>	328
<i>Italy</i>	328
<i>The Netherlands</i>	328
<i>Poland</i>	328
<i>United Kingdom</i>	329
<i>United States of America</i>	329
<i>Bibliography</i>	331
<i>Nederlandse samenvatting</i>	373