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# Why EU Law Claims Supremacy

Justin Lindeboom\*

## Abstract

*This article explores the conception of law that underlies the CJEU's case-law, building on Opinion 2/13 on EU accession to the ECHR as a topical example. Joxerramon Bengoetxea's metaphor of the CJEU being a 'Dworkinian court' fails to explain fundamental aspects of the Court's case-law which are incompatible with Dworkin's theory of law. Instead, the CJEU is committed to an EU legal system which conforms to Joseph Raz's theory of the necessary conditions for legal systems: comprehensiveness, openness, and a claim of supremacy. Within this paradigm, the supremacy claim of EU law is in need of demystification because it is inherent to any legal system. Paradoxically, while Opinion 2/13 suggests that the EU should be given special treatment in its accession to the ECHR, the Court's underlying conception of the EU legal system is essentially mimetic of the typical characteristics of national legal systems. This mimetic nature of the EU legal system entails a dissociation between the political and the legal nature of the EU: while the EU is certainly not a state, its legal system is no different from national legal systems.*

## Keywords

EU law, Opinion 2/13, Dworkin, Raz, legal systems, legal pluralism

## 1. Introduction

The first storm of academic commentary on Opinion 2/13 concerning the draft agreement on the European Union (EU)'s accession to the European Convention on Human Rights

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(ECHR)<sup>1</sup> seems to have passed, if only because the overwhelming majority of scholars dismissed the Court of Justice of the European Union's (CJEU or Court) verdict.<sup>2</sup> In Opinion 2/13 the CJEU held that the draft accession agreement violated EU law for a plethora of reasons, all related to the supremacy of EU law and the interpretative prerogatives of the Court itself.<sup>3</sup> The Court has been criticised for being 'very fearful',<sup>4</sup> for depriving EU law of the Rule of Law,<sup>5</sup> for refusing to engage in judicial dialogue,<sup>6</sup> for prioritising economic integration and mutual trust over fundamental rights,<sup>7</sup> and even for giving an opinion that is 'fundamentally flawed'<sup>8</sup> and 'exceptionally poor'.<sup>9</sup> Those scholars who presented a more optimistic perspective on the Opinion did so while hurrying to add that they did not wish to defend the Court.<sup>10</sup>

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<sup>1</sup> Opinion 2/13 on the accession of the EU to the ECHR, EU:C:2014:2454.

<sup>2</sup> See eg, LFM Besselink, 'Acceding to the ECHR Notwithstanding the Court of Justice Opinion 2/13', *Verfassungsblog* (23 December 2014) available at <http://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213-2/>; S Douglas-Scott, 'Opinion 2/13 on EU accession to the ECHR: a Christmas Bombshell from the European Court of Justice', *UK Constitutional Law Blog* (24 December 2014); M Wendel, 'Mehr Offenheit wagen! Eine kritische Annäherung andas Gutachten des EuGH zum EMRK-Beitritt', *Verfassungsblog* (21 December 2014); D Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34 *YEL* 74; E Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 *MJ* 35; P Eeckhout, 'Opinion 2/13 on EU accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?' (2015) 38 *Fordham ILJ* 955; S Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16 *GLJ* 213. Christoph Krenn and Daniel Halberstam are among the very few to have expressed (at least somewhat) more positive comments. See C Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13' (2015) 16 *GLJ* 147; and D Halberstam, "'It's the Autonomy, Stupid!'" A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 *GLJ* 105.

<sup>3</sup> For an overview of the CJEU's arguments, see in particular Halberstam (n 2), and Eeckhout (n 2).

<sup>4</sup> Spaventa (n 2).

<sup>5</sup> Kochenov (n 2).

<sup>6</sup> Eeckhout (n 2).

<sup>7</sup> *ibid.*

<sup>8</sup> Peers (n 2).

<sup>9</sup> Steve Peers's first response to Opinion 2/13 on Twitter: 'My summary of CJEU ruling on EU accession to ECHR. Blog post coming later. Preview: an exceptionally poor judgment' (18 December 2014), available at <https://twitter.com/StevePeers/status/545523536551768064>.

<sup>10</sup> Halberstam (n 2) 106; Krenn (n 2) 149.

In this article, I will argue that the radical divergence between the Court and the majority of scholars is not ultimately rooted in different views on what EU law prescribes in this specific case but in different views on what law is in general (and what is not). Many commentators rejected the Court's conclusion and reasoning on the basis of arguably Dworkinian assumptions about the conditions for legal validity. As such, these criticisms are remarkable in light of the fact that an influential work on the legal reasoning of the CJEU claimed that the Court itself is a 'Dworkinian court'.<sup>11</sup> By contrast, the main thesis of this article is that the CJEU's jurisprudence reveals a conception of the EU legal system which can be linked to Joseph Raz's theory of the necessary conditions for legal systems.

This thesis is further divided in the following two basic claims. First, the CJEU's constitutional jurisprudence can be explained from the viewpoint of Raz's claim that legal systems necessarily claim comprehensive supremacy, thus reflecting a truism about the concept of law itself. Second, the connection between Raz' theory of legal systems and the CJEU's conception of the EU legal system can be explained by the mimetic nature of EU law: in its construction of the EU legal system, the CJEU imitates the typical characteristics of national legal systems. The implicit apotheosis of this mimesis can be found in Opinion 2/13, where the key problem underlying the Court's concern is that the draft accession agreement treats the EU legal system as different from a national legal system.

In this article, I do not want to engage directly with the legal philosophical debate on the universal nature of law. Neither do I want to argue that the Court ought to behave more 'Dworkinian' or more 'Razian'. My objective is merely to provide a rational construction of the Court's jurisprudence and demonstrate how this jurisprudence is connected to a particular theory of law. Arguably, the self-conception of courts and their conception of law is relevant for the concept of law,<sup>12</sup> and only in this marginal sense this article might contribute to analytical jurisprudence itself. While it is often asserted that the traditional theories of law are outdated in the current, globalised legal landscape, the mimetic nature of EU law demonstrates that at least the EU legal system can be explained by existing theories of law.

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<sup>11</sup> J Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Clarendon Press 1993) vi.

<sup>12</sup> J Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001).

This article is structured as follows. Section 2 will demonstrate that the metaphor of the CJEU being a ‘Dworkinian court’, famously introduced by Joxerramon Bengoetxea, fails to explain essential elements of the CJEU’s case-law, in particular its legal reasoning in Opinion 2/13, which are incompatible with Dworkin’s theory of law. Section 3 applies Raz’s theory of the necessary conditions of legal systems to the CJEU’s case-law on the foundations and nature of EU law, showing how it can explain the Court’s reasoning and its philosophical assumptions. Section 4 explains the Court’s shaping of the EU legal system by linking it to a mimesis of the national legal systems. Hence, it is argued that the Court’s conception of the EU legal system may be rooted in its construction of a legal system which possesses the exact same typical features as national legal systems, thereby mimicking precisely those features which arguably distinguish national legal systems from other normative, social systems.<sup>13</sup> Section 5 concludes.

## 2. Farewell to the Dworkinian Court

### A. What is a Dworkinian court?

In his seminal work *The Legal Reasoning of the European Court of Justice*, Joxerramon Bengoetxea introduced the metaphor of the CJEU as a ‘Dworkinian court’: a court committed to a globally coherent<sup>14</sup> case-law in light of the overall objective of furthering European integration, thus developing a ‘community of principle’.<sup>15</sup> This metaphor is a powerful one. While the Court has often found itself torn between deciding according to one principle or the other, not least because of the open-endedness of the Treaty

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<sup>13</sup> The connection between Raz’s theory of legal systems and the CJEU’s conception of the EU legal system presumes that Raz’s theory accurately describes the typical characteristics of national legal systems. See further sections 3 and 4 below.

<sup>14</sup> I understand Bengoetxea’s thesis that the CJEU is committed to a ‘globally coherent’ case-law to mean that the CJEU strives to interpret individual norms of EU law such that they cohere as much as possible with the rules and principles of the entire EU legal system.

<sup>15</sup> Bengoetxea (n 11) vi. See also J Bengoetxea, N MacCormick and L Moral Soriano, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’ in G de Búrca and JHH Weiler (eds), *The European Court of Justice* (Oxford University Press 2001) 43, 82–85.

provisions,<sup>16</sup> it has rarely departed from the road taken after making a particular choice.<sup>17</sup> The self-referential character of the Court's legal reasoning is well known, and Opinion 2/13 is no exception.<sup>18</sup>

Ronald Dworkin's normative jurisprudence is indeed centred on the value of what he calls integrity, or 'consistency of principle'. He believed law is essentially an interpretative practice, where courts endeavour to construct the meaning of rules and principles in accordance with the most coherent image of the political morality of their political community, as represented by past (judicial) decisions.<sup>19</sup> The courts should thus interpret legal norms as much as possible as forming part of one coherent legal and political community. However, the normative role of integrity in legal interpretation cannot be dissociated from Dworkin's theory of law. Dworkin's theory of interpretation is both normative and descriptive as he purports to demonstrate that this is both how courts should interpret the law, but also what constitutes law. In other words, law is that which justifies state coercion, with the justification lying precisely in the most coherent and morally best interpretation of the available legal materials and the practice of law as a whole. Accordingly, the value of integrity and the need for courts to commit to it can only be properly understood by virtue of Dworkin's key thesis that legality is ultimately

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<sup>16</sup> See G Beck, *The Legal Reasoning of the Court of Justice of the European Union* (Hart Publishing 2012) ch 6. See also K Lenaerts and JA Gutiérrez-Fons, 'To Say What the Law of the European Union Is. Methods of Interpretation and the European Court of Justice' (2014) 20 *CJEL* 3.

<sup>17</sup> Among the rare exceptions to this general trend are, for example, Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard*, EU:C:1993:905. See further M Jacob, *Precedents and Case-based Reasoning in the European Court of Justice* (Cambridge University Press 2014) 159–176.

<sup>18</sup> See eg, Opinion 2/13 (n 1) paras 157, 166 and 176 on the autonomy and supremacy of EU law.

<sup>19</sup> Integrity, in the sense of consistency of principle, is generally understood to reflect Dworkin's commitment to 'global coherence' in legal interpretation. See eg, B.B. Levenbook, 'The Role of Coherence in Legal Reasoning' (1984) 3 *Law and Philosophy* 355. See however J Raz, 'The Relevance of Coherence' (1992) 72 *Boston University Law Review* 273. Moreover, the role of coherence in Dworkin's theory is rather ambiguous, as it is used both as a methodological and a substantive concept. For a critical analysis of Dworkin's theory, see A Marmor, 'Coherence, Holism, and Interpretation: The Epistemic Foundations of Dworkin's Legal Theory' (1991) 10 *Law and Philosophy* 383.

rooted in objective morality,<sup>20</sup> and that legal validity is always (partly) a matter of moral judgment.<sup>21</sup>

A truly Dworkinian court, therefore, is committed to a globally coherent (case-)law – if we understand Dworkin’s theory of law as integrity in this way<sup>22</sup> – not for the sake of being consistent or because some written or unwritten rule states that past decisions must be followed. Instead, it considers itself bound to a set of moral principles that makes the available legal materials stick together as one coherent, and therefore morally justified, system. For Dworkin, and thus for a ‘Dworkinian court’, the systematicity of law is content-dependent, and necessarily moral, in nature.

### B. Can Opinion 2/13 be Dworkinian?

Since it is beyond dispute that Opinion 2/13 does not serve the cause of human rights protection in Europe, the more relevant question is whether the Court’s concerns can be explained consistently with the metaphor of a Dworkinian CJEU. The arguments advanced by the Court will not be reiterated in great detail, as they are generally well known and have been aptly summarised elsewhere.<sup>23</sup> The Court declared the draft accession agreement incompatible with the Treaties for a number of reasons, all of which were related to the normative authority of EU law, and the judicial authority of the CJEU. Fearful of any possibility – hypothetical or otherwise – that the European Court of Human Rights (ECtHR or Strasbourg Court) could decide on the jurisdiction of EU law through the proposed prior involvement and co-respondent procedures which aimed to avoid

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<sup>20</sup> On Dworkin’s theory of the objectivity of morality see, R Dworkin, ‘Objectivity and Truth: You’d Better Believe It’ (1996) 25 *Philosophy & Public Affairs* 87.

<sup>21</sup> In any case this seems to be Dworkin’s position in *Law’s Empire* (Harvard University Press 1986). Whether or not this was already his position in *Taking Rights Seriously* (Harvard University Press 1978) is a different matter which need not concern us here.

<sup>22</sup> As mentioned in n 19 above, Raz questions whether ‘law as integrity’ amounts to a theory of global coherence in law. For the purpose of this article, the details of this issue need not concern us. Bengoetxea explicitly understands ‘law as integrity’ as a theory of global coherence in law. The incompatibility of Dworkin’s theory of law and the CJEU’s case-law does not depend on whether the former is committed to global coherence or not, but rather depends on the question of whether according to the CJEU’s case-law, morality is a necessary or even sufficient condition for legal validity.

<sup>23</sup> See in particular Halberstam (n 2) 111–113; and Eeckhout (n 2).

precisely such jurisdictional clashes, the CJEU required specific guarantees in the EU accession agreement with regard to the Court's exclusive competence to interpret EU law and its scope.<sup>24</sup> The Court also demanded a specific clause excluding ECtHR jurisdiction to review EU acts in the context of the Common Foreign and Security Policy (CFSP), for the sole reason that the CJEU also lacks jurisdiction in CFSP matters.<sup>25</sup> Thirdly, the Court argued that the draft accession agreement violated Article 344 TFEU, according to which the Member States may not submit a dispute pertaining to the interpretation of the Treaties to any method of settlement other than those provided therein.<sup>26</sup> Most crucially, however, were the Court's concerns regarding the negative consequences of EU accession under the current draft accession agreement for the special characteristics and the autonomy of EU law, in particular the principles of supremacy,<sup>27</sup> mutual trust,<sup>28</sup> and the preliminary reference procedure.<sup>29</sup> The absolute supremacy of EU law, in particular in the context of mutual trust among Member States, would be compromised without specific guarantees that EU accession to the ECHR will not entail ECtHR review of the primacy of EU law over conflicting national law. In the context of the preliminary reference procedure, the Court observed that the new Protocol 16 to the ECHR, which allows the highest courts of Member States to request an advisory opinion from the ECtHR on questions of principle relating to the interpretation of the ECHR, could be used to circumvent the preliminary reference procedure in EU law, thus threatening the latter's autonomy and effectiveness.<sup>30</sup>

It is clear that the plentiful references in Opinion 2/13 to the foundational jurisprudence of the EU legal system are consistent with the core of Bengoetxea's

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<sup>24</sup> Opinion 2/13 (n 1) paras 215–248.

<sup>25</sup> *ibid* paras 236–248.

<sup>26</sup> *ibid* paras 201–214.

<sup>27</sup> *ibid* paras 187–190.

<sup>28</sup> *ibid* paras 191–195. The principle of mutual trust has a specific definition in EU law: 'That principle requires, particularly with regard to the [AFSJ], each of the [Member] States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law' (191).

<sup>29</sup> *ibid* paras 196–200.

<sup>30</sup> *ibid* paras 198–199.



metaphor – the creation of a single coherent body of case-law.<sup>31</sup> Moreover, while some of the Court’s concerns regarding the autonomy of the legal system seem far-fetched, Opinion 2/13 contains little new law; it is mostly a plain application of the principles already established in decisions such as *Costa v ENEL* and Opinion 2/94.<sup>32</sup>

However, in a broader sense the metaphor fails to deliver. As regards the prior involvement procedure, the co-respondent mechanism, Article 344 TFEU and judicial jurisdiction over CFSP matters, the Court’s concerns are *institutional* in nature, in that they relate to the question of who decides what the law of the EU is. The Opinion can thus be said to protect the CJEU’s judicial authority. The protection of the so-called ‘specific characteristics of EU law’ in turn aims to protect the supremacy of systemic elements of EU law. Here the Opinion protects the authority of the EU legal system itself. The focus on authority is in both cases fundamentally incompatible with Dworkin’s non-positivism, which is based on the idea that no one – no institution nor any system – may decide what the law is, because what the law requires is ultimately governed by objective, mind-independent morality.<sup>33</sup>

As George Letsas notes, from a non-positivist perspective, doctrines such as the supremacy and autonomy of EU law and the authoritativeness of the CJEU can never *in themselves* justify the force of EU law (or of any other).<sup>34</sup> These institutional concerns are only justified insofar as they remain necessary for the morally justified goals they serve – furthering European integration for the peace and prosperity of the peoples of Europe. This means, for example, that in light of the constitutional principles of the European Union – as reflected most notably in Part I of the TFEU – in particular Article 2 – and the EU Charter of Fundamental Rights (CFR) – the prior existence of a certain

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<sup>31</sup> eg, in para 157: ‘As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order [...] (see, in particular, judgments in *van Gend & Loos*, 26/62, EU:C:1963:1, p. 12, and *Costa*, 6/64, EU:C:1964:66, p. 593, and Opinion 1/09, EU:C:2011:123, paragraph 65)’, and similarly in paras 166 and 176.

<sup>32</sup> Opinion 2/94 on accession by the Community to the ECHR, EU:C:1996:140. See also Kochenov (n 2) 94.

<sup>33</sup> See Dworkin (n 20); and *Justice for Hedgehogs* (Harvard University Press 2011) ch 19. See also G Letsas, ‘Harmonic Law’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 107.

<sup>34</sup> Letsas (n 33) 97, 100.

degree of European integration can mean that national fundamental rights protection trumps absolute supremacy. Maintaining absolute supremacy may no longer be necessary to ensure an already high degree of European integration, as the protection of fundamental rights to the detriment of supremacy can be more coherent with the EU's constitutional principles and its very *raison d'être*.<sup>35</sup> This demonstrates that integrity goes beyond consistency of judicial decision-making; it is about consistency of principle, and the EU's principles are best identified by the founding values and principles enshrined in the Treaties. For a Dworkinian court, therefore, a high degree of legal integration might require overturning *Costa v ENEL* insofar as is needed to make the *acquis* as a whole more coherent.

Whether the Union at present has reached a sufficient degree of legal and political integration to limit supremacy is a question which can only be answered by attributing weight to at least the following parameters: an authoritative and uniform application of EU law and its instrumental value in pursuing the objectives of European integration; the degree of European integration already achieved; the importance of fundamental rights protection in European integration; and the importance of the other principles and values of the EU *acquis* pertaining to the objectives of European integration, such as the fundamental freedoms of the internal market and the principles of mutual trust and recognition. Imagining that the CJEU were as capable as Dworkin's mythological judge Hercules and were able to weigh all these parameters, it would then be in a position to quantify the effects of EU accession to the ECHR. It would consider the added value of EU's accession to the ECHR to protecting fundamental rights in Europe, and the possible negative consequences of EU accession for the other principles and values of the EU. It would also have to calculate the consequences of the relevant counterfactual, ie non-accession. Even then the Dworkinian court would not have found its one right answer, because after identifying the consequences of accession and non-accession for the various parameters of European integration, it would have to take all these considerations together and decide which legal answer to the question asked in Opinion 2/13 is most coherent

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<sup>35</sup> *cf* *ibid*, 100–101.

with the entire EU law community of principle. While Dworkin demands tremendous effort from courts,<sup>36</sup> all Dworkinian courts should at least try to live up to his ideal.<sup>37</sup>

What makes Opinion 2/13 anti-Dworkinian is thus not so much the outcome but the Court's reasons for reaching it. Throughout the Opinion, no serious attempt to weigh the positive and negative implications of accession and non-accession for fundamental rights protection can be found, and nowhere does the Court evaluate these implications in light of the general scheme of principle of EU law. From a Dworkinian perspective, the most disturbing part of the Opinion is not even that the draft accession agreement was rejected, but rather the 'no, unless...' tone of the Court, in which it strongly differed with the View of Advocate General Kokott, who despite sharing some of the Court's concerns, applied a more constructive approach which resulted in a 'yes, provided that...' conclusion.<sup>38</sup> A genuinely Dworkinian CJEU committed to EU law as integrity would at least have found no difficulty in allowing more leeway for future accession. However, the Opinion offers no prospect of compromise, dialogue or inter-systemic balance, and no reflection upon the moral virtues of accession. It maintains that any harm to the supremacy of EU law and the functioning of mutual trust violates the Treaties, notwithstanding any significant benefit for fundamental rights protection in the EU. In other words, in assessing the validity of the draft accession agreement under EU law, moral judgment plays no role whatsoever, not even as a potential justification of an absolute supremacy claim.<sup>39</sup>

In contrast, the academic consensus after Opinion 2/13 – even among those who have expressed considerable sympathy for the Court's concerns<sup>40</sup> – is that the harm to supremacy and mutual trust that the draft accession agreement would have entailed is minor if not insignificant in comparison to the importance of enhanced fundamental rights protection and external control by the Strasbourg Court. The Court's critics all apply

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<sup>36</sup> See also S Shapiro, *Legality* (Harvard University Press 2011) 284–306.

<sup>37</sup> Dworkin, *Law's Empire* (n 21) 254–258.

<sup>38</sup> See Opinion 2/13, View of AG Kokott, EU:C:2014:2475.

<sup>39</sup> One could argue that the supremacy of EU law over national law is morally justified, for example because it contributes to the moral objectives of the project of European integration. The CJEU, however, had no recourse to any arguments of such kind.

<sup>40</sup> See Halberstam (n 2); Krenn (n 2).

variants of this profoundly Dworkinian legal reasoning. Apparently, we are all Dworkinians now, with the remarkable exception of the Court of Justice.

### 3. The Construction of the EU Legal System

If the CJEU is not or no longer a Dworkinian court, what kind of court is it? How can its self-referentiality and precedent-focused case-law be explained? A possible answer can be found in the theories Dworkin aimed to refute, in particular that of HLA Hart and his followers.<sup>41</sup> Contrary to Dworkin's morally grounded theory of law, Hart and his followers conceptualise law as a species of a *social* system which is founded on the social practice of institutionalised officials. The social rule which these officials practise identifies the criteria of validity of legal norms which they are required to apply, and was famously referred to by Hart as the Rule of Recognition. Thus, contrary to Dworkin, Hart and his followers describe a content-independent conception of the systematicity of law,<sup>42</sup> at bottom rooted in the thesis that whether a norm is legally valid depends on its source, not on its merits.<sup>43</sup>

As clearly not all social, normative systems consisting of primary and secondary rules are legal systems, Hart's conception of law appears over-inclusive.<sup>44</sup> A key aspect of the nature of law, one could say, is thus the factors which distinguish legal systems from other social, normative systems comprising primary and secondary norms as well. The most influential account of the necessary conditions for the existence of a legal system is

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<sup>41</sup> HLA Hart, *The Concept of Law*, 3rd edn (first published 1961, Clarendon Press 1998). For Dworkin's critique of Hart, see eg, 'The Model of Rules I', 'The Model of Rules II', and 'Hard Cases', all collected in *Taking Rights Seriously* (n 21); and 'Thirty Years On' (2002) 115 *Harvard Law Review* 1655.

<sup>42</sup> I am thankful to the anonymous referee who raised the point of the different conceptions of the 'systematicity' of law.

<sup>43</sup> See Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 *American Journal of Jurisprudence* 199.

<sup>44</sup> Recognising that legal systems are only one form of socially constructed and institutionalised normative systems, and arguably not always the most important one in the guidance of people's lives, lies at the basis of the initial pluralist theories of law. See eg, J Griffiths, 'What is Legal Pluralism?' (1986) 18 *Journal of Legal Pluralism and Unofficial Law* 1; BZ Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375; and W Twining, 'Normative and Legal Pluralism: A Global Perspective' (2010) 20 *Duke Journal of Comparative & International Law* 473.

the one provided by Joseph Raz. According to Raz, legal systems are social, normative systems which (1) are comprehensive, (2) claim supremacy, and (3) are open systems.<sup>45</sup>

Legal systems are comprehensiveness in the sense that they claim to regulate any type of human behaviour.<sup>46</sup> Secondly, legal systems claim supremacy in the sense that they claim authority over any other normative arrangements within their jurisdiction.<sup>47</sup> In other words, they claim legitimate authority.<sup>48</sup> Thirdly, legal systems include norms which have the purpose of giving binding effect to extra-legal norms, such as the rules of private international law which sometimes require courts in one jurisdiction to apply the law of another jurisdiction. However, no one would say that a British judge who is required to apply French law in a private dispute incorporates French law into the UK legal system.

For the purpose of this article, I take Raz's theory of the legal system to be largely accurate. As I cannot engage here in detail with the relevant philosophical debate, I will confine myself to the following remarks. Firstly, I agree with Scott Shapiro that there is a necessary connection between law and a claim of supremacy under the assumption that law *as we know it* is a functional social system.<sup>49</sup> Whether law claims supremacy in an absolute, exclusionary manner, as typically denied by inclusive legal positivists,<sup>50</sup> is not

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<sup>45</sup> J Raz, *Practical Reason and Norms* (Princeton University Press 1990) 151–154.

<sup>46</sup> *ibid* 150–151.

<sup>47</sup> *ibid* 151–152.

<sup>48</sup> In *Practical Reason and Norms*, Raz seems to use 'claiming supremacy' and 'claiming authority' as synonyms, eg: 'legal systems claim to be supreme [...] means that every legal system claims authority to prohibit, permit or impose conditions on the institution and operation of all the normative organizations to which members of its subject-community belong' (*ibid* 151) and '[no legal system] can acknowledge any claim to supremacy over the same community which may be made by another legal system' (*ibid* 152). In his later works, most notably *The Authority of Law* (Clarendon Press 1979) and 'Authority, Law and Morality' (1985) 68 *Monist* 295, Raz offers a more sophisticated and elaborate theory of the claims of law, focused on the conceptual connection between law and the claim of legitimate authority. While I understand the claim to legitimate authority to be a further refinement of what Raz first called a claim to be supreme, the complexities of this refinement are not directly relevant here, and I will refer to the claim to supremacy in the remainder of this article.

<sup>49</sup> S Shapiro, 'On Hart's Way Out' in JL Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford University Press 2001).

<sup>50</sup> See eg, WJ Waluchow, *Inclusive Legal Positivism* (Clarendon Press 1994).

directly relevant for the purpose of this article insofar as one believes, as I do, that law claims supremacy at least to a significant extent. Secondly, in this regard one could say that the more functional and goal-driven a legal system is, the more important it is for that legal system to claim supremacy. From this perspective, the EU seems to fit Raz's theory of the legal system particularly well because it is by its nature a highly functional system. Unlike national legal systems, the EU has an explicitly purposive nature in light of its specific policy objectives and limited competences. Thirdly, I emphasise 'law as we know it' because I am not entirely convinced that law necessarily claims supremacy, and I certainly do not want to defend this thesis here. Recent works in legal philosophy have strongly argued in favour of a more realistic theory of law and typical, rather than necessary, conditions of law.<sup>51</sup> Tentatively agreeing with Tuori, legal solipsism might not be inevitable in law.<sup>52</sup> However, I do believe that the concept of law as we know it, and which is strongly linked to characteristics of national legal systems, includes a claim to supremacy, and that EU law is no different in this respect.<sup>53</sup>

Moving on to the other two conditions, comprehensiveness and openness can be conceived as 'generatives' for the claim to supremacy, rather than independent conditions in themselves. Comprehensiveness allows the legal system to genuinely claim absolute supremacy over other normative arrangements independent of their content. The openness of the legal system allows it to develop continuously without losing its capability to claim supremacy, through the process of delegating the task of determining what the law is to courts by giving them legally binding directions to engage in extra-legal reasoning.

In the following sections, I will argue that the CJEU has attempted to meet Raz's necessary conditions of legal systems in its jurisprudence on the protection of what the Court calls the 'specific characteristics of EU law': autonomy, direct effect and

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<sup>51</sup> eg, F Schauer, *The Force of Law* (Harvard University Press 2015); B Tamanaha, *A Realistic Theory of Law* (Cambridge University Press 2017).

<sup>52</sup> K Tuori, *European Constitutionalism* (Cambridge University Press 2015) 86.

<sup>53</sup> See further section 4 below.

supremacy. As will be shown, however, none of these characteristics are EU-specific. Rather, what is protected is the *legality*, ie the status of law,<sup>54</sup> of EU law.

#### A. The emergence of the (embryonic?) EU legal system

It is often asserted that EU ‘law’ is not really law, or at least not in the same way that national legal systems are law.<sup>55</sup> Instead, because of its less sophisticated, less comprehensive and less institutionalised structure, EU law is a form of international law,<sup>56</sup> something ‘sui generis’,<sup>57</sup> or a more loosely defined ‘order’.<sup>58</sup>

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<sup>54</sup> The concept of ‘legality’ is often used in different ways. In the Kantian sense, ‘legality’ means mere compliance with law, deprived of any moral endorsement of the law or other reasons for conforming to it. In this sense, legality is contrasted with morality: ‘The agreement of an action with the law of duty is its *legality* [Gesetzmässigkeit] (*legalitas*); the agreement of the *maxim* of the action with the law is its *morality* [Sittlichkeit] (*moralitas*)’ (emphasis in original) (I Kant, *Metaphysical Elements of Justice. Part I of the Metaphysics of Morals*, 2nd edn, trans J Ladd (Hackett Publishing 1999) 19). By contrast, following the modern legal positivist tradition, here ‘legality’ is meant as ‘the property of being law’. The legality of a normative system depends on whether it possesses the necessary and sufficient conditions for being ‘law’. See also Coleman, *The Practice of Principle* (Oxford University Press 2003) 84; and Shapiro (n 36) 7.

<sup>55</sup> See eg, K Culver and M Giudice, ‘Not a System but an Order’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012); A Somek, ‘Is Legality a Principle of EU Law?’ in S Vogenauer and S Weatherill (eds), *General Principles of Law. European and Comparative Perspectives* (Hart Publishing 2017).

<sup>56</sup> T Moorhead, ‘European Union Law as International Law’ (2012) 5 *EJLS* 126.

<sup>57</sup> See eg, JHH Weiler, ‘Federalism without Constitutionalism: Europe’s *Sonderweg*’ in K Nicolaidis and R Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001); B de Witte, ‘The European Union as International Legal Experiment’ in G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2012).

<sup>58</sup> As applied to law, I consider the distinction between ‘system’ and ‘order’ to be largely superfluous. Bengoetxea observes that a ‘system’ in the strict sense may be understood as having the properties completeness, closed, and consistent – unlike the looser connotation of ‘order’. Legal systems/orders arguably do not possess these properties, and at most *claim* to possess them or aspire towards possessing them (eg, J Bengoetxea, ‘Legal System as a Regulative Ideal’ in H-J Koch and U Neumann (eds), *Praktische Vernunft und Rechtsanwendung* (Franz Steiner 1994)). In a weaker sense, ‘system’ can refer to a set of related elements which has a certain internal structure and can be distinguished from its environment (see eg, M van de Kerchove and F Ost, *Legal System. Between Order and Disorder*, trans I Stewart (Oxford University Press 1994), 10–12). When Raz speaks of ‘legal systems’ he appears to have in mind a weak

However, Hart's social constructivist theory of law perhaps provides the most persuasive intellectual support for the famous statement that the Treaty of Rome 'constitutes a new legal order of international law',<sup>59</sup> and that it 'has created its own legal system' bringing into existence 'an independent source of law'.<sup>60</sup> If law is a social construct primarily rooted in the behaviour of a particular group of people, it can emerge spontaneously. Certainly, according to Hart and his followers, something cannot be law if it is not generally obeyed by its subjects,<sup>61</sup> but this only means that efficacy is a *conditio sine qua non* for a legal system to exist, and by no means a *conditio per quam* for it to emerge.<sup>62</sup>

It also follows from Hart's social constructivism, however, that a legal system cannot be created top-down *ex nihilo*. Given the existing institutional infrastructure of the national legal systems, the only group of people designated as 'officials' who could realistically establish a new legal system in Europe is the judiciary of the Member States. If EU law is to be a directly effective legal system in the Member States' legal-institutional arena, clearly the practice of the national courts must establish a social rule to that end. In this perspective, the rationale of *van Gend & Loos*, to empower national courts to apply provisions of EU law, is indeed a foundational strategy.<sup>63</sup> It marks the shift from a-legality to the possibility of legality by creating the necessary institutional conditions for the emergence of legal system.<sup>64</sup> The word 'possibility' is key: *van Gend & Loos* was at most the prophecy of a legal system, 'an invitation to the Member State

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conception of 'system', if only because of their openness, and as such the term can be used interchangeably with 'legal order'. Moreover, while some legal systems have a higher degree of (mainly institutional) systematicity than others, I see no reason to make a distinction between 'systems' and 'orders' on the basis of sophistication alone.

<sup>59</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen*, EU:C:1963:1.

<sup>60</sup> Case 6/64 *Flaminio Costa v ENEL*, EU:C:1964:66, para 3.

<sup>61</sup> Hart (n 41) 116–117; Raz, *The Concept of a Legal System* (Clarendon Press) 202–207.

<sup>62</sup> H Kelsen, *General Theory of Law and State*, trans A Wedberg (Harvard University Press 1945) 119. In the same vein, though applying different terminology, Hart (n 41) 103–104; and Raz (n 61) 202–204.

<sup>63</sup> See in this regard also JHH Weiler, 'The Transformation of Europe' (1991) 100 *YLJ* 2403; R Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Palgrave Macmillan 1998).

<sup>64</sup> On the shift from a-legality to legality, see H Lindahl, *Fault-Lines of Globalisation: Legal Order and the Politics of ALegality* (Oxford University Press 2013).



courts’ in the words of Weiler,<sup>65</sup> or a ‘juridical coupe d’État’ in those of Stone Sweet.<sup>66</sup> Had no national court heeded the Court’s invitation, there would certainly not have been an autonomous EU legal system. If there has indeed been a juridical coup d’État altering the Rules of Recognition in the EU Member States, it could only have been achieved through the institutional infrastructure capable of establishing a new Rule of Recognition – the national courts, not the CJEU. But if this is the case, there is no difference in how any legal system comes into being

An autonomous EU Rule of Recognition must not be conflated with any written norm in the Treaties, contrary to President Koen Lenaerts’s statement that the ‘ultimate Rule of Recognition [of the European Union], to speak with HLA Hart, are the Treaties: on the European Union [sic], on the Functioning of the European Union, and the Charter of Fundamental Rights’.<sup>67</sup> This is a misunderstanding of Hart’s notion of the Rule of Recognition. The Rule of Recognition is not the highest norm or set of norms of the legal system, but the social rule that *designates* this-or-that norm or set of norms as the highest source of the legal system.<sup>68</sup>

Conceptualising the EU legal system as a social, normative system with an autonomous Rule of Recognition, the subsequent question is which distinguishing features the EU legal system possesses. The case-law of the CJEU contains myriad examples of how the Court constructs EU law along the lines of other legal systems. Put together, these examples illustrate how the Court effectively purports to *mimic* national

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<sup>65</sup> Weiler (n 63) 2451.

<sup>66</sup> A Stone Sweet, ‘The Juridical *Coup d’État* and the Problem of Authority: *CILFIT* and *Foto-Frost*’ in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 202.

<sup>67</sup> Intervention by President Koen Lenaerts during the ICON 2016 conference (Berlin, 19 June 2016), available at [https://www.youtube.com/watch?v=\\_Vrjbt9Yfg](https://www.youtube.com/watch?v=_Vrjbt9Yfg) (from 31:54). In full, commenting on the relationship between the EU and the ECHR in the context of Opinion 2/13, the President said: ‘The European Union is a domestic legal order, domestic to the European Union [...] When I say “domestic”, I simply mean the European Union as a self-referential legal order whose ultimate Rule of Recognition, to speak with HLA Hart, are the Treaties: on the European Union, on the Functioning of the European Union, and the Charter of Fundamental Rights. That is our ultimate constitutional standard, but which is rooted in the common constitutional traditions of the Member States, in the ECHR’.

<sup>68</sup> Hart (n 41) 103–110; J Gardner, ‘Can There Be a Written Constitution?’ in J Gardner, *Law as a Leap of Faith* (Oxford University Press 2012) 101ff.

legal systems. From this perspective, otherwise obscure case-law on the comprehensiveness, openness, and most notably the supremacy of EU law can be better understood.

#### B. The truism of claiming comprehensive supremacy

Since *Costa v ENEL* the Court of Justice has maintained that EU law has absolute supremacy over national law.<sup>69</sup> Applying the condition of comprehensiveness, the supremacy of EU law cannot depend on the subject or the political or legal sensitivity of the matter. Following Raz, the law regulates parts of private life that cannot be constrained by law by self-declared non-intervention. Similarly, the constitutional limitations to ‘pure’ supremacy in reality confirm the supremacy of EU law even in those fields. For example, Article 4(2) TEU states that the EU

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.

This Article has been interpreted in the literature as entailing necessary limitations to the supremacy of EU law.<sup>70</sup> The Court has acknowledged that national identity may be relevant in the context of derogations from EU law.<sup>71</sup> But this is precisely the point:

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<sup>69</sup> See eg, Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, EU:C:1978:49; Opinion 2/13 (n 1). See further JHH Weiler, ‘The Community System: The Dual Character of Supranationalism’ (1981) 1 *YEL* 267.

<sup>70</sup> See eg, A von Bogdandy and S Schill, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’ (2011) 48 *CMLRev* 1417; D Leczykiewicz: ‘The “National Identity Clause” in the EU Treaty: A Blow to Supremacy of Union Law?’, UK Constitutional Law Association (21 June 2012); see further M Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014); and G van der Schyff, ‘The Constitutional Relationship Between the Union and its Member States: The Role of National Identity in Article 4(2) TEU’ (2012) 37 *ELRev* 563. For an defence of a limited form of supremacy of EU law, see MacCormick, *Questioning Sovereignty* (Oxford University Press 1999) 117–121.

<sup>71</sup> See eg, Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, EU:C:2010:806; Case C-391/09 *Malgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, EU:C:2011:291.

incorporating the limitations to supremacy into the Treaty and the Court's case-law strengthens the supremacy of EU law, as it is EU law which rules over national identity or constitutional tradition *by permitting it*.

The Court's case-law on supremacy has been reinforced recently in both *Melloni*<sup>72</sup> and Opinion 2/13. The *Melloni* case dealt with the interpretation of Article 53 CFR, which reads:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

This provision seems to ensure that Member States can apply higher standards of human rights than those guaranteed by the Charter, although its text is anything but clear.<sup>73</sup> In *Melloni*, the Court had to decide whether the right to a fair trial as safeguarded by Article 24(2) of the Spanish Constitution could prevail over the provisions of the Arrest Warrant Directive.<sup>74</sup> The Court answered this question in the negative. It interpreted Article 53 CFR to mean that the Member States *cannot* apply higher human rights standards insofar as that this would compromise the supremacy and effectiveness of EU law, in this case the Arrest Warrant Directive. This interpretation leans heavily on the phrase 'human rights and fundamental freedoms as recognised, *in their respective fields of application*, [...] by the Member States' constitutions'.

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<sup>72</sup> Case C-399/11 *Stefano Melloni v Ministero Fiscal*, EU:C:2013:107.

<sup>73</sup> Prior to *Melloni*, several scholars pointed to the recondite phrasing of Article 53 CFR, leaving much about its meaning and scope to guesswork. See eg, J Bering Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 38 *CMLRev* 1171; LFM Besselink, 'The Member States, the National Constitutions and the Scope of the Charter' (2001) 8 *MJ* 68; R Alonso García, 'The General Provisions of the Charter of Fundamental Rights of the European Union' (2002) 8 *ELJ* 492.

<sup>74</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1.

The *Melloni* judgment received abundant criticism both for its legal outcome – the subordination of a national provision of constitutional law which contained a fundamental human right – and the obscure and counterintuitive interpretation of Article 53 CFR.<sup>75</sup> From the perspective of Raz’s theory of the legal system, however, it is a truism to state that within the jurisdiction of a particular legal system, only that legal system may be supreme. The text of Article 53 CFR in this regard supports such a conclusion, as it emphasises on the contrary that the Charter cannot adversely affect human rights protection standards in *another* system’s respective fields of application, including higher standards. This interpretation confirms the idea that all legal systems are autonomous in their own jurisdiction.

In other words, whatever is in the scope of, say, Member State law is subject to the supremacy of the various national legal systems, and conversely, whatever is in the scope of EU law is subject to the supremacy of EU law. The fact that EU law and national law continuously interact and are concurrently present in the geographical territories of the Member States does not alter this conclusion.<sup>76</sup> From a legal systems point of view, we could indeed argue that each of the 28 national legal systems and the separate EU legal system are autonomous from within their respective perspectives.<sup>77</sup> In that regard, it makes little sense to ask whether in a given EU Member State, it is the national legal system or the EU legal system which is normatively superior. There is nothing in the

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<sup>75</sup> See eg, LFM Besselink, ‘The Parameters of Constitutional Conflict after *Melloni*’ (2014) 39 *ELRev* 531; A Torres Pérez, ‘*Melloni* in Three Acts: From Dialogue to Monologue’ (2014) 10 *EuConst* 308; N Lavranos, ‘The CJEU’s Judgments in *Melloni* and *Akerberg Fransson*: Une ménage à trois difficulté’ (2013) 4 *Grundrechte* 133. cf however B de Witte, ‘Article 53’ in S Peers et al (eds) *The EU Charter of Fundamental Rights – A Commentary* (Hart 2013); and D Sarmiento, ‘Who’s Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe’ (2013) 50 *CMLRev* 1267.

<sup>76</sup> cf MacCormick (n 70) 117–121, Culver and Giudice (n 55); A von Bogdandy, ‘The Transformation of European Law: the Reformed Concept and its Quest for Comparison’, *Max Planck Institute for Comparative Public Law & International Law Research Paper* 2016-14.

<sup>77</sup> See also NW Barber, ‘Legal Pluralism and the European Union’ (2006) 12 *ELJ* 306; J Dickson, ‘How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations between, Legal Systems in the European Union’ (2008) 2 *Problema* 9; J Dickson, ‘Towards a Theory of European Union Legal Systems’ in J Dickson and P Eleftheriadis, *Philosophical Foundations of European Union Law* (Oxford University Press 2012).

concept of a legal system that suggests it is constrained to a single geographic area, nor that any geographic area can have only one legal system.<sup>78</sup>

The same approach to supremacy is unequivocally pursued by the Court in Opinion 2/13. The Court's considerations as regards the incompatibility of the draft accession agreement and the principle of mutual trust are particularly illuminating in this regard. As a consequence of the specific characteristics of EU law, the Court held in its Opinion that the draft EU accession agreement threatens the principle of mutual trust, particularly in the context of the Area of Freedom, Security and Justice (AFSJ). Of all the aspects of Opinion 2/13, this argument seems to have endured the most severe criticism. Many commentators have observed that the Court aims to protect mutual trust to the detriment of fundamental rights protection, and therefore hierarchically ranks fundamental rights below mutual trust and integration generally.<sup>79</sup>

However, what seems particularly crucial to the Court's reasoning is not the substance of the principle of mutual trust as opposed to that of fundamental rights, but the fact that mutual trust is a matter within the jurisdiction of EU law:

[T]he Member States have, by reason of their membership of the EU, accepted that *relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.*<sup>80</sup>

As a matter of EU law as it currently stands, Member States must comply with the requirements of mutual trust expressed in secondary legislation. This requirement is a logical consequence of the presumption of the legal validity of the Dublin Regulation,<sup>81</sup> which remains warranted until it is successfully challenged for violating higher-order law

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<sup>78</sup> J Gardner, 'Fifteen Themes from *Law as a Leap of Faith*' (2015) 6 *Jurisprudence* 601, 605.

<sup>79</sup> See in particular Peers (n 2); Eeckhout (n 2); Kochenov (n 2).

<sup>80</sup> Opinion 2/13 (n 1) para 193 (emphasis added).

<sup>81</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31.

within the normative scope of the EU legal system. In Kelsenian terms, secondary legislation can only be subject to the normativity that is inherent to the ‘pure’ legal system.<sup>82</sup> The Court repeated in Opinion 2/13 that in conformity with EU law on this point, Member States must presume that fundamental rights standards have been complied with by other Member States, and may in principle not check whether those standards are observed.<sup>83</sup>

By contrast, nothing in the Court’s reasoning suggests that the functioning of mutual trust is excluded from fundamental rights review. Within the EU legal system, however, this entails review of the relevant secondary legislation in light of primary fundamental rights law, in particular the Charter, following a specific case or preliminary question to that end. Since the Court was not asked for its opinion on the interpretation of the Dublin Regulation itself, it should come as no surprise that it did not speak of the compatibility of the application of the regulation with fundamental rights. Indeed, in the recent *CK and Others* judgment the Court held that the application of the Dublin Regulation is subject to Article 4 CFR.<sup>84</sup> While consistent with the ECHR’s *MSS* jurisprudence,<sup>85</sup> which is a welcome approach, this judgment does not overturn Opinion 2/13 in this respect at all,<sup>86</sup> as the latter precisely centres on the argument that it is EU law and EU law alone which may decide the interpretation of the Dublin Regulation. Given the opportunity to interpret the Regulation further, the Court in *CK and Others* decided to give the Dublin Regulation

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<sup>82</sup> See on Kelsen’s ‘pure theory of law’, which asserts that the normativity of the law should be explained solely in its own terms, generally, H Kelsen, *Reine Rechtslehre* (Mohr Siebeck 2008); and Kelsen (n 62).

<sup>83</sup> Opinion 2/13 (n 1), para 192.

<sup>84</sup> Case C-578/16 PPU *CK and Others v Republika Slovenija*, EU:C:2017:127, para 65: ‘It follows from all of the preceding considerations that the transfer of an asylum seeker within the framework of the Dublin III Regulation can take place only in conditions which preclude that transfer from resulting in a real risk of the person concerned suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter’.

<sup>85</sup> eg, *MSS v Belgium and Greece*, App No 30696/09 (GC, 21 January 2011); *Tarakhel v Switzerland*, App No 29217/12 (GC, 4 November 2014).

<sup>86</sup> cf S Peers, ‘The Dublin system: The ECJ Squares the Circle between Mutual Trust and Human Rights Protection’ (20 February 2017) available at <http://eulawanalysis.blogspot.nl/2017/02/the-dublin-system-ecj-squares-circle.html>.

the sense that anyone would sensibly presume it has, even though earlier case-law seemed to strongly suggest otherwise.<sup>87</sup>

Consequently, the Court's emphasis that mutual trust is governed by EU law to the exclusion of any other law leaves untouched the possibility for external review by the ECtHR after future accession, if it is EU law which is subject to review – not the Member States implementing EU law. The Court effectively does exactly what Halberstam suggests as a remedy to ensure future ECHR accession.<sup>88</sup>

The relevance of the principle of mutual trust and the Dublin Regulation in Opinion 2/13 marks the importance of different conceptions of legal validity for the soundness of the Opinion. For the Dworkinian, legal validity does not depend on whether there are rules, principles or court judgments which affirm the validity of a norm. The legal validity of the principle of mutual trust would depend on the question of whether it fits the morally best interpretation of the EU's community of principle. This underlies virtually all commentators' arguments: mutual trust certainly has specific virtues, which are however not absolute and the supremacy of EU law cannot justify the moral loss of non-accession to the ECHR. The Razian might morally agree with this conclusion, but would dismiss the argument as irrelevant from the legal point of view, in which moral reasons are preempted by legal ones.<sup>89</sup>

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<sup>87</sup> In determining what EU law really requires on this point, the problem with cases such as *Joined Cases C-411/10 and C-493/10 NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865; *Case C-4/11 Germany v Kaveh Puid*, EU:C:2013:740; *Case C-394/12 Shamso Abdullahi v Bundesasylamt*, EU:C:2013:813; and *Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, EU:C:2016:198, is that the questions referred to the CJEU were narrow in scope and did not explicitly address the compatibility of the application of the Dublin Regulation with the CFR in cases where there is a real risk of violation of Art 4 CFR. See further K Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet Not Blind) Trust' (2017) 54 *CMLRev* 805, 834. However, this argument is not entirely convincing as the CJEU is in reality never *only* solving the case at hand. CJEU judgments very frequently read as providing at least partially generalisable rules, both by what they say and by what they do *not* say.

<sup>88</sup> Halberstam (n 2) 145–146.

<sup>89</sup> On Raz's 'legal point of view' as opposed to Hart's 'internal point of view', see W Conklin, *The Invisible Origins of Legal Positivism* (Kluwer 2001) 269–273.

### C. Total EU law

One might object that despite its supremacy claim, EU law fails to meet Raz's conditions for the legal system, for it cannot even remotely match or claim the comprehensiveness of national law.<sup>90</sup> Indeed, one of the major idiosyncrasies of EU law *qua* law is that it only possesses limited competences in the pursuance of specific objectives. However, the CJEU has been endeavouring to advance the comprehensiveness of EU law, most notably through the doctrine of judicial *Kompetenz-Kompetenz* and its case-law on the 'retained powers' of the Member States. In the words of Loïc Azoulay, the resulting image is that of EU law as total law,<sup>91</sup> which corresponds to Raz's notion of comprehensiveness.

The doctrine of judicial *Kompetenz-Kompetenz* holds that while the competences of the EU are limited in nature, it is solely for the CJEU to establish whether a particular matter falls within the scope of EU law. Since long, the Court itself has held that 'the question of a possible infringement of fundamental rights by a measure of the [EU] institutions can only be judged in the light of [EU] law itself'.<sup>92</sup> One can infer judicial *Kompetenz-Kompetenz* from the wording of Article 263 TFEU, which grants the CJEU the adjudicative jurisdiction to assess the validity of acts of EU institutions and lists 'lack of competence' as a ground for illegality.<sup>93</sup> Moreover, from Article 267 TFEU it can be inferred that the CJEU has the exclusive jurisdiction to invalidate acts of EU institutions.<sup>94</sup>

Secondly, beyond the express and implied powers of the EU, the CJEU has rejected the existence of domains reserved to national sovereignty. According to the 'retained powers formula',<sup>95</sup> the Court has consistently maintained that while EU law does not detract from certain retained powers of the Member States, for example education, direct taxation, the organisation of their social security systems, and the conferral and

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<sup>90</sup> See J Raz, 'Why the State?' (2014) *Oxford Legal Studies Research Paper* 73/2014.

<sup>91</sup> L Azoulay, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 *EJLS* 192.

<sup>92</sup> Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz*, EU:C:1979:290, 3744.

<sup>93</sup> JHH Weiler and UR Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass' in T Schilling, JHH Weiler and UR Haltern, *Who in the Law is the Ultimate Judicial Umpire of European Community Competences? The Schilling – Weiler/Haltern Debate*, Harvard Law School Jean Monnet Working Paper Series No 10/1996.

<sup>94</sup> Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*, EU:C:1987:452.

<sup>95</sup> Azoulay (n 91).



withdrawal of nationality, ‘when exercising those powers, the Member States must comply with EU law’.<sup>96</sup> To put it more directly, under EU law, ‘there simply is no nucleus of sovereignty that the Member States can invoke, as such, against the [EU]’.<sup>97</sup> Hence comprehensiveness of EU law lies not so much in its policy powers, but in the unlimited field of application of its law *within* its jurisdiction. In this regard, the EU legal system is similar to national legal systems in that the latter’s jurisdiction is also constrained, at least geographically and temporally. Consequently, the criterion of comprehensiveness does not necessarily mean that law claims unlimited jurisdiction.<sup>98</sup> Rather, law appears to claim an *unspecified* jurisdiction, always claiming authority for itself,<sup>99</sup> and refusing to acknowledge any limit on their jurisdiction.<sup>100</sup> This is precisely what EU law claims through both the doctrine of *Kompetenz-Kompetenz* and the retained powers formula.

The Court’s effort to totalise EU law is further illustrated with the case-law on the application of the free movement provisions. In *Omega Spielhallen*<sup>101</sup> the Court held that the law of the internal market applied to the German prohibition of laser tag games. Notwithstanding the marginal assessment of the necessity and proportionality of national law, it is clear that within the scope of EU law, every sphere of human behaviour is regulated by the fundamental freedoms of the internal market. The fact that it is the Court of Justice which decides to apply a marginal balancing test between economic freedoms and human rights is arguably of far greater constitutional importance than the deferential nature of the test itself. Secondly, the total law approach is further supported by the broad

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<sup>96</sup> See as to education eg, Case C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française*, EU:C:2010:181, para 28; Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren*, EU:C:2007:626, para 24; as to direct taxation see eg, Case C-279/93 *Finanzamt Köln-Altstadt v Roland Schumacker*, EU:C:1995:31, para 21; as to social security eg, Case 238/82 *Duphar BV and Others v Netherlands*, EU:C:1984:45, para 16; as to nationality eg, Case C-135/08 *Janko Rottmann v Freistaat Bayern*, EU:C:2010:104, para 45.

<sup>97</sup> K Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’ (1990) 38 *AJCL* 205, 220.

<sup>98</sup> TAO Endicott, ‘Interpretation, Jurisdiction, and the Authority of Law’ (2007) 6 *APA Newsletter* 14.

<sup>99</sup> J Raz, *The Morality of Freedom* (Clarendon Press 1986) 77.

<sup>100</sup> Endicott (n 98) 18.

<sup>101</sup> Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, EU:C:2004:614.

and purposive interpretation of key concepts of EU law in a way which maximises their *effet utile*, most notably the *Dassonville* rule for identifying measures having equivalent effect to quantitative import restrictions,<sup>102</sup> which has effectively been transplanted to the other fundamental freedoms.<sup>103</sup> In the *Tobacco Advertising* cases, this broad definition of obstacles to trade has also been applied to the EU's competence to harmonise legislation.<sup>104</sup>

The doctrine of total EU law and the manner in which the Court maintains the claim to comprehensive supremacy illustrate how the criteria of comprehensiveness and supremacy and interrelated in a specific way. Rather than a fully separate criterion in itself, comprehensiveness can be seen as a generative for the maintenance of the supremacy claim. The total law doctrine of the CJEU reflects a typical claim of legal systems in general, perhaps even revealing a truism about law: law is always total law.

#### D. ...because *we* say so

Like any national legal system, EU law contains many norms which give binding force to norms which are themselves not part of EU law. As regards the adoption of norms

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<sup>102</sup> Case 8/74 *Procureur du Roi v. Dassonville*, EU:C:1974:82, para 5: 'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions'.

<sup>103</sup> For the free movement of services, see eg, Case C-384/93 *Alpine Investments BV v Minister van Financiën*, EU:C:1995:126, paras 35–38; Joined Cases C-544/03 and C-545/03 *Mobistar SA v Commune de Fléron and Belgacom Mobile SA v Commune de Schaerbeek*, EU:C:2005:518, para 29; for free movement of workers, see eg, Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and Others and UEFA v Jean-Marc Bosman*, EU:C:1995:463, paras 98–103; for the freedom of establishment, see eg, Case C-169/07 *Hartlauer Handelsgesellschaft mbH v Wiener Landesregierung und Oberösterreichische Landesregierung*, EU:C:2009:141, para 34; for free movement of capital, see eg, Case C-439/97 *Sandoz GmbH v Finanzlandesdirektion für Wien, Niederösterreich und Burgenland*, EU:C:1999:499, para 19. See in general terms, Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, EU:C:1995:411, para. 37; For analysis of the development of the case-law, see R Schütze, *From International to Federal Market* (Oxford University Press 2017) 284–288, with further references.

<sup>104</sup> Case C-376/98 *Germany v European Parliament and Council*, EU:C:2000:544; Case C-380/03 *Germany v European Parliament and Council*, EU:C:2006:772. For a critical analysis, see A Somek, *Individualism* (Oxford University Press 2008).

created by individuals to arrange their private affairs – contracts, private regulation etc – EU law does not behave any differently from other legal systems. The interaction between the EU legal system on the one hand, and national and international legal systems on the other, deserves some further scrutiny.

In *Internationale Handelsgesellschaft*,<sup>105</sup> the CJEU famously introduced unwritten EU fundamental rights which it derived from the common constitutional traditions of the Member States, in order to shield the supremacy of EU law from the *Bundesverfassungsgericht*'s critique.<sup>106</sup> Currently, fundamental rights are both part of the general principles of EU law and enshrined in the EU Charter of Fundamental Rights. Nevertheless, neither the constitutional traditions of the Member States nor the ECHR are actually incorporated into the EU legal system. Article 6(3) TEU carefully declares that

Fundamental rights, *as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States*, shall constitute general principles of the Union's law.<sup>107</sup>

This Article ensures that the autonomy of EU law is protected against external norms by *copying* the rights referred to into EU law, rather than *incorporating* them.<sup>108</sup> Therefore, the Court is able to deny that the Convention itself is a source of EU law. At most, when interpreting and applying EU fundamental rights, EU law directs courts to engage in ECHR-inspired legal reasoning in accordance with EU law. Similarly, but more specifically, Article 52(3) CFR states that the rights in the Charter which correspond with ECHR rights, should have the same meaning and scope as those laid down by the ECHR. Article 52(3) CFR can thus be said to provide an interpretative direction.

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<sup>105</sup> *Internationale Handelsgesellschaft* (n 69).

<sup>106</sup> BVerfGE 37, 271, 2 BvL 52/71 (29 May 1974) (*Solange I*). See further B de Witte, 'The Past and Future of the European Court of Justice in the Protection of Human Rights' in P Alston (ed), *The EU and Human Rights* (Oxford University Press 1999); JHH Weiler and NJS Lockhart, "'Taking Rights Seriously' Seriously' (1995) 32 *CMLRev* 579.

<sup>107</sup> Art 6(3) TEU (emphasis added).

<sup>108</sup> Similarly, see *Lenaerts* (n 87) 807: '[T]he ECJ seeks to define the EU constitutional space without denying that EU law *influences*, and is *influenced by*, the legal orders that surround it' (emphasis added).

The key difference between *giving binding effect* to the rights enshrined in the ECHR in order to further develop the fundamental rights of EU law, and the *incorporation* of such rights in the EU legal system itself, is that in the first case the CJEU merely uses sources exogenous to the legal system to shape EU law in accordance with existing norms. It follows that EU law remains capable of claiming supremacy. In contrast, were the rights of the ECHR to be fully incorporated into the EU legal system, this new part of EU law would in effect be subject to the interpretation of the Strasbourg Court. The price for this distinction is widespread confusion about the ultimate source of legitimate legal interpretation within the EU, which suffocates the law's ability to claim supremacy.

In other words, the openness of the EU legal system in conjunction with its claim to comprehensive supremacy is given by the formula '...because *we* say so'. There can be no doubt that EU law – and its interpretation by the CJEU – is influenced both by the national legal systems and by the ECHR. From a legal-sociological perspective, the CJEU must operate not only within boundaries of legality, but is also bound by a wider range of steadying factors,<sup>109</sup> which include politico-judicial legitimacy.<sup>110</sup> However, the claims of the CJEU are immune to extra-legal influences precisely because the Court also claims that EU law is what the Court says it is. Also here one can see why the CJEU, when it really matters, does not behave like a Dworkinian court. When it is confronted with sufficiently strong extra-legal force – which can be pressure from other jurisdictions including the ECtHR, but also insights from particular schools of economics,<sup>111</sup> or simply pragmatic considerations<sup>112</sup> – the Court typically has little trouble in effectively departing from its own case-law to avoid conflict, albeit *without ever admitting that it succumbs to outside pressure*. Rhetorical devices are plentiful for the creative court: from the infamous

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<sup>109</sup> K Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown & Co 1960) 19ff.

<sup>110</sup> For an overview of the various extra-legal steadying factors in the CJEU's case-law, see G Beck, *The Legal Reasoning of the Court of Justice of the European Union* (Hart Publishing 2013) 349–433.

<sup>111</sup> eg, Case C-413/14 P *Intel Corp. v European Commission*, EU:C:2017:632, where the Court effectively overturned its long-standing case-law on loyalty rebates (paras 137–147), and arguably, the goals of the prohibition of abuse of dominance in Art 102 TFEU more broadly (para 133).

<sup>112</sup> eg, 'the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom', as the CJEU put it subtly in *Keck and Mithouard* (n 17) para 14.

‘clarifying the case-law’ argument in *Keck and Mithouard*<sup>113</sup> and more recently in *Intel*,<sup>114</sup> to suddenly discovering new, unwritten principles in EU law itself (which, unsurprisingly, are identical to the common constitutional traditions of the Member States) in *Internationale Handelsgesellschaft*, or similar carrot-and-stick strategies such as denying that national constitutional law can escape the supremacy of EU free movement law while simultaneously applying a marginal proportionality assessment in politically or ethically sensitive cases (*Omega Spielhallen*). And of course, there is always the option of denying that there has ever been a conflict at all, as seems to happen in *Aranyosi and Căldăraru* and *CK and Others*, where the CJEU silently re-interprets its *NS* case-law and the Charter to accommodate the ECtHR’s jurisprudence.<sup>115</sup>

In summary, it is the openness of the legal system that allows for the maintenance of the supremacy claim. The self-referentiality of the CJEU’s case-law can be explained by the fact that norms of the EU legal system derive their validity exclusively from their source, which is a corollary of EU law’s claim to absolute supremacy.<sup>116</sup> More specifically, legal propositions of the EU legal system must either be derived from the Treaties or secondary legislation, or in what could be called ‘hard cases’, be derived from the CJEU’s support of this proposition as a proposition of EU law. The implicit endorsement of the ‘sources thesis’ by the CJEU not only explains its self-referential tendencies. It also explains how the Court finds no trouble in *not* following its own case-law when it deems a departure necessary to avoid conflict with other jurisdictions. After all, in hard cases it is the Court who decides what the law says,<sup>117</sup> and absent many constraints on its own authority outside some degree of predictability and sanity, the Court can change its mind.<sup>118</sup>

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<sup>113</sup> *ibid.*

<sup>114</sup> *Intel Corp. v European Commission* (n 111) para 138.

<sup>115</sup> See n 87 above.

<sup>116</sup> Arguably, the ‘sources thesis’ of legal validity is the only way in which EU law can maintain its claim absolute supremacy, in particular since the EU is an explicitly functional legal system. I follow Raz, ‘Authority, Law and Morality’ (n 48); and Shapiro (n 49) in this respect.

<sup>117</sup> *cf* *Lenaerts and Gutiérrez-Fons* (n 16).

<sup>118</sup> Formally, there is no doctrine of precedent or *stare decisis* in EU law. In this sense, the CJEU’s self-referential and precedent-based type of legal reasoning does not legally prevent it from (implicitly) overturning previous jurisprudence. See generally, Jacob (n 17).

#### 4. Mimesis, Solipsism, and Pluralism

##### A. The EU legal system and national legal systems

Perhaps the most remarkable aspect of Opinion 2/13 is its assertion that the draft accession agreement violates characteristics *specific to the EU*:

The approach adopted in the agreement envisaged, which is to treat the EU as a State [...] disregards the intrinsic nature of the EU.<sup>119</sup>

This assertion is puzzling, given that the Court's concerns appear very similar to concerns of autonomy and supremacy typically expressed by national constitutional courts.<sup>120</sup> Moreover, since the essential point is EU law's claim to supremacy in matters within its jurisdiction, this can be regarded as a claim inherent to law. In other words, while the Court indeed perceives EU law as a legal system throughout its Opinion, the Court's focus on the 'intrinsic nature of the EU' and its supposed idiosyncrasy leads it to a profoundly mistaken argument for a truistic conclusion. The actual problem does not seem to be that the draft accession agreement treats the EU as a State, but that it treats the EU legal system as different from a national legal system.

This brings me to a potential explanation of the Court's conception of EU law. Surely this does not root in the personal philosophical positions of the members of the Court. Although it cannot be excluded that some members would endorse Raz's theory of legal systems, such speculation cannot warrant attributing these premises to the CJEU as a whole. More importantly, doctrines like the supremacy of EU law predate Raz's writings by several years. Neither am I convinced that the CJEU must do what it does simply by virtue of being a court in law because the characteristics of legal systems as Raz identified them are 'necessary conditions' for law.<sup>121</sup> Leaving aside the question of whether

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<sup>119</sup> Opinion 2/13 (n 1), para 193.

<sup>120</sup> See on this point also Krenn (n 2).

<sup>121</sup> 'Legal philosophy [...] is concerned with the necessary and the universal [...] Legal philosophy has to be content with those few features which all legal systems necessarily possess', Raz, *The Authority of Law* (n 48) 104–105; see also Shapiro (n 36) 8–22.

necessary conditions for law exist and whether Raz's theory of legal systems succeeds in providing conceptual truths about law,<sup>122</sup> there is nothing in the Treaties that forces the Court to shape the EU alongside the conceptual lines of what constitutes a legal system. It has been the CJEU's jurisprudence which transformed the EU into an EU legal system, not the EU legal system which forced the CJEU to acknowledge its existence as such.<sup>123</sup>

Accordingly, connection between the CJEU's case-law and Raz's theory of the legal system is neither psychological nor conceptual. Instead, the CJEU's conception of the EU legal system and its self-understanding can be linked to its attempt to model EU law after the national legal systems, ie to give it those characteristics that (1) national legal systems also have, and (2) which arguably characterise the latter as law. While Raz's theory of law purports to be universal, the state is of particular importance for his legal philosophy: 'State law was special in the past and is likely to remain special in the future, because it is likely to remain the most comprehensive law-based social organisation', and so while 'exclusive concentration on state law was, it now turns out, never justified, and is even less justified today', state legal systems can be regarded as paradigm instances of law as we understand the concept of law.<sup>124</sup> It is certainly true that in the past decades, legal theory has become far less state-focused than it used to be, both because of the increasing importance of transnational legal systems and due to the insights of legal pluralism. However, both in terms of the comprehensiveness of their claims and their entrenched social legitimacy, national legal systems stand out in many aspects, and this was certainly the case in the 1960s and 1970s when the CJEU laid the foundations of what it nowadays calls the 'specific characteristics of EU law'.

Accordingly, the CJEU's conception of the EU legal system is perhaps best explained as originating in the Court's effort to construct a legal system along the lines of national legal systems, mimicking them to the fullest possible extent. The necessary link between the Court's shaping of the EU legal system Raz's theory of legal systems is then given by

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<sup>122</sup> Critical as to the viability of finding necessary truths about law are, eg, B Leiter, *Naturalizing Jurisprudence* (Oxford University Press 2007); Schauer (n 51); Tamanaha (n 51). On the possibility of imagining a legal system that does not claim absolute authority, see fns 154–156 and the accompanying text below.

<sup>123</sup> Weiler (n 63).

<sup>124</sup> Raz (n 90) 22.

the concept of *imitation* or *mimesis*. Agreeing with Robert Schütze, the mythology of the EU's 'sui generis' nature was already under siege, as European constitutionalism has come to acknowledge the idea of the EU being a 'federation of states'.<sup>125</sup> Adding to the constitutional perspective, in which the 'normative ambivalence surrounding supremacy and sovereignty can better be viewed as part of the parcel of the European Union's *federal* nature',<sup>126</sup> also from a legal-philosophical viewpoint, the EU legal system is perhaps not at all that different from national law, at least not in its claims and self-conception.<sup>127</sup>

By analogy, it is inconceivable that any federal constitutional court would allow the ECHR to disturb the constitutional relations between the federal level and its subparts. Indeed, EU accession is unique to the extent that both the EU and the Member States would become Contracting Parties. However, this is only a *factual* peculiarity as a result of the complex political and legal interactions between the EU and the Member States. It has nothing to do with the characteristics of the EU legal system in itself. The only reason why the concerns of the CJEU should be assessed differently from those of any other constitutional court is a political one: the EU cannot claim the political sovereignty that States claim to possess. Consequently, the conceptual resemblance of the EU law and national law is directly linked to the dissociation between the EU's political and legal nature. The thesis that the EU legal system is mimetic of national legal systems can be maintained notwithstanding the fact that politically the EU is undeniably an entity distinct from the modern nation state.

A second objection to the mimetic nature of the EU legal system is the following.<sup>128</sup> There is a structural duality in the creation and application of EU law. For example, pursuant to the ordinary and special legislative procedures,<sup>129</sup> EU legal norms are created by nationally elected Ministers in the Council together with the European Parliament. These institutions respectively represent European individuals both as nationals of a

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<sup>125</sup> R Schütze, 'On "Federal" Ground: The European Union as an (Inter)National Phenomenon' (2009) 46 *CMLRev* 1069, 1070.

<sup>126</sup> *ibid* 1081 (emphasis in the original).

<sup>127</sup> On the importance of the self-conception of legal institutions in legal philosophy, see J Dickson, 'Who's Afraid of Transnational Legal Theory? Dangers and Desiderata' (2015) 6 *Transnational Legal Theory* 565.

<sup>128</sup> I am thankful to Oliver Garner for raising this point.

<sup>129</sup> Art 289(1) and (2) TFEU.



Member State<sup>130</sup> and as citizens of the EU.<sup>131</sup> This inherent duality also permeates the law-applying institutions. As mentioned above, national courts are quintessential part of the institutional infrastructure that upholds the EU legal system, while they distinguish themselves as adjudicative institutions by virtue of national secondary legal norms. This paradoxical role of national courts brings an additional dimension to the chicken-and-egg problem of how law can emerge.<sup>132</sup> However, it is at the very least arguably the case that, perhaps contra the self-perception of many national courts, when national courts apply EU law they are actually functioning as courts of the EU legal system as opposed to their national legal system.<sup>133</sup> Nothing in the concept of a legal system resists the thesis that multiple legal systems are applied concurrently, even by the same officials. Moreover, the idea that national courts are wearing two hats certainly seems to be the position of the CJEU in its *Simmenthal* judgment, which obligates national courts directly to apply EU law, turning national courts into decentralised EU courts within the EU legal system.<sup>134</sup>

Whether the social practice of national courts supports the existence of an autonomous EU norm of adjudication as applied to them is an empirical question, as is the question of whether an autonomous EU Rule of Recognition is practised by national courts. However, the dual hats of national courts as such do not threaten the CJEU's conceptualisation of the EU legal system as being no different from the national legal systems.

#### B. The pluralist challenge

If law indeed claims comprehensive supremacy, this would mean that all legal systems are necessarily highly solipsistic,<sup>135</sup> transforming legal analysis into an exercise in 'Ptolemaic jurisprudence', to use Dworkin's pejorative assessment.<sup>136</sup> Notwithstanding

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<sup>130</sup> Art 16(2) TEU.

<sup>131</sup> Art 14(2) TEU.

<sup>132</sup> Shapiro (n 36) ch 2.

<sup>133</sup> See eg, Barber (n 77); Dickson (n 77).

<sup>134</sup> *Simmenthal* (n 69) para 21: 'Every national court must, in a case within its jurisdiction, apply [EU] law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it'.

<sup>135</sup> Tuori (n 52) 86.

<sup>136</sup> Dworkin, 'Thirty Years On' (n 41) 1665.

that this might indeed be considered a disturbing feature of law, such an evaluative perspective does not invalidate the analytical value of the thesis itself, nor its manifestation in the CJEU's jurisprudence. However, Raz's theory of the necessary conditions of legal systems has not been particularly fashionable in recent years, also from an analytical perspective. Theories of legal pluralism, for all the differences between them, all seem to presume that the legal landscape – and the landscape of normative systems affecting human life more generally – is not adequately covered by the state-centred theories of law.<sup>137</sup>

In the context of the European legal space and the relationship between EU law, the ECHR and the national legal systems, legal pluralism has manifested itself as the foremost challenger of authority-based theories of law. Constitutional pluralism, which can be roughly defined as an application of legal pluralism theories to theorise the constitutional structure of the European legal space, remains particularly popular, both as a descriptive theory<sup>138</sup> and as a normative theory endorsing the need for inter-system harmony and judicial dialogue.<sup>139</sup> Constitutional pluralism and other variants of legal pluralism do raise the question of whether 'traditional' legal philosophy should be amended to include the increasingly transnational character of law. Since the present article portrays the CJEU as a court strongly committed to Raz's theory of the legal system, it is likewise affected by the pluralism movement insofar as the latter might claim that Raz's allegedly state-centred theory<sup>140</sup> of law is obsolete in general.

However, while pluralist theories of law can be applied to the *normative* question of how to shape constitutionalism in the undisputedly pluriform European legal space, I would argue that they generally add little to the philosophical debate on the properties of

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<sup>137</sup> For an overview of theories of legal pluralism see eg, Twining (n 44).

<sup>138</sup> eg, N MacCormick, 'The *Maastricht-Urteil*: Sovereignty Now' (1995) 1 *ELJ* 259; I Pernice, 'Multilevel Constitutionalism in the European Union' (2002) 27 *ELRev* 511.

<sup>139</sup> See by way of introduction, M Wind and JHH Weiler (eds), *European Constitutionalism beyond the State* (Cambridge University Press 2003); M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012); and N Walker, 'Constitutional Pluralism Revisited' (2016) 22 *ELJ* 333.

<sup>140</sup> *cf* Raz (n 90).

law.<sup>141</sup> Purely descriptive variants of legal pluralism which confine themselves to observing that the ultimate supremacy question is redundant because state and other legal systems have equally legitimate claims to supremacy, do not escape the presumptions of ‘traditional’ legal positivist theories.<sup>142</sup> There is nothing in legal positivism to resist the idea that concurrent legal systems have concurrent claims to supremacy. In fact, some classical works on descriptive constitutional pluralism in Europe can be viewed as restatements of traditional legal systems theory.<sup>143</sup>

In contrast, many legal pluralists include some element of normativity.<sup>144</sup> Notable constitutional pluralism theories applied to the European Union, for example, claim to resolve disagreement and constitutional deadlock through processes of judicial dialogue and mutual understanding. The principles and interpretative techniques common to the legal systems should be used to avoid inter-system conflict as much as possible, for overlapping claims to supremacy are a matter of fact in Europe which has to be dealt with.<sup>145</sup> Mattias Kumm draws on Dworkin’s non-positivist theory of law to argue that we should search for the morally best account of the relationship between concurrent legal systems, given their normative commitments towards one another.<sup>146</sup> Unwritten principles should be used as conflict-resolutions rules to construct morally ideal solutions in light of the entire order of legal systems.<sup>147</sup> In contrast, in his later, more normatively

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<sup>141</sup> For a brilliant critique of legal pluralism see Letsas (n 33). This is not to deny that pluralism – in particular in its anthropological early variants – has contributed greatly to a better understanding of the many normative systems guiding human behaviour, and the insight that law is not necessarily the most important one for many people.

<sup>142</sup> *ibid* 84–91.

<sup>143</sup> eg, MacCormick (n 138), explaining the constitutional deadlock of competing supremacy claims of national and EU law as a logical and inevitable consequence of legal systems theory.

<sup>144</sup> M Poiares Maduro, ‘Three Claims of Constitutional Pluralism’ in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012).

<sup>145</sup> N Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *MLR* 317; M Poiares Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in N Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003); A Torres Perez, *Fundamental Rights in the European Union* (Oxford University Press 2009).

<sup>146</sup> M Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’ (2005) 11 *ELJ* 262, 287.

<sup>147</sup> *ibid*.

loaded work on constitutional pluralism, Neil MacCormick resorted to public international law, which he claims could serve as the ultimate arbiter between colliding legal systems, essentially reinvigorating Kelsenian monism.<sup>148</sup>

However, whether or not normative constitutional pluralism can actually help in applying the law,<sup>149</sup> or whether pluralism in law generally is really something new,<sup>150</sup> the normativity of constitutional pluralism seems to provide no alternative to the question of the proper conception of law, nor to investigations into the self-conception of courts and other legal institutions. If the normative obligation on courts to avoid conflict are *legal* ones, they are legally binding either by virtue of their source – in which case constitutional pluralism collapses into legal positivism; or by virtue of their merits – in which case it collapses into non-positivism.<sup>151</sup> If such obligations are not necessarily legal, but in any case morally or politically desirable, constitutional pluralism fails to be a theory of law at all.

This conclusion does not in any way affect the moral virtues of pluralism,<sup>152</sup> but it demonstrates that it possesses no real philosophical added value. For the purpose of identifying the essential properties of law, it is not relevant how legal systems and courts should behave but how they are necessarily behaving. Even constitutional pluralists recognise that courts apply an internal perspective, remaining faithful to the internal perspective of their own legal system.<sup>153</sup> Tuori claims, however, that '[e]xclusive

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<sup>148</sup> MacCormick (n 70) ch 7.

<sup>149</sup> Gareth Davies sharply criticises constitutional pluralism for its lack of problem-solving capacity: if a norm conflict is genuine, courts ultimately have to decide one way or the other, effectively subjecting one norm to the other and declaring the former unconstitutional. See G Davies, 'Constitutional Disagreement in Europe and the Search for Pluralism' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012).

<sup>150</sup> For a sceptical view on the often-heard claim that traditional legal philosophy is not equipped to handle the contemporary, globalised legal landscape see eg, J Gardner, 'What is Legal Pluralism?', lecture delivered at Osgoode Hall Law School (8 May 2013); and Dickson (n 127).

<sup>151</sup> Letsas (n 33) (arguing that all pluralist theories – including Kumm's – are based on positivist presumptions).

<sup>152</sup> M Kumm, 'The Moral Point of Constitutional Pluralism' in J Dickson and P Eleftheriadis (eds), *The Philosophical Foundations of EU Law* (Oxford University Press 2012).

<sup>153</sup> Walker (n 139) 355, referring to Tuori (n 52); M Avbelj, 'Symposium: Four Visions of Constitutional Pluralism (Conference Report)' (2008) 2 *EJLS* 325, 336: 'Miguel Poiaras Maduro: Well, judges never talk

perspectivism and concomitant radical pluralism convey a one-sided and distorted picture of our contemporary legal landscape [...] Legal perspectivism in law is inevitable, but legal solipsism is not'.<sup>154</sup> However, I feel that Raz and his followers would probably reply that as a matter of fact, all legal systems *do* resort to legal solipsism.<sup>155</sup> They would explain that all legal systems claim supremacy over all other legal and non-legal normative systems within their jurisdiction, and that when courts derive inspiration from other principles, rules or interpretative techniques from other legal systems, they are merely adopting those norms rather than incorporating them.<sup>156</sup>

Again, nothing in this article should be understood as an argument against the virtues of pluralism and dialogue. What matters from an analytical perspective is the question of how extraordinary the claims of the CJEU are regarding the specific characteristics of the EU legal system compared to the claims of other courts and legal systems. Arguably, the Court's concerns are shared with those of other constitutional courts because they reveal truisms about law as such. Rather than perceiving EU law as something 'supranational', 'international' or 'sui generis', the CJEU simply perceives the EU legal system – following its own construction to this end – as an autonomous legal system mimicking national law, claiming supremacy not because it deems itself hierarchically positioned above national law, but because this is an inherent part of the imitation.

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about constitutional pluralism and in part that is inherent in the theories of constitutional pluralism itself. The actors that operate in the system are expected to adopt the internal perspective of that system [...] *Constitutional pluralism is necessarily a kind of external theory*' (emphasis added). If however 'external' means external to law, then constitutional pluralism is not a legal theory. If the obligation is external to the legal system but nevertheless internal to the law (which would amount either to a transnational monism or non-positivism), this implies that the judge failed to apply the law properly.

<sup>154</sup> Tuori (n 52) 86.

<sup>155</sup> I refer to exclusive legal positivists because I am not certain whether inclusive legal positivists would similarly object to legal pluralism, as they might perhaps leave open the possibility that some extra-system norms (from another legal system or from another, non-legal, normative system) are valid based on their merits insofar as this is flows from the Rule of Recognition. Consequently, the ECHR and the jurisprudence of the ECtHR may be considered legally valid in the EU legal system based on their moral merits because their merits-based validity is entailed by Art 6(3) TEU and Art 52(3) CFR.

<sup>156</sup> Insofar as this is an *empirical* claim as to how legal systems and their courts behave, however, this does raise the question of whether 'solipsism' and claiming authority and autonomy are *conceptual* truths for law. This points again at the distinction between typical characteristics and necessary conditions of law.

## 5. Conclusion

This article aimed to explore the conception of law which underlies the CJEU's case-law, with Opinion 2/13 on the draft agreement for EU accession to the ECHR as a topical example. The metaphor of the CJEU as a 'Dworkinian court' fails to explain the Court's case-law on autonomy and supremacy of which Opinion 2/13 is the apotheosis. More effective fundamental rights protection and sufficient external control by the ECHR and the Strasbourg Court must give way to the supremacy claim of the EU legal system. This is profoundly incompatible with Dworkin's interpretative theory of law. The CJEU's key constitutional case-law instead shows how the Court is committed to constructing a legal system which possesses the conditions described by Raz, using comprehensiveness and openness to maintain the EU legal system's claim to supremacy within its jurisdiction. The storm of academic critique after the Opinion is understandable given that most academics silently rely on Dworkinian conceptions of law.<sup>157</sup> A proper mutual understanding between academia and the judiciary as to their respective legal philosophical assumptions is essential for a sensible discussion on whether Opinion 2/13, and case-law more generally, is legally sound.

In this article, I did not want to address the philosophical question of whether the CJEU is conceptually destined to be committed to Raz's theory of legal systems or other aspects of his theory of law. I also did not want to answer the normative question of whether the CJEU should be more Dworkinian in its conception of law or its criteria of legal validity. My objective has merely been to provide an account of how the Court's jurisprudence reveals its implicit philosophical assumptions, and how they differ from those of the critics of Opinion 2/13. This analysis leads to three main conclusions. First: the supremacy claim of the CJEU is precisely in need of demystification because it is inherent to any legal system, and the outcome of Opinion 2/13 is unsurprising. Second: the paradox of the Opinion is that it seemingly lives and breathes the idea that the EU should be given special treatment by virtue of its specific characteristics which distinguish

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<sup>157</sup> A wildly speculative guess: this might be explained by the fact that a Dworkinian conception of law gives legal commentators far more legal ammunition vis-à-vis courts. For those who want to criticise court judgments for moral reasons, but want to do so on legal grounds, it is useful to be a Dworkinian.

it from a State. To the contrary: the Court's underlying conception of law is essentially mimetic of the typical characteristics of national legal systems, which also questions the extent to which the EU legal system is a threat to 'traditional', allegedly state-focused legal philosophy. Third: the mimesis of national law entails a dissociation between the legal and political nature of the EU. Whereas the EU is certainly not a State, the EU legal system is no different from national legal systems. At bottom, Opinion 2/13 is not the apotheosis of a perplexing chain of jurisprudence, but rather quite typical of law as we know it: 'pretentious and rife with an inflated sense of its own importance'.<sup>158</sup>

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<sup>158</sup> Gardner (n 78) 619.