ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

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WEAVING THE THREADS OF A EUROPEAN LEGAL ORDER

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ABSTRACT: Two assumptions dominate and frustrate the debate concerning the emergence and rapid expansion of the European legal order and its relation to national legal systems. The first is that the will and consent of sovereign powers should be seen as a (social) fact that is logically and practically unable to give rise to (legal) norms. The second is that legal orders are distinct systems demarcated by separate sets of criteria of validity. In this *Article* both assumptions are criticised. Facts are not mere facts. And legal orders are not "autonomous" buildings erected on separate foundations. In order to account for the ways in which the European order overlaps with international and domestic law normative orders a legal order may be more adequately pictured as a web. In such a web, rules are the threads that bind together things, persons and institutions. It is hypothesised that the density of such webs as well as their capacity to connect to other webs determine their weight and relevance as reasons for action and decision-making. This hypothesis is tested in the capacity of European adjudication and regulation to connect to and to include national actors and institutions.

KEYWORDS: validity – valency – actants – count-as rules – networks – democratic criteria.

I. INTRODUCTION

The emergence as well as the rapid expansion of the European legal order has led to a number of theoretical puzzles and hot debates. How can a new legal order arise from the will of sovereign states? Can a mere assertion of a court establish an autonomous legal

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order? And how should we understand the relation between European Union (EU) and national law? Which one is superior?

In this *Article* I will argue that in order to gain some light in these matters a couple of assumptions should be removed that currently dominate the debates. The first is the assumption that the consent of sovereign states is to be regarded as a "social fact". The second assumption is that legal orders should be conceptualized as separate entities, that owe their validity to different sets of principles and criteria.

In section II and III, I will argue – against the first assumption – that if we take into account the ways in which normative orders grow and develop there is no place for pure factuality. In sections IV and V, I will argue – against the second assumption – that normative orders should not be pictured as buildings, erected on firm foundations, but should be seen as webs that derive their strength from the number of connecting threads. I will argue that the stability and success of normative orders depend on the degree to which new actors are included in and empowered by such threads.

These insights will be applied to EU law, where I will try to explain the expansion of EU law by its ability to draw in and empower national actors. In section VI, I will explain how in adjudication this is done by the doctrine of direct effect and the possibility of preliminary rulings. In section VII, I will show how EU legislation succeeds in including national actors by the technique of outsourcing regulation and legislation. Section VIII concludes.

II. Actants

A persistent problem in legal theory is that it seems impossible to account for the emergence of legal orders. Any attempt will inevitably be circular. This circularity has to do with the relation of actors and rules. Can we conceive of the legal order as emanating from the will of a sovereign, singular or plural, secular or divine, in which case rules are the product of the actor? Or does the sovereign owe its legal competence to legislate to a pre-existing legal order in which case the sovereign is the product of (power-conferring) rules?

This chicken-and-egg problem has haunted natural law theory in its eternal dilemma between voluntarism and intellectualism: should we see natural law as the product of the will of God which *may be* whimsical and unintelligible or should we see it as the reasonable guide that informs God's will in which case we condemn God to impotence?[1] The dilemma surfaces again in our understanding of customary international law. We are constantly reminded by authors that state practice in itself is not enough and that we should supply it with *opinio juris*: the requirement that state practice should be accepted as law. An addition that unfortunately presupposes the very concept – law – that should

[1] See *e.g.* H Welzel, *Naturrecht und materiale Gerechtigkeit* (Vandenhoeck & Ruprecht 1951); M Villey, *La formation de la pensée juridique moderne: cours d'histoire de la philosophie du droit* (Presses Universitaires de France 1968).

be defined.[2] Finally, the age-old dilemma causes confusion and bewilderment at the phenomenon of a European court declaring that a "European legal order" exists.[3] What is happening here? Can a legal order just spring up from the assertion of a court or the consent of sovereign states? Or was there a pre-existing legal rule assigning and justifying this form of "Kompetenz-Kompetenz"?

There is a stubborn reluctance and even refusal to acknowledge that indeed such assertions and convergence of will *can* and *do* give rise to law. A theoretical objection against the idea that law arises from the will of actors (either citizens, judges or sovereigns) is that it presupposes a mysterious transition from facts into norms and would therefore be guilty of the logical trap of a natural fallacy. Social acceptance, agreement of wills or commands of a sovereign power are all seen as (social) facts that by themselves cannot give rise to norms. But also practical considerations explain the persistent aversion to derive normative force from social facts. Just as natural law seems to lose some of its force if it could in theory be discarded by God, there is the fear that international and EU law could be discarded if they were constantly at the mercy of factual consent or obedience. It is therefore generally maintained that legal norms should be seen as "autonomous": independent from the factual wills – and whims – of actors.[4]

These problems fade away, however, if we slightly adjust our view of what actors are. The 705 members sitting in parliament are more than just a set of physical beings. They are provided with a set of deontic attributes: rights, obligations, immunities that are bundled into their role as MPs and are therefore loaded with normativity. Nor are, for that matter, the sheets of paper which are before them to be regarded as mere "facts", devoid of any normative meaning. These papers *count as* legislative proposals, just as the individual members *count as* a legislative assembly. The hands they raise *count as* consent after which the proposals *count as* formal law. That means that the whole setting (gestures, persons, papers, and even the building in which they assemble) can be regarded as entities that are all loaded with normativity in the sense that they either *have* deontic properties such as rights and obligations, *signal* these rights and obligations or *give rise* to such deontic properties.

In this setting rules function as the vehicles of transport. These rules are of the logical form:

[2] Kelsen was one of the first to notice this, see H Kelsen, 'Théorie du droit international coutumier' (1939) Revue internationale de la théorie du droit 253, 263. A long list of objections against the two elements theory is finally summarized in the final Committee Report, International Law Association London Conference 2000, Committee of Formation of Customary (General) International Law.

[3] Case C-26/62 *Van Gend & Loos* ECLI:EU:C:1963:1; case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

[4] This objection is forcefully expressed by Pavlos Eleftheriades who fears that the social fact of disobedience would weaken the normative force of the legal system, see P Eleftheriadis, 'The Primacy of EU Law: Interpretive, not Structural' (2023) European Papers www.europeanpapers.eu 1255.

If conditions a, b, c apply then X counts as Y. If Y, then consequences d, e, f, will follow.[5]

Y is then the central element denoting the deontic status assigned to X. For instance:

A. If democratically elected, this group of people (X) counts as legislature (Y).

But the condition "democratically elected" is in itself a status Y that only is assigned to events on the condition that certain rules are followed:

B. If people can choose more than 1 candidate… etc. then election (X) counts as "democratic" (Y).

And when does something count as an "election"? Well, that is of course stipulated by a set of prior rules as well.

Not only are the conditions the result of many prior deontic propositions; the consequences also give rise to many subsequent status-assigning propositions:

C. If adopted by the legislature, this text counts as law

is a deontic proposition which of course gives rise to an enormous number of laws, each of which stipulates the conditions to be fulfilled for subsequent "X counts as Y" propositions. *Any rule is always just a link in an endless chain of prior and subsequent rules*.

Hart emphasized the importance of the latter count-as rule C and saw it as the distinctive trait of a legal order.[6] However, C is only one link in an entire chain of count-as rules, in which any new rule starts from an X term or from conditions that are the Y-terms of prior count-as rules. In the entire chain, rules transport statuses from one entity to another. Rules can therefore be pictured as the lines that connect nodal points such as papers, buildings, events and persons. These nodal points may be very different physically speaking but as carriers of deontic status they are functionally equivalent. Bruno Latour therefore suggested calling such functionally equivalent entities "actants".[7] Actants may be actors but they can also be documents or buildings. Their physical appearance is in principle irrelevant as long as their deontic status is preserved. The MPs may be dead or alive but may still count as "legislators". The papers may have perished but they still count as law. Conversely, it is possible that real debates among living persons, conducted in the presence of the entire press may nevertheless be considered as "null and void" as soon as a vital condition has not been met in order to be counted as proceedings that are assigned the status of "parliamentary debate".

In this sense, all normative orders, including ritual and religious ones have a certain autonomy. Rights, duties, exemptions and immunities travel independently from their carriers. This realization may dispel the fears that factual disobedience may defeat the

[5] Slight modification of Searle's proposition "X counts as Y in Context C", J Searle, *The Construction of Social Reality* (The Free Press 1995).

[6] HLA Hart, *The Concept of Law* (3rd edn Oxford University Press 2012) chapter V.

[7] See B Latour, 'On Actor-Network Theory: A Few Clarifications Plus More Than a Few Complications' (1996) Soziale Welt 369.

force of law. Coalitions of political parties may decide to actually disregard EU law but the consent of deontically loaded "sovereign States" to the primacy of EU law may still uphold the normative force of EU law (although consistent disregard by all who are involved may ultimately weaken its claims).

III. The absence of brute facts

One may wonder whether the view that actors such as MPs are loaded with normativity is really new. As I indicated above, H.L.A. Hart, although focusing on only two layers of count-as rules, maintained too that a "sovereign" is only a "sovereign" by virtue of a secondary rule of recognition which endows him or her with the competence to act as a sovereign.[8] It seems, then, that my network picture is not different from the (intellectualist) tradition that insists on the conceptual priority of norms over actors.

My view is, however, a bit more radical. Not only are legal actants loaded with normativity but there are hardly any actants *without* deontic statuses assigned to them. To speak of a pure *Sein*, or "brute facts"[9] presupposes a kind of Genesis-like starting point in which the whole world was "formless and empty". But it is hard to conceive of such a state of affairs. Searle points out that a derelict wall that is no more than a pile of stones may still retain its deontic status by virtue of our collective agreement on the proposition that "this pile of stones counts as a border". Searle claims that the X ("this pile of stones") is a brute fact to which – by virtue of our collective agreement – the deontic status is added of "border". But is this indeed a brute fact? It is not coincidental that we assign that status to *this* particular pile of stones, and not to stones haphazardly strewn across the earth. This particular pile of stones had already acquired a deontic status because of the repeated acts of actors who had grown used to their existence *as a border*.[10]

In his fascinating book on trails, Robert Moor describes how entire landscapes can be read as the expression of collective knowledge. The network of paths can be read as a meaningful embodiment of the deontic pathways mentioned above.[11] Social acceptance of that pile of stones as a border is not the result of our imposition of meaning on an otherwise empty and "objective" world of facts. This view of an objective heap of facts is itself the result of a (scientific) discourse and practice in which such facts are only *seen* as brute facts. In other practices they acquire different meanings.

[8] HLA Hart, *The Concept of Law* cit. chapter V.

[9] J Searle, *The Construction of Social Reality* cit.

[10] As Heidegger had already noted: we *see* something *as* something and this "seeing-as" is always embedded in and guided by a practical context: this is *in order to*... Not only epistemologically but also ontologically facts are never "brute". See M Heidegger, *Sein und Zeit* (Max Niemeyer Verlag 1979) 148–149.

[11] R Moor, *On Trails: An Exploration* (Simon & Schuster 2016).

It is only by disregarding this practice as a whole set of customs, social rules and norms[12] that John Austin's Rex can appear as the purely factual starting point of all law. This pure factuality is a myth. Rex can only be the X term in

A. Rex counts as lawgiver

by virtue of a prior deontic proposition such as

B. The owner of this land counts as Rex

which of course is preceded by another deontic proposition stipulating who would count as owner etc. *ad infinitum*. Obviously this applies to EU law as well. The will of sovereign states is not a fact, but owes its normative force from our notion of sovereignty, which in itself is the resulting Y-term of a large number of prior count-as rules, stipulating and elaborating the conditions for sovereignty. None of these count-as rules are to be seen as factual. They are just links in normative chains.

Infinite regress not only pervades any attempt to account for the emergence of the law. It pervades all our accounts of normative orders, *i.e*. orders in which deontic status is assigned to actants by means of (implicit or explicit) rules. I once had a very bright student who remarked, after I had explained Hart's rule of recognition: "We have at home a rule of recognition as well. That is: Mother's will is law". She left me speechless. It suddenly dawned upon me that secondary rules are employed in even the simplest normative orders and not only at a certain degree of complexity, as Hart thought. Not only legal orders are marked by self-referentiality. All normative orders have rules about rules. We might therefore safely say that the introduction of secondary rules is not necessarily unique to the emergence of a legal order. It is characteristic of *any* normative order. Moreover, as any "X counts as Y" proposition is preceded by conditions, which in turn are the products of a prior count-as rule, we can imagine endless chains of rules, not just two levels.

Where then does the legal begin? We might be tempted to go back to our chicken-and-egg dilemma and answer this question by reference to the actors: secondary rules are addressed to a class of officials. But the question immediately arises: who counts as an official? Does the mother of my student count as one? In some patrilinear societies uncles may have the obligation to marry their deceased brother's wife and thereby acquire the right to decide on the dowry of his niece. They are not officials in a complex bureaucracy but are still endowed with far-reaching powers, which effectively can change legal reality and those powers are bound by a set of rules. How then do we differentiate between uncles and officials? The demarcation between officials and laymen seems to be just as elusive as that between primary and secondary rules. It is hard if not impossible to trace the exact moment in which actants turn "legal". Their deontic loads (rights and obligations, their competences and immunities) are superimposed on already existent loads.

[12] GJ Postema, 'Custom, Normative Practice, and the Law' (2012) DukeLJ 707.

IV. Valency

So we end up with the picture of normative networks consisting of nodal points (actants with deontic statuses) and connecting dots (the rules connecting conditions to consequences). All sorts of normative practices can be conceptualized in this way and it is hard if not impossible to single out the characteristics of a truly "legal" network differentiating them from other normative networks.

All this sounds as abstruse philosophy that offers little help to practising lawyers. Yet, I think that it helps us to get rid of some problems when we try to understand the emergence of legal orders. They do not arise in a mysterious way from "facts" but slowly grow out of pre-existing networks by weaving (count-as) threads to actants that initially are no more than outposts but may or may not evolve into central hubs.

In order to see how normative orders evolve it is advisable to make full use of the metaphor of the network. That metaphor is not a very original one in these times of world-wide webs and network analysis and I may therefore be the victim of fashion.[13] But it may help us to discover characteristics that are hidden from our view as long as we cling to the dominant metaphor of the building[14] which underlies most theories of law. Kelsen's *Grundnorm* captures both image and idea: the ground or basis on which the entire edifice of law is erected (*Stufenbau*) and from which it derives its validity. Buildings should be freestanding ("autonomous"), built on solid "foundations" and by means of "hard" material. The discourse in which "soft" law is said to become "crystallised" in hard law, or the fear that (international) law is about to be "fragmented",[15] all testify to the undiminished dominance of the "building" metaphor.

The building metaphor is ill-suited to understanding our current situation of overlapping multiple legal orders (how can buildings overlap?) and is not very helpful in understanding situations in which the relevance of standards and actants is not answered

[13] The metaphor is as old as Heraclitus's comparison with the spider as the human soul in the web of the human body. See A Finkelberg, 'Heraclitus and Thales' Conceptual Scheme: A Historical Study' (2017) Jerusalem Studies in Religion and Culture 147, 147–148. Martha Nussbaum uses the metaphor for *moral* sensibility (the spider feeling the tugs in the web) in MC Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge University Press 2013) 69. I haven't seen it applied to law, although Postema comes very close to my view where he describes custom as a nodal point in a network. GJ Postema, 'Custom, Normative Practice, and the Law' cit. 707–738. A particularly powerful essay on the implications of the spider's web as metaphor is given by F Deligny, *The Arachnean and Other Texts* (Univocal Publishing 2015).

[14] Building metaphors are ubiquitous. See G Lakoff and M Johnson, *Metaphors We Live By* (University of Chicago Press 1980). Recently, HG Cohen, 'Metaphors in International Law' in A Bianchi and M Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (Oxford University Press 2021). I analysed the house metaphor for law in P Westerman, 'From Houses to Ships: Governance as a Form of Law' (2018) Le Libellio 5.

[15] M Koskenniemi, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (Report of the Study Group of the International Law Commission-2006) UN Doc A/CN.4/L.682.

by an all-or-nothing appraisal of validity but by means of a constant ranking and assessment of relative weight.[16] The network metaphor is better able to understand and to assess the different shades of relevance. It helps us to focus on an important characteristic if it comes to deciding on the resilience and success of normative orders: the number of *connections* between actants. If networks are very tightly woven they may *appear* hard but, in fact, their hardness is brought about by the density of the connecting lines.

My hypothesis is that the success of normative orders in providing relevant and weighty reasons for decision-making by adjudicators and regulators is to a large extent dependent on the degree to which actants connect with other actants. I decided to refer to this capacity to connect as "*valency*". In chemistry, valency refers to the ability of an atom or a group of atoms to combine with other atoms or groups of atoms. In microbiology the term is used for the capacity of antibodies to bind to an antigen and the degree to which it does so is vital for immune response. The term was transplanted to logic[17] and linguistics but as far as I know it was never adapted to law.

Yet, the importance of valency has in fact been acknowledged in the traditional emphasis on coherence as a virtue of law. Coherence expresses the degree to which legal concepts are connected to each other. They should be connected in such a way that they are *mutually* supportive.[18] The importance of coherence is more accurately pictured by webs than by buildings. Rather than seeking one hard and solid foundation for the entire building, the decisive issue is to what extent the elements can support *each other*. Just as the spider's web that is woven between multiple anchor points is more stable than the modest beginning of such a web in a single thread, we may consider normative systems by taking into account the number of actants that are linked with one another.

The problems of the building metaphor are obvious in the debates on the status of EU law. If we understand EU law as a self-standing legal system, we have difficulty in understanding the ways in which national and European rules and standards refer to each other. The recurrent debates between adherents of a "monist" and a "dualist" conception of EU law can be understood as being dominated by the building metaphor and in fact boil down to the question whether EU law can be understood as a freestanding house or a semi-detached one. None of these answers is satisfactory. Both start from the assumption that each legal order (conceptualized as a house) is erected on its own foundations: the criteria that determine validity. Validity is seen as determined by membership: does a certain rule or principle "belong" to EU-law or to the national legal

[16] Nearly all contributors to the volume *Soft Law and Validity* that I edited together with Hage, Kirste and Mackor tried to make room for a gradual concept of validity instead of a binary one. See P Westerman, J Hage, S Kirste and AR Mackor (eds), *Legal Validity and Soft Law* (Springer 2018).

[17] See CS Peirce, 'The Logic of Relatives' in CS Peirce (ed.), *'Studies in Logic' by Members of the Johns Hopkins University* (John Benjamins Publishing 1983, reprint of Boston edition 1883).

[18] R Alexy and A Pezcenik, 'The Concept of Coherence and Its Significance in Discursive Rationality' (1990) Ratio Juris 130.

system? A rule is either valid or invalid, and if valid it derives this validity from membership of either EU or domestic law. By clinging to the *Grundnorm* as the sole support of such a system, overlapping legal orders become a conceptual impossibility.

Yet, they do overlap. National courts and legislatures constantly refer to European standards, and vice versa: European regulation is constantly informed by existent national and international rules as well. Actants do not "belong" to any such order but are connected by several threads to each other. Such orders are strictly speaking not overlapping but interwoven.

V. Law as proliferation of power

Although the metaphor plausibly suggests that the number of connections strengthens the web, we should now approach the issue in more concrete terms: *Why* does the number of connections add to the weight of the norms in such a network?

In order to answer this question we should bear in mind what the linking threads in fact *do*. The linking threads are made up by X counts as Y rules. Y-terms denote the deontic properties that are attributed to the X-term. It assigns a *status* to X. This status consists of rights and obligations and usually the two are combined. The patrilinear uncle has the obligation to support the family and *by virtue of that obligation* he has the (deontic) power to decide on his niece's marriage. The official who is granted the right to raise taxes may exercise this right *on condition* that he conforms to the requirements attached to his office. In both cases, power is allocated to actors by rules and that power can only be exercised if the conditions imposed by the rules are fulfilled. In short: *rules are vehicles for power.*

People tend to think of power as being restrained by rules, and indeed that is the case if you take a look at rules as carriages that – by adding conditions – prevent powers from floating wildly in all directions. But we should not forget that rules also transport powers to other destinations. "Power" is not only something that is curbed or restrained by law but something which is *organised* by law. Rules enable power to circulate.[19] In Foucault's words: "[p]ower must, I think, be analyzed as something that circulates, or rather as something that functions only when it is part of a chain. It is never localized here or there, it is never in the hands of some, and it is never appropriated in the way that wealth or a commodity can be appropriated. Power functions. Power is exercised through networks [...]".[20]

Foucault does not elaborate on how the circulation operates but his idea can be made a bit more precise by combining it with Searle's notion of rules as depicted above. The "chain" that is mentioned here is just the chain that can be witnessed in any

[19] See also T Parsons, 'On the Concept of Political Power' (1963) Proceedings of the American Philosophical Society 232, 245.

[20] M Foucault, '"Society Must be Defended": Lectures at the Collège de France, 1975–1976' in M Bertani and A Fontana (eds), D Macey (trans), (Penguin Books 2003), Lecture of 14 January 1976, 29.

normative order and in which actor A has been conferred the competence x by virtue of rule r1, which owes its existence to the rulemaking power y of official B, who was given this competence by rule r2, which was drafted in agreement with the constitution r3 etc. The relays, that are mentioned by Foucault, can be understood more precisely as the rules themselves, which continually attach conditions to consequences.[21]

I would add to this that power is not only organised but also *grows* via this type of circulation. In order to see how this is possible, we should combine the structural analysis of networks with an analysis of the interests of the actors who are thus connected. First of all, since the exercise of powers is conditional, effective exercise of powers (*i.e*. whether they effectively bring about deontic changes) depends on the degree to which actors submit to the conditions under which they are conferred these powers. If they do not meet these conditions their acts are considered "invalid" and they cannot bring about any legal effect. Therefore, actors have a vital interest in conforming to the conditions; otherwise their acts would remain without effect.

Second, and more importantly, we should keep in mind that actors owe their deontic status to the normative chains in which they participate. If they do not enjoy such a status, they have literally nothing to lose and they will not consider the requirements of such a "stepmotherly" normative order as weighty reasons for action or decision-making. If normative orders are exclusive, *i.e*. if its rules grant powers to only supporters of one political party or one ethnic or religious group, their impact will be minimal. Not only will they fail to attract support and compliance by outsiders, but other rival normative orders (customary, religious, ideological) will occupy the niche. This phenomenon can be witnessed in so-called failed states[22] where people will turn to religious or ethnic groups or just one's –extended - family that promise a more secure status.

Conversely, we might expect that the higher the deontic status which they are accorded, the more the actors will have an interest in the continuity of the order to which they owe their deontic status. Moreover, it seems reasonable to suppose that an inclusive network that assigns rights and duties to many actors will be supported by more beneficiaries than a more exclusive one that reserves its deontic powers to just a happy few. By such a distribution its total power will increase. Power is not a zero-sum phenomenon in the sense that the more power is given to A, the less power B will enjoy.[23] It is the other way round: the more power is distributed, *i.e*. the more people are empowered, the greater it will become. Exactly this is what happens in EU-law, which we may consider as a normative web marked by high valency.[24]

[21] Foucault is ambiguous here and refers to the *individual persons* as relays.

[22] D Acemoglu and JA Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Profile Books 2012).

[23] T Parsons, 'On the Concept of Political Power' cit. 250 ff.

[24] For an account of normative orders with low valency see my P Westerman, 'Failures of Law: The Case of the Corrupt Official' (2023) Nalsar Law Review (forthcoming).

VI. Increasing adjudicative power

The rapid expansion and increasing weight of EU law, in particular the position of the European Court of Justice (ECJ), has met with considerable amazement and surprise. Political scientists explain this expansion by assessing the benefits and burdens anticipated by the member-states, such as awareness of common interests and the need to monitor compliance.[25] They mainly focus on the advantages of "a" legal system and neglect to take into account the special characteristics of EU law. Some political scientists do acknowledge the virtue of legal discourse, but they tend to see it mainly as a "mask" that conveniently disguises controversies.[26] These accounts may all contribute to our understanding of the EU but fail to take into account its special normative structure.

Legal theorists mirror this one-sidedness by emphasizing the normative content of EU law while neglecting interests and the distribution of power. High on their agenda are such things as the emergence of soft law, the relation between legislation and adjudication, the hierarchy between EU and national law and the way in which these orders are weighed in actual judicial decision making. They focus on law and neglect power.

The difference between the two perspectives is based on the familiar facts/norms dichotomy mentioned in sections II and III above. The interests of states are seen as "facts" that should be distinguished from "norms". What remains hidden from view is the connection between the two. Once we see legal rules as *vehicles* for power there is room for an analysis of the ways in which the very structure of the rules determines the number of actants involved as well as how deontic entities (powers, obligations, immunities) are arranged and distributed.

I think that on the basis of such an investigation, the emergence and rapid increase in importance of EU law can be understood. EU law manages to involve an enormous number of actors by conferring on them powers they would not have enjoyed without EU law.

In adjudication, this is manifest in the doctrine of direct effect and supremacy of EU law and art. 267 TFEU that provides the ECJ with the jurisdiction to give a preliminary ruling. The doctrine of direct effect has increased the valency of the EU legal order to an unprecedented degree. By giving *every citizen* of the EU the right to invoke EU law in their own national courts to challenge national legislation, power flows to an enormous number of actors who all enjoy powers and rights they would not have enjoyed otherwise. These actors have an interest in sustaining these new forms of appeal.

Moreover, connections are firmly established with the national courts that are empowered to ask for a preliminary ruling, and to apply that in their own decisions. Here

[25] G Garrett and B Weingast, 'Ideas, Interests, and Institutions: Constructing the EC's Internal Market' in J Goldstein and R Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change* (Cornell University Press 1993) 173.

[26] A-M Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) International Organization 41.

again, these connections add to the powers of these actors. As Weiler notes, art. 267 TFEU (by then art. 177 EC) was enthusiastically applied especially by lower national courts which, without that provision, had no or only limited powers to review national legislation.[27] As a consequence these courts did not regard EU Law as a competitor and became willing and integrated partners in the administration of EU law.[28] Weiler explains that in this way the circle of actors was widened: "individuals, corporations, pressure groups, and others who may build a stake and gain an interest in the effectiveness of Community norms".[29] As early as 1981, Stein even concluded that there is "a symbiotic relationship between national courts and the Court of Justice".[30] Even if that assessment may be exaggerated, it is still clear that without these crucial doctrines the role of the ECJ would have at best remained marginal. We would probably not even have considered *Van Gend & Loos* and *Costa v Enel* as "landmark" cases. Such epitheta are usually accorded after their consequences have manifested themselves.

It should be noted that the whole process of weaving a web cannot merely be understood as the result of the perceived short or long term interests of the weavers.[31] Since the threads consist of rules and since rules have the tendency to be applied, by means of analogy, to different spheres, the process acquires a momentum of its own. Karen Alter notes that the ECJ may originally have been established to keep the European Coal and Steel Community in check.[32] In terms of the Principal-Agent model we might then view the ECJ as the Agent of the member states.[33] But *once it was there*, the dynamic changed. The doctrine of direct effect and the possibility of asking for preliminary rulings seem to have inverted the relationship. The national legislatures of member-states are now kept in check by the ECJ. The ECJ may even be labelled as the Principal who has outsourced the task of administering EU law to national courts. It is a form of outsourcing that has enormously increased the impact of EU law.

VII. Increasing regulatory power

In regulation, a similar dynamic can be witnessed. The principles of subsidiarity and proportionality have effectively managed to involve a great many actors and institutions.

[27] JHH Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors' (1994) Comparative Political Studies 510, 523. Also KJ Alter, 'Who are the "Masters of the Treaty"? European Governments and the European Court of Justice' (1998) International Organization 121.

[28] JHH Weiler, 'A Quiet Revolution' cit. 518.

[29] *Ibid*. 520.

[30] E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) AJIL 1.

[31] See the abstruse but fascinating writings on the epistemological lessons of the spider web by F Deligny, *The Arachnean and Other Texts* cit.

[32] KJ Alter, 'Who are the "Masters of the Treaty"?' cit. 124.

[33] G Garrett and B Weingast, 'Ideas, Interests, and Institutions' cit., criticised by KJ Alter, 'Who are the "Masters of the Treaty"?' cit.

The principle of subsidiarity, which was adopted in the Treaty of Maastricht as one of the pillars of European unification, states that powers or tasks should rest with the lower-level sub-units of a certain political order unless allocating them to a higher-level central unit would ensure higher comparative efficiency or effectiveness in achieving the policies.[34] The principle of proportionality requires that one should not take any action that exceeds that which is necessary to achieve the desired aim.[35] According to this principle, in choosing between two options, legislators and regulators should always opt for the "lighter" means and avoid "heavy" regulative instruments.

The two principles are twins. What subsidiarity states about the levels of *actors* that should be entrusted with rulemaking, the proportionality principle says about the kind of *rules* that should be made: they express a preference for soft law such as guidelines, agreements, declarations, compromises, self-regulatory codes of conduct and other non-binding instruments. Here again we see the intricate connection between rules and actors.

In my book *Outsourcing the Law*[36] I analysed in detail how these principles are expressed in framework directives. Framework directives guide the Principal-Agent relation that underlies outsourcing relationships. They consist of three elements.
First of all, framework directives point out a certain goal to be reached: this may be an abstract one such as the protection of the marine environment[37] or a more concrete one such as the storage of electrical and electronic waste.[38]

Second, framework directives impose on the norm-addressee the obligation to further or to reach that goal. They may require norm-addressees to draft rules, to formulate or carry out policies, to set up a well-functioning organisation or to take other "appropriate measures", such as setting up inspection boards, or devising new schemes of financing. Usually, little information is provided on what these rules and policies should look like. Addressees are left free in their choice of how these goals should be pursued.

Third, framework directives impose a duty to report to what extent that goal has been reached. It requires that reports should be delivered concerning the measures that have been taken, the policies that have been pursued, annual reports or plans.

The choice of norm-addressees is inspired by the goal that is imposed. Although the primary norm-addressees of a framework directive are of course the member states, other institutional actors with more specific roles are also addressed. The Marine

[34] Definition by A Føllesdal, 'Survey Article: Subsidiarity' (1998) Journal of Political Philosophy 190.

[35] Art. 5(4) of the Consolidated version of the Treaty on European Union [2016].

[36] P Westerman, *Outsourcing the Law: A Philosophical Perspective on Regulation* (Edward Elgar 2018).

[37] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).

[38] Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on Waste of Electrical and Electronic Equipment (WEEE).

Strategy Framework Directive and the Water Framework Directive,[39] for instance, not only address member states but also and explicitly address various international river and regional seas commissions as well as sub-national actors. In other cases, further regulation is outsourced to standardization organisations. Monitoring and supervision are entrusted to newly created agencies and/or supervisory boards.

Even where the framework directive merely addresses member-states, the threefold structure of the directive is typically *reproduced* at lower levels. As I analysed in more detail, member states usually *repeat* the three elements of the directive, by making the goal more concrete, and by specifying the measures that should be taken as well as the reports that should be delivered. They give rise to an incredible number of norm-addressees – supervisory bodies, certification offices, monitoring and audit committees, steering committees etc. – who are all in the business of concretising and specifying these three elements further and further, giving rise to a host of targets, performance indicators, and best practices but also prescribing concrete formats in which reports should be delivered, etc. The proliferation of actors matches the proliferation of rules as well as rule-products such as certificates, licences etc.

This dynamic of differentiation can be deplored and in my book I outlined the disastrous effects of such outsourcing on the rule of law and democracy. However, this outsourcing strategy has greatly enhanced the valency of EU law. Outsourcing draws in – *and creates*! – an enormous number of actors who are linked together by an increasing number of rules. Moreover, these actors in the fields to be regulated are addressed *as Agents* and are therefore given the necessary powers. All kinds of informal bodies and agencies have sprung up which are given the powers to make, monitor and enforce rules. Their rule-products are given effect. As far as these actors have a deontic status that they would not have without these power-conferring rules (imagine the former teacher turned into a member of the audit committee), they have an interest in maintaining the rules even if they do not subscribe to their content.
Both in adjudication and regulation outsourcing may have "emptied" the centre but has led to the increasing impact of EU law.

VIII. Conclusion: the importance of inclusion and empowerment

The increasing impact of EU law teaches us the shortcomings of the traditional dichotomy between (social) facts and norms. The expansion of EU law shows us, moreover, how normative orders can develop and spread. Its development may therefore serve as an argument to abandon the traditional view of a legal order as a distinct entity, spatially

[39] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a Framework for Action in the Field of Water Policy.

confined and demarcated from other normative orders by a particular validating normative or factual source which is unique to that order.

Instead of searching for the origin of such orders either in the will of a sovereign or in some pre-existent rules, I have argued that we should be guided by the image of the network or web as an alternative to the image of an integrated system of building blocks. Rather than focusing on a fixed touchstone of validity, I suggested to take valency into account: the capacity of rules to link together actants (buildings, actors, events, as well as rule-products). Valency as the degree to which new actants are created, involved and empowered seems to be an important characteristic of viable normative orders. Moreover, as I have explained elsewhere,[40] their dynamic is to a large extent self-reinforcing.

The practical implication of this alternative view is that we should focus more on how the periphery – national courts, but also supervisory boards and private organisations – is organised. Do they gain or lose in status? How are their rights and duties tied to the other actants of the network? Are they connected by central hubs and well-trodden pathways or are they isolated outposts? Are they able to perform the functions granted to them by EU law? The position of the judiciary in Poland and Hungary has an immediate effect on the European normative network as a whole.

Viable and strong normative orders are not necessarily morally good or desirable ones. Expansive networks can also be stifling and their rules can be experienced as such weighty reasons for action and decision that freedom is seriously jeopardized. Yet, stable networks are important because they create a world in which rules may count as weightier reasons than money or violence. In order to forestall their decline and insignificance, it is important to understand the way they are born, grow, and spread.

[40] P Westerman, 'Validity: The Reputation of Rules' in P Westerman and others (eds), *Legal Validity and Soft Law* (Springer 2018).