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RESEARCH ARTICLE

Knowing EU Law

Martijn W. Hesselink

Department of Law, European University Institute, Florence, Italy
Email: martijn.hesselink@eui.eu

Abstract

This paper discusses how epistemic and ontological commitments shape different understandings of European Union (EU) law and why it matters. Many key debates on EU law—and some of the fiercest disagreements in European legal scholarship—go back to divergent epistemic and ontological commitments. While these philosophical commitments usually operate in the background, this paper foregrounds them. A core aim of the paper is to denaturalise the epistemic and ontological groundings of mainstream approaches to EU law and, thus, to demarginalise approaches more peripheral to the centres of power in EU law-making and in EU legal academia.

Keywords: EU law; legal ontology; legal epistemology; legal method

I. Introduction

What does it mean to know European Union (EU) law? When we say that we have knowledge of EU law what do we intend? And when we argue that a certain claim about EU law is true or false then which validity standards do we rely on explicitly or implicitly? These are epistemological questions about EU law. When claiming to know EU law, then, presumably, we mean that we have knowledge about EU law as it is. This raises the question of what exactly the mode of being of EU law is, which is related today, in one way or another, to the further question of what the EU really is, and, in some cases, on what else exists and what not. These are ontological questions about EU law.

As this paper will show, many key debates on EU law—and some of the fiercest disagreements in European legal scholarship—go back to divergent epistemic and ontological commitments. While these philosophical commitments usually operate in the background, this paper foregrounds them. The hope is that this will contribute to bringing more clarity about the nature of the disagreements in some of the main battlefields in European legal scholarship, as well as on the prospect of reaching agreement.

While theoretical clarity constitutes a legitimate scholarly aim in its own right, the main reason for the present inquiry is more practical and political. An important aim of this paper is to denaturalise the epistemic and ontological groundings of mainstream approaches to EU law and, thus, to demarginalise approaches more peripheral to the centres of power in EU law-making and in EU legal academia. There exists no obvious relation, to say the least, between the political and academic dominance of certain approaches and their epistemic and ontological credentials.

One key takeaway from this paper is that everyone inevitably does it: it is impossible to engage in European legal scholarship without any epistemic and ontological commitments, ie without any background understandings of what it means to have knowledge of EU law and about the reality of EU law and its mode of being. And insofar—as to the latter—everyone engages in legal metaphysics, at least negatively, ie in terms of ontological commitments about what is *not* there when it comes toEU law. Another insight, however, at least as important, is the fact that everyone does it differently:

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there exists no consensus—not even an overlapping consensus—on the epistemology and ontology of EU law. Indeed, as will be shown, even the meta-debate about the nature of the dissensus has not yielded an obvious single outcome—quite the contrary. In other words, then, what this paper does is to show the existence of epistemic and ontological pluralism, when it comes to knowing EU law, and of meta-level pluralism, when it comes to attempts to make sense of the fact of epistemic and ontological pluralism in EU law scholarship.

EU law does not exist—nor can it be known—in isolation. Indeed, there are important continuities between the different understandings of EU law, on the one hand, and those of national and international law, on the other. Yet, knowing EU law also has distinct features and raises some distinct questions of its own. This paper will show and analyse some prominent sites specifically of EU legal epistemology and EU legal ontology in action.

The paper is organised as follows. Sections II and III introduce, respectively, the nascent scholarly fields of legal epistemology and legal ontology. Section IV proceeds by discussing the epistemic and ontological commitments of various strands in EU law scholarship. These strands usually adopt methods and approaches to law whose scope is not limited to EU law but are practiced more widely in other legal fields. Next, Section V presents and discusses epistemological questions specific to EU law, to be followed by Section VI, which centres the nature, reality and specific mode of being of the EU and its laws. Section VII, then, turns to the meta-question of what to make of this fact of epistemic and ontological pluralism in EU law scholarship, and how to deal with it. Finally, Section VIII concludes.

II. Legal epistemology

A. Epistemology

Epistemology is the philosophical discipline concerned with the study of knowledge. As one of the oldest academic disciplines, it is interested in questions about the possibility of knowledge, how to distinguish knowledge from mere opinion, and how belief can be justified. Contemporary epistemologists identify different types of cognitive success (knowing, understanding, mastering), possible sources of knowledge (perception, introspection, memory, reason, testimony), and justification strategies (in particular, foundationalism versus coherentism).[1]

Epistemology has developed over the centuries in a dialectical relationship with scepticism in its various forms. Sceptics doubt the possibility of knowledge. Global (or radical) scepticism is the view that knowledge is generally impossible, while local sceptics assert the impossibility of knowledge merely in a certain domain. By contrast, relativists do believe in truth or validity but consider it to be always relative to a specific set of persons (epistemic communities). Rejecting the possibility of objective or universal truths, they accept only subjective or intersubjective truths.

Justified belief—and hence justification—plays an important role in contemporary epistemology. It is important, in this regard, to note the difference between epistemic justification and moral justification. Epistemic agents seek knowledge. They try to determine reasons for justified belief, quite apart from the things one could do when possessing knowledge. Their standard for the evaluation of justificatory reasons is whether they are true (or plausible). Moral agents, by contrast, ask themselves what they should do. They seek reasons to justify or criticise possible courses of action as morally right or wrong. In other words, their standards for the evaluation of proposed reasons differ.

Epistemology as a philosophical field usually focuses mainly on knowledge of physical objects in the external world, such as chairs and tables, where questions like the BIV problem (how do

[1] See, eg, Matthias Steup and Ram Neta, 'Epistemology', *Stanford Encyclopedia of Philosophy* (Winter 2024 Edition), Edward N Zalta & Uri Nodelman (eds); Alvin I Goldman & Matthew McGrath, *Epistemology: a contemporary introduction* (Oxford University Press, 2017); Jennifer Nagel, *Knowledge: a very short introduction* (Oxford University Press, 2014).

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I know I am not a brain in a vat?) become central, and where legal knowledge is normally not considered at all.

B. Legal epistemology

Legal epistemology is a much more recent and comparatively less well-established field of study.[2] It explores the possibilities and limits of legal knowledge and understanding, including the capability of legal claims for being true or false (valid or invalid). Legal scepticism, then, is the view that legal knowledge is impossible, while legal relativism maintains that legal knowledge is always relative to a specific group of knowers.

Legal epistemology enquires into the nature, sources, premises, possibility, origins, development, structure, and limits of legal knowledge. This raises the question of what we mean by legal knowledge. In the most general sense, we could define it as knowledge whose object is the law. However, as we will see, different approaches to law may understand the object of knowledge—ie the law itself—quite differently.

Just like in general epistemology, so too with regard to the law can we distinguish different modes of knowing. Traditionally, legal knowledge has been understood as a form of prudence (*iuris prudentia*), with an intrinsic practical dimension (in contrast notably to legal positivism). However, with the arrival of various new types of legal scholarship (starting from legal sociology in the 19th century), each with their own claims to legal knowledge, the general distinction in contemporary epistemology between different types of cognitive success now seems to befit here as well: different types of legal knowledge can display different combinations of knowing, understanding, and mastering.

C. Stakes in legal epistemology

Can just any person claim to have legal knowledge? Or do jurists have special (or even exclusive) epistemic authority concerning legal knowledge? And if only jurists can properly know the law, then why are citizens presumed to know the law and is ignorance of the law not a valid defence ('nul n'est censé ignorer la loi')? Are there any purely technical (ie wholly non-political) legal questions? And how can jurists claim that the legal system provides an answer to *all* legal questions? There are several stakes in these and similar questions.

First of all, having legal knowledge (knowing statements about the law to be true, or having reason to be confident about their validity) can provide a reason for—or against—a certain course of action (which may be either good or bad).[3] Thus, it can inform rational choice—individual or collective—and be the basis for an informed consent (eg about legal (non)compliance, or in negotiations in the shadow of the law). By contrast, from the point of view of the legal sceptic, who denies the possibility of legal knowledge and legal truth, action informed by purported legal knowledge is no less arbitrary than flipping a coin.

In particular, the possibility of legal knowledge allows us to rely on the judgment or advice of others, and for a division of labour in society, where a group of persons specialise in acquiring legal knowledge, thus becoming legal experts. By contrast, legal sceptics question the legitimacy for legal scholars to speak as experts claiming to express something they know objectively rather than merely giving a subjective opinion like everyone else.

Moreover, if we can have knowledge of positive law specifically then law cannot be reduced to mere politics. And vice versa, if law is more than politics then presumably something specific can be

[2] François Gény, *Science et technique en droit privé positif: nouvelle contribution à la critique de la méthode juridique* (Sirey, 1913), Vol 1, Ch 4, entitled 'Du rôle des éléments intellectuels en toute élaboration de droit positif (essai d'épistémologie juridique)', seems to be the first explicit attempt at a legal epistemology. Notable contributions include Gunther Teubner, 'How the law thinks: toward a constructivist epistemology of law', 23 *Law & Society Review* (1989), 727–758; Christian Atias, *Épistémologie juridique* (Dalloz, 2002); and Geoffrey Samuel, *Epistemology and method in law* (Routledge, 2002).

[3] For the 'bad man's view', see famously Oliver Wendell Holmes Jr, 'The path of the law' 10 *Harvard Law Review* (1897) 457.

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known about law beyond our general knowledge of politics. In other words, the law *v* politics divide is another important stake in legal epistemology.[4]

A further stake in the possibility of specifically legal knowledge is the issue of legal scientism and legal naturalism. Speaking of legal knowledge (and legal epistemology) and understanding legal scholarship as legal science (*Rechtswissenschaft*) seems to evoke the hard-scientific knowledge of the natural sciences as a role model to be emulated, while it denigrates at the same time softer claims to knowledge, from which legal scholars should distance themselves on this scientist view.

III. Legal ontology

A. Ontology

Ontology is the branch of philosophy concerned with questions of being: what exists, what is real, which different modes of being are there? Aristotle referred to what today we call ontology as the 'first philosophy', whose substance is prior to that of all other sciences.[5] It addresses the different kinds of categories (particular and universal, abstract and concrete, etc) and different modalities (possible and actual, contingent and necessary, etc).

Metaphysics, of which ontology (or 'general metaphysics') is the main part, was famously rejected by logical-positivists—and is still rejected today by most (but not all) contemporary analytical philosophers—on the ground that propositions which do not refer to observable facts are nonsensical.[6] Just like in the case of epistemology, the philosophical field of ontology does not usually consider law as an object of study or reflection.

B. Legal ontology

With specific reference to the law, we can use the term of legal ontology for the study of legal reality and the law's modes of being. Many debates in legal philosophy and 'general jurisprudence' can be properly understood as legal-ontological ones. Think, for example, of the legal realists whose main claims were concerned with the question of what the law really is. Proto-realist Oliver Wendell Holmes famously affirmed: 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.'[7] And Karl Llewellyn, one of the protagonists of American legal realism, stated no less famously: 'What officials do about disputes is, to my mind, the law itself.'[8]

Similarly, the question of whether the law is a system and, if so, whether it is a closed system or a (partially) open one, are ontological questions too. Kantorowicz was sceptical, pointing out that there seem to exist as many different legal systems in one jurisdiction as there are doctrinal treatises presenting them.[9] Think also of Jhering, who argued that the reality of law is struggle rather than system.[10]

Think also of the debates about legal (and constitutional) pluralism, between radical pluralists, constrained pluralists, and monists. These are disputes about legal (and constitutional) reality and

[4]Duncan Kennedy, 'The political stakes in "merely technical" issues of contract law', 10 *ERPL* (2002), 7–28.

[5]Aristotle, *Metaphysics* (Penguin, 2004), 1026a (p. 156).

[6]See Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (Routledge, 1992), 6.5.3.

[7]Oliver Wendell Holmes, 'The path of the law', 10 *Harvard Law Review* (1897), 457.

[8]Karl N Llewellyn, *The bramble bush; on our law and its study* (Oceana, 1951).

[9]See Gnaeus Flavius (Hermann Kantorowicz), 'Der Kampf um die Rechtswissenschaft', Heidelberg 1906 (reprinted in: Thomas Würtenberger (ed.), *Rechtswissenschaft und Soziologie; Ausgewählte Schriften zur Wissenschaftslehre von Hermann Kantorowicz*, Karlsruhe 1962, 13–39), 27–28.

[10]Rudolf von Jhering, *Der Kampf ums Recht* (1872).

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about the nature of law, especially whether law is essentially statist or whether we can meaningfully speak of law beyond the state.[11]

Another example is the idea of legal sources: What are the sources of the law? Do they constitute a limited set? Is there a hierarchy among them? If so, how are the limit and hierarchy constituted?

C. Stakes in legal ontology

Clearly, the stakes in legal ontology are at least as high as in legal epistemology. While legal epistemology is concerned with legal truth (the validity of legal knowledge), legal ontology is concerned with legal reality (the law's mode of existence) and, hence, determines legal realism. What is part of the law and what is not, is not only of theoretical but also of very practical interest, not only to legal scholars but also—and in the first place—to the general public.

The two are also connected insofar as there is obviously little to be known about something that does not even exist. For example, doctrinal treatises claim to represent the legal system of a given jurisdiction. However, if the law is or has no system then doctrinal scholarship does not represent anything real at all. The same applies, eg for the existence of legal values, the possibility of non-state law, or the reality of systemic racism. And conversely, if these are real then it is well worth knowing more about them—and to take action.

IV. Different strands in EU law scholarship and their epistemic and ontological commitments

Today, there exists a wide range of different fields of EU law scholarship. In each of these fields, legal scholars make epistemic claims and assumptions, sometimes explicitly but more often implicitly. These assumptions and claims are partly based on different understandings of the nature of their object, ie EU law. In other words, they also make different ontological claims and assumptions.

Moreover, across those fields, scholars adopt various approaches to EU law and methods for studying it.[12] Most of these are specific instances or applications of wider legal methods and approaches. These approaches also each have their own distinct epistemic and ontological commitments. Indeed, the divergent epistemic and ontological commitments underlying the various approaches to EU law are often at the root of their scholarly disagreements.

Here follows a brief exploration of core epistemic and ontological commitments in some of the main strands in EU legal scholarship.[13]

A. Doctrinal-positivist scholarship

The most familiar and recurrent claims to knowledge of EU law are positivist-doctrinal claims as to what the law of the EU is on a certain matter, in particular knowledge concerning the proper

[11] John Griffiths, 'What is legal pluralism?', 53 *Journal of Legal Pluralism and Unofficial Law* (1986), 1–55; Gunther Teubner, '"Global Bukowina": legal pluralism in the world society', in: Gunther Teubner (ed), *Global law without a state* (Aldershot, 1997), 3–28; Ralf Michaels and Nils Jansen, 'Private law beyond the state? Europeanization, globalization, privatization', 54 *American Journal of Comparative Law* (2006), 843–890.

[12] These approaches are adopted not only with regard to EU law but also for other legal fields and indeed the law as such ('general jurisprudence'). Much of the discussion here may, therefore, be of wider relevance. Exploring this question would exceed the scope of the paper.

[13] For a similar discussion for sociological research on the EU, see Niilo Kauppi, 'Rationality, Institutions and Reflexivity in the EU: Some Ontological and Epistemological Considerations (2008) 25 *Politique Européenne* 87–113 (GSPE Working Papers—Niilo KAUPPI—1/27/2009).

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answer to legal questions (ie questions of law, as opposed to questions about the law, on which further below). These include claims about the proper understanding of primary or secondary EU law, their interpretation by the Court of Justice, their bearing upon the national laws of member states, and their implications for specific cases and disputes.

Such doctrinal-positivist claims purport to be valid. To that end they rely, usually implicitly, on the understanding that statements about positive EU law can be correct or incorrect. This is reflected, for example, in the practice in universities where answers to exam questions on positive EU law are marked as correct or incorrect, as well as in the legality review of legislative acts and preliminary rulings concerning the proper interpretation of primary and secondary EU law by the Court of Justice of the European Union (CJEU).[14]

Positivist-doctrinal claims to knowledge are based on the notion that positive law exists (ontological claim) and can be known (cognitive claim), and that it is possible to distinguish between true and false beliefs about positive law (epistemic claim). In other words, positivist-doctrinal claims about EU law presuppose a capability for validity and invalidity of claims about legal validity or invalidity concerning EU law, which itself is presumed to be real, ie to exist 'out there' in one way or another.

Certain legal positivists consider legal validity to be a matter of fact. On this view, if we want to know what the law is we must observe what legal officials recognise as law (Hart's rule of recognition).[15] To the extent that these legal officials are judges, and judicial precedents are what they recognise as law, there is a degree of circularity (or bootstrapping) in this argument. Something similar occurs when legal scholars recognise their own doctrinal work as a source of law.[16] While Hartian legal positivism relies on the empirical fact of recognition (and insofar is properly referred to as sociological),[17] the other main strand in legal positivism understands positive law as ultimately metaphysically grounded, ie in a transcendental *Grundnorm*.[18]

A sharp distinction between law and morality is a key characteristic of legal positivism of all stripes. This is in contrast, in particular, to natural law views, which hold that the law should implement or reflect morality, and that legal validity depends at least in part on the law's moral rightness. Natural law claims to the effect that legal validity is grounded ultimately in moral validity imply—and often make explicit—the notions that morality exists (moral realism) and that it is possible to obtain knowledge about it (moral cognitivism).[19]

From an epistemological point of view, both legal positivism, be it of the Hartian or the Kelsenian type, and legal moralism are forms of foundationalism. They all offer an ultimate grounding for legal validity, of EU law in our case, even though they differ radically in what they count as the proper pedigree for a legal claim (ie established judicial practice, the *Grundnorm*, or morality).[20] By contrast, Dworkin's law as integrity (as well as his wider theory of justice for hedgehogs),[21] according to which there exist single right answers to all legal questions, which 'fit' with the legal materials and express the political morality of the polity, and which can be found through legal interpretation from the internal

[14]See Arts 263 and 267 TFEU, respectively.

[15]HLA Hart, *The concept of law* [1961], 2nd ed (Clarendon, 1994), 94.

[16]On the 19th-century origins of legal doctrine as a source of law, see Christoph Jamin & Philippe Jestaz, *La doctrine* (Dalloz, 2004).

[17]Hart, *op cit*, vi: 'descriptive sociology'.

[18]Hans Kelsen *Reine Rechtslehre* [1934], 1st ed (Scientia, 1994), ch V. The (Kantian) transcendental argument for the *Grundnorm* is metaphysical, not epistemic. It is about the conditions of possibility for reason, for a rational argument.

[19]In other words, the natural law view's legal epistemology and legal ontology refer to metaethics, which will be discussed further below, in Section IV D.

[20]Radically sceptical, in this regard, for doctrinal EU law scholarship, Urška Šadl and Jakob v H Holtermann, 'The foundations of legal empirical studies of European Union law: a starter kit', in Christoph Bezemer, Michael Potacs and Alexander Somek (eds), *Vienna lectures on legal philosophy: normativism and anti-normativism* (Hart Publishing, 2020), 207–232.

[21]See, respectively, Ronald Dworkin, *Law's empire* (Belknap, 1986), and idem, *Justice for hedgehogs* (Belknap, 2011).

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point of view of the law,[22] is a form of legal-epistemological-ontological coherentism.[23] Here we see how foundationalist and coherentist views respond quite differently to the epistemic regress problem in the chain of justifications for justified belief,[24] also when it comes to validity claims concerning knowledge and understanding of EU law.

Doctrinal scholarship of positive law tends to rely on the idea of sources of law. From an epistemological point of view, these sources of legal validity are at the same time sources of knowledge about the law: this is where one will find the answers to legal questions. Sometimes, legal sources are indicated officially by positive law, as for example in Art 1 of the Swiss civil code (1907) and in Art 38 Statute of the International Court of Justice (1945) (which lead to new regress problems). While there does not exist a similar canonical enunciation of its sources for EU law, the idea that all EU law ultimately derives from the founding Treaties, and the related distinction between primary and secondary EU law, are well entrenched and widely accepted certainly in doctrinal EU law scholarship.

In the recognised legal sources, one will find answers to all questions of law to the extent that the law is properly understood as a closed system. This latter (ontological) point, however, is controversial, also regarding EU law as we will see.

Except in the most radical natural law views, legal validity—and hence knowledge of positive law—is always relative to a given time and place.[25] Thus, in doctrinal legal scholarship, relativism is the standard view. It is also the basis for the disciplines of legal history and comparative law, that will be discussed below, which both only make sense in the absence of legal universalism. From a positivist-doctrinal point of view, comparative legal knowledge is perhaps best understood epistemologically as concerned with detached normative statements (in the Razian sense) about foreign law.[26]

B. Law and economics scholarship

Economic analysis has been applied widely to EU law. The field of EU law where economic analysis has been most influential is competition law, where the consumer welfare paradigm has been dominant. However, also in other fields of EU law, economic analysis has been influential. In European private law (EPL), for example, specific doctrines of EU consumer law, such as mandatory withdrawal rights in consumer contracts, have been evaluated by scholars and rejected for being inefficient. And more generally, the idea of centralised uniform EU-private-law-making has been contrasted unfavourably with regulatory competition between the member states, which could be facilitated by a free choice of law (the 'law market'). In so-called 'impact assessments', a key element in EU law-making ever since the Lisbon agenda, economic impact is centre-stage. The claims, criticisms and proposals coming from EU law and economics scholarship rely on a number of ideas and concepts that are grounded in specific epistemic and ontological assumptions.

Law and economics offers hypotheses concerning the efficiency of legal rules, doctrines, remedies, and institutions. It claims that these hypotheses could be tested empirically, ie as a matter of fact. Efficiency, be it in its Pareto (no one could be made better off without making anyone else worse off) or Kaldor–Hicks (no improvement is possible where winners could compensate the losers and still be better off) versions, is understood to be an empirical concept. Welfare itself is usually expressed in terms of preference satisfaction, where preferences are held to be factual states with which individuals find themselves.

[22] On legal interpretivism, see Nicos Stavropoulos, 'Legal interpretivism', in: *Stanford Encyclopedia of Philosophy* (Spring, 2021), Edward N Zalta (ed).

[23] Dworkin's position is not merely a view about how to find the single right answer (through interpretation) but also about its mode of being (each single right answer being a 'truth maker' for others). See Joseph Raz, 'A hedgehog's unity of value', *Columbia Law School public law & legal theory working paper group*, paper nr 14–396 (2014).

[24] On the epistemic regress problem, see, eg, Goldman & McGrath, *op cit*, ch 1.

[25] See Andrei Marmor, 'The pure theory of law', in: *Stanford Encyclopedia of Philosophy* (Fall 2021), Edward N Zalta (ed), 10.

[26] Joseph Raz, *Practical reasons and norms* [1975], (Oxford University Press, 1990), 171ff.

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In other words, to be convinced by claims made by law and economics, including those concerning EU law, one has to accept the notion of preferences as factual, stable, and exogenous to choice (be it individual or collective choice). That idea, however, has long been criticised as descriptively rather implausible. Most of the time people have reasons for their preferences, which would mean that preferences are in fact normatively grounded.[27] Moreover, individuals and polities usually determine what they want through individual and collective deliberation, not prior to it and independently of it, and they often change their minds in the processes of individual and collective choice, frequently in response to reasons offered by others.[28] This would mean that preferences usually are neither exogenous to choice nor stable.

In addition to this ontological critique of the reality of preferences, there is also the epistemic critique of how we can get to know them if they exist. The understanding by economists of preferences as both individual and fundamentally subjective raises the difficulty of accessing them: how can we obtain objective knowledge about subjective states? To solve this problem, economists introduce the notion of revealed preferences. For example, willingness to pay is often understood as an indicator for a preference ('hypothetical preference satisfaction'): how much money would you be prepared to pay for a good or service? A practical advantage of this move is that by monetising preferences interpersonal comparisons and aggregation of preference satisfaction, and, hence, the determination of social welfare, become possible. However, this move has attracted severe criticism as well, both within and outside law and economics scholarship, and both as a descriptive matter (doesn't willingness to pay reflect also—or even first and foremost—how much one has, ie the distribution of resources?) and normatively (is wealth a value?).[29] More fundamentally, it becomes obscure what descriptive and normative work the notion of preferences is supposed to do once we structurally resort to proxies.[30]

In summary, EU law and economics scholarship has a strong ontological commitment to the factual reality of preferences and an epistemological commitment to certain ways of knowing them, in particular via proxies such as willingness to pay. Indeed, these metaphysical and epistemic commitments are foundational for EU law and economics scholarship, including its policy recommendations. At the same time, however, these foundational commitments have been contested quite fundamentally for decades.

C. *Empirical legal scholarship*

Empirical legal studies are a relatively recent field of legal scholarship. An heir to legal realism, it became popular with the behavioural and—wider—empirical turn in law and economics, after the financial crisis of 2008 had led to a backlash against the rational agent model underlying neoclassical economics. Empirical legal methods have been widely applied to EU law as well.[31] Typical contributions to empirical legal studies tend to be quantitative rather than qualitative. Data sets, sometimes obtained through experiments, play an important role. The methods adopted in empirical legal scholarship are usually borrowed from the social and behavioural sciences.[32] With it usually comes a strong epistemological commitment to empiricism (science as measurement) and often also to naturalism. Indeed, scholars in empirical legal studies tend to contrast their own methods

[27] See Joseph Raz, *Ethics in the public domain* (1994), 116.

[28] See Jürgen Habermas, *Between facts and norms*, 336.

[29] Ronald Dworkin, 'Is wealth a value?', 9 *Journal of Legal Studies* (1980), 191–226.

[30] See Onora O'Neill, *Bounds of Justice* (Cambridge University Press, 2000), 17.

[31] Cf Gareth Davies, 'Taming law: the risks of making doctrinal analysis the servant of empirical research', in: *The politics of European legal research: behind the method*, M Bartl and JC Lawrence (eds) (Elgar, 2022), ch 9.

[32] Cf Urška Šadl and Jakob v H Holtermann, 'The foundations of legal empirical studies of European Union law: a starter kit', in Christoph Bezemek, Michael Potacs and Alexander Somek (eds), *Vienna lectures on legal philosophy: normativism and anti-normativism* (Hart Publishing, 2020), 207–232, arguing explicitly for a 'new European legal science'.

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favourably with doctrinal legal scholarship as being more scientific, rigorous, and objective (because of repeatability).[33]

A flourishing recent field of empirical legal research, unrelated to economics, focuses on cross-citations by courts.[34] This quantitative empirical work analyses thousands of cases from the CJEU or from national supreme courts, understanding these bodies of case law as datasets, from which to draw statistical inferences (rather than as legal sources to be interpreted hermeneutically), with a view to establishing citation patters and networks.[35] The aim is to uncover, through statistical analysis, jurisprudential patters that have escaped doctrinal scholarship or that even go directly against received doctrinal readings of the case law.[36] As another example, think of Or Brook's study of the balancing of competition and noncompetition interests in practice, based on a systematic content analysis of *all* Art 101 TFEU public enforcement actions taken by the Commission—more than 3,100 in total.[37]

The epistemic and ontological premises of empirical legal studies are hardly uncontroversial.[38] A familiar criticism concerns the epistemic fallacy of reducing science to measurement, thus suggesting that those parts of legal reality which cannot be quantified and statistically measured are somehow less capable or worthy of being known or understood. Another is the ontologising move of treating law as data. As many legal scholars have pointed out, it is implausible that law could be observed as raw data, without drawing (at least implicitly) on any background theory of law.[39] This raises the question of whether empirical legal studies are grounded ultimately in—or at least share in part—the epistemic and ontological commitments of doctrinal legal scholarship.

D. Normative legal scholarship

Normative legal scholarship offers practical knowledge, ie knowledge about what to do, in particular about what ought to be done (normative in a narrow sense) or what it would be good or best to do (evaluative knowledge). To be more precise, it includes knowledge not only about what to do but also about what to refrain from doing (because this would be wrong or bad, respectively). Knowledge about what to do individually derives from moral philosophy (or personal morality) and about what to do collectively from normative political philosophy (or political morality).

Metaethics is the philosophical field that specifically addresses, among other things, the epistemology and ontology of morality. The realism/antirealism debate in metaethics is concerned with the ontological question of whether moral norms, values, duties, and rights and wrongs are real,

[33] For a nuanced discussion, see Tommaso Pavone and Juan Mayoral, 'Statistics as if legality mattered: the two-front politics of empirical legal studies', in: *The politics of European legal research: behind the method*, M Bartl and JC Lawrence (eds) (Elgar, 2022), ch 6.

[34] Urška Šadl and Fabien Tarissan, 'The relevance of the network approach to European (case) law: reflection and evidence', in: Claire Kilpatrick and Joanne Scott (eds), *New legal approaches to studying the Court of Justice* (Oxford University Press, 2020), 92–124.

[35] See, eg, Sabrina D'Andrea, Nikita Divissenko, Maria Fanou, Anna Krisztián, Jaka Kukavica, Nastazja Potocka-Sionek and Mathias Siems, 'Asymmetric Cross-Citations in Private Law: An Empirical Study of 28 Supreme Courts in the EU', 28 *Maastricht Journal of European and Comparative Law* (2021), 498–534.

[36] See, eg, Or Brook, 'Politics of coding: on systematic content analysis of legal text', in: *The politics of European legal research: behind the method*, M Bartl and JC Lawrence (eds) (Elgar, 2022), ch 8.

[37] Or Brook, *Non-competition interests in EU antitrust law: an empirical study of article 101 TFEU* (Cambridge University Press, 2022).

[38] There exists a longstanding critique of naturalism and scientism in the social sciences. Think, in particular of the *Positivismusstreit* (positivism dispute) about the methodology of the social sciences, and their epistemological and ontological commitments, between the critical rationalists Karl Popper and Hans Albert, on the one hand, and the critical theorists from the Frankfurt school Theodor Adorno and Jürgen Habermas, on the other, in the early 1960s. Further discussion of the epistemic and ontological commitments in sociology and other social sciences falls outside the scope of this paper.

[39] Hanoch Dagan, Roy Kreitner, and Tamar Kricheli-Katz, 'Legal theory for legal empiricists', 43 *Law & Social Inquiry* (2018), 292–318.

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while the cognitivism/non-cognitivism debate is about whether moral learning is possible, which is closely connected to the epistemic question of whether we have reason to believe that moral judgments (about right and wrong) and value judgments (about good and bad) can be true or false (valid/invalid).

Moral realists claim that moral and evaluative judgements describe an aspect of the world as it is.[40] By contrast, antirealists deny that moral propositions refer to anything that exists independently of moral judgment. Typically, they endorse some form of naturalism, which holds that only what the natural sciences can empirically prove exists. Moral realists explicitly reject that naturalist reduction. They argue that the mere fact that we cannot observe values and norms does not mean they don't exist. To require 'value-facts' (Putnam) or 'moral particles (morons)' (Dworkin) as evidence would amount to an impermissible (indeed definitional) naturalist reduction.[41]

Moral cognitivists claim that moral judgments can be true or false and that, therefore, moral knowledge and learning are possible. By contrast, non-cognitivists maintain that moral judgments do not express cognitive states of mind, like other beliefs about reality, and that, therefore, moral judgments cannot be correct or incorrect (valid or invalid) and that, as a result, moral knowledge and learning are impossible. They believe that moral propositions express emotions, interests or preferences, or merely reproduce power relationships.[42]

An important distinction to be drawn, in this regard, is between indeterminacy and uncertainty. If there were no determinate answers to moral questions then moral claims would always be incapable of being true, and it would be impossible to obtain moral knowledge. By contrast, moral disagreement (even if it is pervasive and runs deep) does not imply per se that none of the positions in the debate are true. Nor does uncertainty as to which is the morally right course of action mean that we should suspend our moral judgments. Joseph Raz, a moral realist, explicitly rejects 'epistemic abstinence', ie the idea that disagreement about values should provide a ground for governments to abstain from the inclusion of values among the reasons for their decisions.[43]

Normative knowledge—or claims thereto—specifically about the EU includes, in particular, knowledge about what we ought to do—or what it would be good to do—about EU law. So, we look at the current state of EU law, compare it with a normative or evaluative standard and ask what ought to change or what it would be good to change. A typical such normative standard is social justice.[44] An evaluative standard could be economic efficiency.

In addition to ideal normative theories about EU law, which focus on what EU law ideally should be in light of the adopted normative or evaluative standard, we can also engage in nonideal normative theories of EU law. Then, the question becomes: given the current state of the world, in particular the current state of the EU, what should we do? Theories can be nonideal to different degrees and in different respects. For example, we can take as given that the EU is not a federal state, has the current set of attributed competences, has no general competence for private law, or does not currently include Turkey as a member state. Each of these characteristics, and many others, is nonideal from the point of view of at least some normative theories. If we decide nevertheless to work within the frame of that reality and ask ourselves what should be done under these circumstances (ie our circumstances), then insofar our theory is a nonideal one.

[40] Geoff Sayre-McCord, 'Moral realism', *Stanford Encyclopedia of Philosophy* (Winter, 2023), Edward N Zalta & Uri Nodelman (eds).

[41] See Hilary Putnam, 'Are values made or discovered?', in: idem, *The collapse of the fact/value dichotomy and other essays* (Harvard University Press, 2002), 96–110, 102; Ronald Dworkin, *Justice for hedgehogs* (Belknap Press, 2011), 42.

[42] Mark van Roojen, 'Moral cognitivism vs. non-cognitivism', *Stanford Encyclopedia of Philosophy* (Summer, 2024), Edward N Zalta & Uri Nodelman (eds).

[43] Joseph Raz, *Ethics in the public domain: essays in the morality of law and politics* (Clarendon Press, 1995), ch 4 and 5.

[44] See, eg, Study Group on Social Justice in European Private Law, 'Social justice in European contract law: a manifesto', 16 *ELJ* (2004), 653–674.

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Perhaps the strongest version of nonideal theory is an interpretative theory. An interpretative version of a normative theory takes the existing law (the existing legal materials or sources of law) as given and tries to implement as much as possible of the theory's demands through the interpretation of positive law, in our case of positive EU law (the 'acquis communautaire'). The scope for idealising elements in legal interpretation will then depend on the (perceived) margin of appreciation (or discretion) in interpretation that is left by the legal materials, in particular by open-ended legal norms (also referred to as standards).

An interesting question about ideal EU legal theory, for example a theory of EU justice, is how much idealisation is compatible with the theory still being about the EU. This question highlights how closely related the epistemology of EU law is to its ontology. In particular, it raises the question of whether any feature of the EU is an essential characteristic of it or whether they are all contingent. For example, would the EU still be the EU if it abolished (or de-constitutionalised) the four market freedoms or direct effect, if the EU became a nation-state, if the CJEU were abolished, or if countries from other continents became member states?

E. Comparative legal scholarship

Comparative legal scholarship is epistemically committed to the comparability of legal systems and ontologically to their difference (at least in the minimal sense of nonidentity).

The epistemic commitment to comparability entails a further epistemic commitment to the possibility of knowing foreign law. Having said that, it is disputed among comparative legal scholars whether a comparatist can ever know foreign law as locals know it, and whether it is ever possible to know any foreign legal system 'as it is' (ie objectively, independently of the observer). Indeed, Pierre Legrand argues that fundamental differences between legal systems arise at the epistemic level: they 'do not give the same answer to the question 'what is it to have knowledge of the law?'[45]

The ontological commitment to difference follows from a commitment to the discontinuity of legal systems—put differently, to the reality of political boundaries.[46] Having said that, at the same time many comparatists are committed to the reality of 'legal families' or 'legal traditions' in spite of the political boundaries that have been firmly in place around the world at least since formal decolonisation. Insofar, it has been argued, comparative legal scholarship never became fully postcolonial.[47] This is not only politically dubious but also ontologically remarkable. Today, the common law and the civil law are still often referred to, in spite of political boundaries, each as a single unit, which can also be understood as a subject, indeed an agent—as in the proposition that 'the common law does not enforce gratuitous promises'.

At the same time, however, there exists a branch of comparative legal scholarship, particularly relevant for the EU, that focuses on the common core of European legal systems, which has ontological commitments that go directly against the idea of legal families.[48]

[45] Pierre Legrand, 'European legal systems are not converging', 45 *International and Comparative Law Quarterly* (1996), 52–81.

[46] Catherine Valcke, *Comparing Law: Comparative Law as Reconstruction of Collective Commitments* (Cambridge University Press, 2018), distinguishes epistemic and material dimensions of law as the object of legal comparison. While this distinction is not identical to the one between epistemic and ontological aspects, there is some overlap eg where she discusses 'the Westphalian, territorial conception' (ibidem, p. 7) of comparative law as the paradigmatic instance of comparative legal materialism.

[47] See, eg, Sherally Munshi, 'Comparative law and decolonizing critique', 65 *American Journal of Comparative Law* (2017), 207–236; Daniel Bonilla Maldonado, *The legal barbarians: identity, modern comparative law and the Global South* (Cambridge University Press, 2021).

[48] See further below.

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F. Critical legal scholarship

Critical approaches to law critique the law on its own terms (internal critique), from the outside (external critique), or on its own terms but with the aim of transforming the existing practices and understandings (immanent critique).[49] Today, there exist many different strands of critique. These include Marxist, Frankfurt school, critical legal studies (CLS), critical race theory (CRT), feminist, post- and decolonial critique, among others. Each of these approaches has been adopted in EU law scholarship. Much of the critique is epistemic and/or ontological at its core. In particular, critique is often directed against the epistemic and ontological premises of other approaches, especially those which are dominant.

Marxist materialist critique, for instance, attacks the idealism of normative theory. On this view, moral theories are simply part of the superstructure that reproduces power structures which are determined by those who own the means of production.[50] On this understanding, ideal theories are mere fantasies.[51] Alternatively, normative theory—ideal theory but sometimes also nonideal theory—is considered ideological. Indeed, in classical Marxism the law itself is regarded as ideological. In other words, Marxist views of the law, as well as of normative legal theory such as theories of justice, tend to be ontologically and epistemically sceptical.[52]

Classical Frankfurt school critique attacked the Enlightenment project of reason and progress. Adorno and Horkheimer, in particular, argued how reason, which was meant to emancipate individuals, actually turned out oppressing them, as instrumental reason, and alienating them, by turning them into passive consumers.[53]

Foucauldian critique is first and foremost epistemic. All knowledge depends for its possibility on (contingent) historical conditions (historical a priori).[54] In other words, all knowledge production is constrained and enabled by the epistemic assumptions (*épistémè*) of its own age.[55] Knowledge and power mutually shape each other through dominant discourse (knowledge–power), for example legal discourse. As a result, the critical focus comes to lie on the power structures which are discursively produced (and reproduced) as law. In other words, Foucauldian critique tends to be epistemically relativist and ontologically sceptical.

The critical legal studies movement's critique in the 1980s was both ontological and epistemic. As to the former, crits challenged the reality of the law/politics divide. As to the latter, and relatedly, they denied the possibility of obtaining specifically legal knowledge through distinctly legal reasoning.[56] CLS had a European revival in the early days of the EPL movement.[57]

Critical race theory, which originated in legal academia,[58] argues that the current social–economic–political structure, including the law, is organised to serve the interests of white people

[49]Cf Titus Stahl, 'What is immanent critique?' (available at: https://ssrn.com/abstract=2357957); Titus Stahl, *Immanente Kritik: Elemente einer Theorie sozialer Praktiken* (Campus Verlag, 2013), ch 1.

[50]Friedrich Engels and Karl Marx, 'The German ideology' [1846], in *Karl Marx selected writings*, 2nd ed (Oxford University Press, 2000), 175–208.

[51]Explicitly so, *ibidem*.

[52]As to Marxist critique's own epistemic and ontological assumptions, Marx himself claimed that historical materialism was real and could be empirically observed. See *Ibidem*.

[53]See especially, Max Horkheimer and Theodor W Adorno, *Dialectic of enlightenment* [1944] (Verso, 1997); Max Horkheimer, *Eclipse of reason* (Oxford University Press, 1947); Herbert Marcuse, *One-dimensional man* (Routledge, 1964). Their approach was immanent and dialectical.

[54]Michel Foucault, *The order of things: an archaeology of the human sciences* [1966] (Routledge, 2001).

[55]*Ibidem*.

[56]Duncan Kennedy, 'Form and substance in private law adjudication', 89 *Harvard Law Review* (1976) 1685–1778; Roberto Mangabeira Unger, *The critical legal studies movement* (Harvard University Press, 1986).

[57]See, eg, Bas van Zelst, *The politics of European sales law* (Kluwer Law International, 2008); Chantal Mak, *Fundamental rights in European contract law* (Kluwer Law International, 2008) (both employing Duncan Kennedy's political continuum approach).

[58]Kimberlé Crenshaw et al, *Critical race theory: the key writings that formed the movement* (New Press, 1995); Richard Delgado and Jean Stefancic, *Critical race theory: an introduction*, 2nd ed (NYU Press, 2018).

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and that real change will not happen except when it is also in the interest of whites.[59] In particular, our laws produce and reproduce racialised hierarchies. It, therefore, makes no sense to believe in the possibility of objective truths regarding the law. The implication is, on the one hand, that legal scholarship cannot but be partisan. It must be undertaken explicitly and avowedly from a particular standpoint. As a result, activist scholarship is not only an acceptable type of legal scholarship; self-consciously activist scholarship is the only legitimate legal scholarship, because classical legal scholarship in effect does nothing more than to reinforce the status quo of racialised power hierarchies while at the same time obscuring this very fact by presenting itself as objective and neutral. Clearly, here too the critique is both epistemic and ontological, in that it questions the objectivity of dominant white discourse and that it understands structural racism to be very real.

Much of feminist critique is explicitly epistemic, arguing that dominant understandings of knowledge and practices of knowledge acquisition disadvantage women.[60] Standpoint critique (or standpoint epistemology) is one of the best known and most influential strands in feminist critique. Feminist standpoint critique claims that women as a group have an epistemic advantage—ie an advantage as knowers—regarding the oppression of women. Against critics claiming that standpoint critique cannot offer objective knowledge, Sandra Harding retorts that standpoint epistemologies generate *stronger* objectivity, because in order to have a full understanding of the world we cannot dispense with the perspective of currently marginalised persons.[61] However, standpoint critique itself came under attack from other feminists for essentialising women as a group, effectively privileging the perspective of white heterosexual women. Kimberlé Crenshaw pointed out that 'because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.'[62] And Judith Butler argued that gender being a social construct there is no non-normalising and non-exclusionary way of defining women and, hence, their shared epistemological standpoint.[63]

In sum, a common characteristic of various critical approaches to law is that they question the epistemic and ontological assumptions of dominant legal discourses. But what are their own ontological and epistemic commitments? When they deny the existence of certain legal realities (the private/public or the law/politics divides)—rather than being merely agnostic about them—or claim the presence of other realities (patriarchy, structural racism, the EU as being essentially neoliberal), or deny the possibility of certain types of legal knowledge (say knowledge through doctrinal scholarship), then insofar they themselves take ontological and epistemic stances.

For example, when crits reject the idea of legal reason, then this is still a statement regarding what they claim to know about the law. They are not agnostic. Instead, they positively claim that the ideas of legal reasoning and the internal perspective of the law are incoherent, and that true knowledge of positive law does not exist. Similarly, on its own terms the social constructivism thesis itself is also a social construct. And as Habermas has pointed out—against Foucault and Derrida—, the critique of reason becomes a performative contradiction when reasons are offered against reason itself.[64]

Some critical approaches are not sceptical but epistemically or ontologically relativist with regard to legal reason. This is true, for example, for certain versions of decolonial critique ('epistemologies

[59] Derrick Bell, 'Foreword: the civil rights chronicles' 99 *Harvard Law Review* (1985), 4–83.

[60] Elizabeth Anderson, 'Feminist epistemology and philosophy of science', *Stanford Encyclopedia of Philosophy* (Fall, 2024), Edward N Zalta & Uri Nodelman (eds).

[61] Sandra Harding, 'Rethinking standpoint epistemology: what is "strong objectivity?"', 36 *Centennial Review* (1992), 437–470, 438.

[62] Kimberle Crenshaw, 'Demarginalizing the intersection of race and sex: a black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', 139 *University of Chicago Legal Forum* (1989), 139–167, 140.

[63] Judith Butler, *Gender trouble* (Routledge, 1990), 19.

[64] Jürgen Habermas, *The philosophical discourse of modernity* (Polity, 1987). Of course, Habermas' position also has ontological and epistemic commitments of its own.

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of the south', 'pluriverse').[65] Also, the Foucauldian historical a priori can be understood as relativist as it regards knowledge and truth as intrinsically contingent to historical circumstances.

V. EU legal epistemology

A shown in the previous section, different methods and approaches to law offer different kinds of knowledge and understanding of it. And as was also shown, each of these approaches can be—and has been—applied to EU law. Therefore, with regard to EU law, there exist different claims to knowledge and understanding, deriving from different methods and approaches to law. The next question is whether EU law raises any specific epistemological questions or issues of its own.[66]

A. A European legal method?

A prominent question in this regard is whether a specifically European legal method is needed—or perhaps does already exist—for gaining access to knowledge about EU law. This question has several important epistemic and ontological dimensions, some of which lead back to the earlier discussion about positivist-doctrinal legal scholarship.[67]

The idea of a legal method is a key element in doctrinal-positivistic scholarship. It relies on—and vice versa purports to underscore—the understanding that positive law exists and can be known. It is a corollary to the ideas of legal sources, legal system, and legal reason. By legal method we mean, then, a method for the application, interpretation, and further development of the law. The method adopts the internal perspective from within a given legal system. Although this perspective is typically associated with the image of a judge who must apply the law to a given case, the (positivist) idea is that, in principle, any other person with sufficient knowledge and understanding of the system at hand could reach the same result. Indeed, on the positivist view it is the judge's task to apply the law as it is and can be known to be. Put differently, the idea of a legal method both expresses legal positivism's cognitivism and is meant to underscore it as well.

The idea of a legal method, and in particular the idea that employing such a method implies adopting the internal perspective of a given legal system, naturally raises the question of whether EU law requires—or already has—its own legal method. That question has already led to a discrete literature.[68] The intuition behind the idea of a European legal method is that certain distinct features of EU law require a method that matches these specific features: different sources, a different kind of system, and perhaps even its own rationality. These purported distinct features of EU law pertain to the ontology of EU law, which will be discussed in Section VI.

B. Gold plating

When EU member state laws, transposing EU directives, expand the scope of application (especially the substantive or personal scope) of the rules contained therein (gold plating), typically with a view to maintaining the normative coherence of national law (treating like cases alike), then the question arises of whether these national rules insofar as they go beyond the scope of EU law, should nevertheless be interpreted in conformity with EU law, and whether in such cases the CJEU has jurisdiction

[65] Boaventura de Sousa Santos, *The end of the cognitive empire: the coming of age of epistemologies of the south* (Duke University Press, 2018), Ch 1; Aníbal Quijano, 'Coloniality and modernity/rationality' 21 *Cultural Studies* (2007), 168–178 and Walter D Mignolo and Catherine E Walsh, *On decoloniality: concepts, analytics, praxis* (Duke University Press, 2018).

[66] These also include the question of whether it is possible for EU legal theory to escape fully the shadow of the received categories and understandings of pre-EU legal theory. On epistemic limits in this regard, see Neil Walker, 'Legal theory and the European Union: a 25th anniversary essay', 25 *Oxford Journal of Legal Studies* (2005), 481–601.

[67] See Section IV A.

[68] See, eg, Karl Riesenhuber, *European legal methodology* (Intersentia, 2021); Ruth Nielsen & Ulla Neergaard (eds), *European legal method—in a multi-level EU legal order* (Djøf Publishing, 2012); Martijn W Hesselink, 'A European legal method? On European private law and scientific method', 15 *ELJ* (2009), 20–45.

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to provide preliminary rulings concerning the interpretation. In this regard, the CJEU has held (1) that it is for the member states to decide whether the interpretation of such gold-plating national law should follow the interpretation of EU law and (2) that in case national law indeed requires so the CJEU does have jurisdiction to give a preliminary ruling, because it is in the interest also of the EU to ensure such normative coherence.[69]

The epistemic dimension is clearly the idea, held by the referring national court as well as by the CJEU, that in such cases of national gold plating of EU law the interpretation of EU law by the CJEU can provide knowledge—and that the CJEU as an interpreter enjoys epistemic authority—with regard to the proper interpretation of provisions of national law falling outside the scope of EU law. Put differently, the epistemic idea is that in such cases the CJEU can shine a helpful (albeit non-binding) light on the gold-plating elements in the national law transposing EU law.

C. Multilingual legal knowledge

The EU is strongly committed to multilingualism.[70] For EU law, this means that all language versions are equally authoritative. But what if different language versions contradict each other? Different strategies can be envisaged and have been discussed.[71]

Similarly, multilingual law leads to multilingual legal scholarship. To the extent that these different linguistic communities of EU law scholarship have developed different understandings of EU law (to a degree unbeknownst to each other), this raises the epistemological question whether only one of them can be correct (and how this could be determined) as well as the ontological question whether in reality perhaps there exist as many versions of EU law as there exist official EU languages (ie 24).

D. Imaginaries

In EU law scholarship, the idea of 'imaginaries' has become quite fashionable in recent years. The use of the term is somewhat ambiguous. Sometimes it seems to be understood as a synonym for a (political) theory. However, to the extent that it is meant to have a more specific meaning, as something more in the background with no specific author, it seems best understood as an epistemic notion, referring to our way(s) of—and conditions for—understanding EU law. For example, Jan Komárek defines 'European constitutional imaginaries' as 'ideas that stand behind various conceptualisations of the EU constitution, produced by EU constitutional lawyers and theorists'.[72]

Marija Bartl has adopted Taylor's notion of 'social imaginaries' in her account of transformations of European private law, defining social imaginaries similarly as the collectively held, and often institutionalised, beliefs, ideas, images, and fantasies that underwrite our lived experience. They represent shared pre-understandings as to what constitutes our social existence—how the economy, society, human relations, nature, and politics fit together—thereby providing a basic infrastructure for meaning making, the reduction of complexity, and the ordering of social reality.[73] Note, however, that Bartl's

[69] See CJEU, 17 July 1997, *Leur-Bloem*, C-28/95, EU:C:1997:369, para 32, and more recently CJEU, 24 October 2019, *Belgische Staat*, joined cases C-469/18 and C-470/18, ECLI:EU:C:2019:895, paras 21–23.

[70] See the very first regulation, EEC Council Regulation No. 1, determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, 385–386.

[71] CJW Baaij, *Legal integration and language diversity: rethinking translation in EU lawmaking* (Oxford University Press, 2018).

[72] Jan Komárek, 'European constitutional imaginaries: utopias, ideologies and the other', *iCourts Working Paper Series*, No. 172; 2019 *IMAGINE Paper* No. 1.

[73] Marija Bartl, 'Socio-economic imaginaries and European private law', in: *The law of political economy: transformations in the function of law*, PF Kjær (ed) (Cambridge University Press, 2019), ch 9.

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understanding of social imaginaries is distinctly more economically tilted than Taylor's.[74] Note also that Bartl's use of the term sometimes verges on ontologising 'social imaginaries', as if they existed 'out there', having subjectivity and agency, doing things in the world.

E. Common core

In the past two decades, the 'Common Core of European Private Law' project, involving more than 300 academics from all across Europe, has produced more than 20 scholarly volumes.[75] Clearly, the ontological and epistemic premises of this branch of European legal research are that such a common core of different European legal systems both exists and can be ascertained.

Similarly, the CJEU regularly refers to principles common to the constitutional traditions of the member states.[76] Here too, the premise seems to be that such constitutional traditions common to 27 different states do exist and can be known.

The existence of truly common traditions, as opposed, eg to a mere overlapping consensus among different traditions,[77] seems a strong ontological claim. It also seems difficult, at least as a practical matter, to know them, as such, ie independently of the member states' legal systems.

A further epistemic dimension is that common core research foregrounds similarity, and by the same token backgrounds differences, between European legal systems. The political dimension of knowledge acquisition (or, in a more sceptical formula, of knowledge production) here is that the common core discourse favours European integration—or, to be more precise, claims to uncover already existing uniformity, ready to be discovered and perhaps codified—by EU institutions.

F. Eurocentrism

Do European legal scholars have any privileged knowledge of—or access to—EU law? Does one have to be European to be able to know EU law (properly)? Or is it perhaps the case that outsiders (Europe's 'others') can know EU law, but inevitably will know it differently (perhaps less well) than the way Europeans know it? If this were the case, clearly knowledge and understanding of EU law would be fundamentally and categorically relative. The relativist view raises complicated practical questions as to who should properly count as European for the purposes of knowing EU law. Is citizenship decisive? This may include Europeans who never set foot on EU territory. It would also mean that at the moment of Brexit all UK citizens, including persons who had lived all their lives within the borders of the EU (some of whom were practitioners or professors of EU law), would have lost true or full knowledge of EU law, or at least that their knowledge underwent a categorical modification on 1 February 2020 (Brexit date). Or is it a (full) legal education in an EU member state that matters most? These practical questions are familiar from comparative law, especially from those understandings of comparative law, which claim, as we saw, that there exist unsurmountable epistemic obstacles to knowing foreign law.

Perhaps the right question to ask here is a very different one: Is the knowledge Europeans have of EU law necessarily Eurocentric? The more radical strands in decolonial critique claim, on the one hand, that the European point of view is necessarily Eurocentric and, on the other, that knowledge produced elsewhere, notably in the Global South, is necessarily and categorically different. This general claim, it seems, can be applied to knowledge of EU law as well. On this view, Europeans cannot but have a Eurocentric view of EU law, only non-Europeans can have a non-Eurocentric view. The

[74] See further, Martijn W Hesselink, *Justifying contract in Europe: political philosophies of European contract law* (Oxford University Press, 2021), 317–321.

[75] On the 'Common Core of European Private Law' project, see https://common-core.org. On its methodology, see Mauro Bussani & Ugo Mattei, 'The common core approach to European private law', 3 *Columbia Journal of European Law* (1997/1998) 339.

[76] See, eg, CJEU, 15 July 2021, *European Commission* v *Republic of Poland*, C-791/19, ECLI:EU:C:2021:596, para 52.

[77] Cf John Rawls, *Political liberalism* (Columbia University Press, 2005), Lecture IV.

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implication is that Europeans, rather than having special epistemic authority concerning EU law, in fact cannot fully know it. In particular, they lack the epistemic advantage of being socially situated in a way that allows them to know how it impacts non-Europeans. It takes the standpoint of EU's 'others', who may reside inside the EU or outside it, to be able to know properly the impact of the EU on those whom the EU has turned into its others.

G. Epistemic borderwork and sabotage

The next section will discuss EU legal ontology, ie questions about what EU legal discourse considers to be there and about the EU's mode of being. However, while this neat distinction between epistemology and ontology may work well on the analytical level, it dramatically falls apart when it comes to the crude reality of the EU's external boundaries. As Thom Davies, Arshad Isakjee, and Jelena Obradovic-Wochnik demonstrate in their chilling account of epistemic struggle over the truth of systemic illegal pushback at the external borders of the EU,[78] epistemic violence is a constituent part of the EU borders' existence while epistemic struggle is endemic to its mode of being.[79] They propose the term 'epistemic borderwork' to capture 'practices designed to deny, conceal, or undermine knowledge about the violence of borders'.[80] These practices include notably the racialisation of migrants to undermine their epistemic authority. By collecting thousands of testimonies of pushback survivors, building a 'counterhegemonic archive', these scholars self-consciously engage in research-activism, a form a epistemic resistance.[81] Their aim is to create 'epistemologies of refusal' that can sabotage the state's epistemic borderwork.[82]

VI. EU legal ontology

While EU legal epistemology focuses on how we can know EU law, EU legal ontology instead is concerned with what is there to be known. Ontological claims about the EU are claims about the EU's reality, including its mode(s) of being. Similarly, ontological commitments are concerned with what must be there (or absent) for a statement or theory to be capable of truth. What are such 'truth makers' for claims about EU law?[83]

As will be shown in this section, some familiar debates about EU law can be shown to be concerned with the EU's legal ontology. The focus will be on highlighting the ontological commitments rather than on attempting to resolve the disputes over them, which would reach far beyond the scope of this paper.

As we will see, many specific doctrines, such as primacy, direct effect, harmonious interpretation, and the autonomy of EU law are bound up with commitments concerning the ontology of the EU and its laws. And as will also become clear, views on whether and how some of these questions are understood to overlap, in part, also depend on ontological commitments.

[78] Pushbacks are illegal under international law and also specifically under EU law (principle of non-refoulement). See, notably, Arts 18 and 19, Charter of Fundamental Rights of the European Union; Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive); Regulation 2019/1896 of 13 November 2019 on the European Border and Coast Guard (Frontex).

[79] On epistemic violence, see Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in C. Nelson, L. Grossberg (eds.), *Marxism and the interpretation of culture* (Macmillan Education, 1988), pp. 271–313.

[80] Thom Davies, Arshad Isakjee & Jelena Obradovic-Wochnik, 'Epistemic Borderwork: Violent Pushbacks, Refugees, and the Politics of Knowledge at the EU Border' (2023) 113 *Annals of the American Association of Geographers* (2023) 169–188.

[81] The term 'epistemic resistance' was introduced by José Medina, *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination* (Oxford University Press, 2013), 3.

[82] Davies, Isakjee & Obradovic-Wochnik, 'Epistemic Borderwork', n 80.

[83] On ontological commitments as truth makers for a theory, see Phillip Bricker, 'Ontological commitment', *Stanford Encyclopedia of Philosophy* (Winter, 2016), Edward N Zalta (ed).

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A. What is the EU?

The most fundamental ontological question about the EU is: what is it, an international organisation, a superstate, a sui generis entity? Given that no one denies the EU's existence, this is a question about the EU's mode of being.[84] Any essentialist (or essentialising) claims about the EU's nature are also ontological (or ontologising) claims. As examples, think of claims to the effect that the EU is in essence Christian,[85] or a peace-organisation,[86] or that certain values are part of the EU's essence.[87] Insofar, the preambles to the Treaties can be regarded as attempts at situating the EU metaphysically.

A related matter is the question of the EU's finality.[88] This question about the EU's telos—what the Union is for—is also an ontological question. Or to be more precise, the question whether the EU has a telos and what it is are ontological questions, while the question of what it ought to be or become is a normative one.[89]

Another vexed question underlying various debates on EU law is whether the EU has a demos (*Volk*, 'we the people of the EU'). The question is central to the debate on the relationship between the EU and its member states, in particular between the Treaties and national constitutions, and consequentially on the relationship between national constitutional courts and the CJEU, most notably the vexed question of ultimate authority to determine authority (*Kompetenz-Kompetenz*). As it is well known, the German Federal Constitutional Court has consistently held that the EU has no democratic people (demos, Volk) that would be constitutive of the EU ('we the European people'). In its Lisbon judgment, the Court contended that, 'even in the new wording of Article 14.2 Lisbon TEU, and contrary to the claim that Article 10.1 Lisbon TEU seems to make according to its wording, the European Parliament is not a representative body of a sovereign European people.'[90] The no-demos thesis also operates as a premise within several political theories of the EU. Think for example of Kalypso Nicolaïdis' account of the EU as a demoicracy,[91] and of Richard Bellamy's theory of a republican Europe of sovereign states.[92] Some contributions to the debate understand a democratic demos as an ethical community that must exist, at least in part, prior to political institutions, while others regard it as legally constituted by these very institutions. Thus, the no-demos thesis can be understood variously as referring to an empirical fact, a social construct, or a normative construct.

[84] One aspect of the EU's mode of being is that it founded on the Treaties. See Art, Para 2 TFEU: 'This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded'.

[85] See the political debates in 2006 on the preamble of what became the Lisbon Treaty, where the then German Chancellor Angela Merkel, following Pope John Paul II, stressed the need for the European constitution to refer to 'our Christian values'. Cf 'Merkel backs more Christian EU constitution', *Guardian*, 29 August 2006 (www.guardian.co.uk/world/2006/aug/29/germany.eu).

[86] See the Schuman declaration of 9 May 1950. See also Àgnes Heller, *Paradox Europa* (Edition Konturen, 2019).

[87] On the metaphysics of the EU, see the Court's reasoning in the landmark cases CJEU, 16 February 2022, C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, para 125, and CJEU, 16 February 2022, C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98, para 143, discussed further below, in Section VI.H.

[88] Cf Art 3, Para 1 TEU: 'The Union's aim is to promote peace, its values and the well-being of its peoples.

[89] See the debate triggered by Joschka Fischer, 'From Confederacy to Federation—Thoughts on the finality of European integration' (speech by at the Humboldt University, Berlin, 12 May 2000, available at http://www.cvce.eu/viewer/-/content/4cd02fa7-d9d0-4cd2-91c9-2746a3297773/en). Cf Ulrich Haltern, 'On Finality', in: Armin von Bogdandy & Jürgen Bast (eds), *Principles of European Constitutional Law*, 2nd ed. (Hart Publishing, 2010), ch 6; Joseph HH Weiler, 'Does Europe need a constitution? Demos, telos and the German Maastricht decision', 1 *European Law Journal* (1995), 219–258.

[90] *BVerfG*, Judgment of 30 June 2009–2 BvE 2/08, 280. In support of this view, see, eg, Dieter Grimm, 'Does Europe need a constitution?' 1 *ELJ* (1995), 282–302; Fritz W Scharpf, 'Legitimacy in the multilevel European polity', 1 *European Political Science Review* (2009), 173–204, 177.

[91] Kalypso Nicolaïdis, 'European demoicracy and its crisis', 51 *Journal of Common Market Studies* (2013), 351–369, 351 and 356.

[92] Richard Bellamy, *A republican Europe of states: cosmopolitanism, intergovernmentalism and democracy in the EU* (Cambridge University Press, 2019), 119.

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Either way, each of these understandings constitutes or includes a claim about the mode of being of a democratic people (demos) and/or of the EU. And as we saw, empiricism, social constructivism, and moral constructivism each have their own ontological commitments too.

General background understandings about what the EU is, what it exists for, where it is going, and whom it is made of, inevitably feed into more specific views and debates about the nature, scope, legitimacy, and future of EU law. In other words, contributions to the political and academic debates on EU law tend to be grounded, often implicitly, in background metaphysical views about the nature of the EU.

B. How many systems?

A core ontological question about EU law is whether it is a system. If so, this raises the further question of how it relates to the legal systems of the members states, and, hence, the question how many legal systems there are in the EU. There are several possibilities: (a) EU law is not a system; (b) all the law applicable within the boundaries of the EU constitutes one big (multilevel) system; (c) there are as many systems as there are member states (EU law as ultimately national); (d) there are the member state systems plus one EU law system; and (e) the EU has its own legal system, which however is at the same time also an integral part of the member state systems.[93] Which is it?[94] If indeed a 'European Union legal system' exists (contrary to alternative a),[95] (only) then further questions arise concerning the relationships between the different systems (in alternatives c–e)) or among the different levels with the one big system (alternative b). A specific instance of this latter type of questions is whether the principle of harmonious interpretation, which requires national courts to interpret national law within the scope of EU law as much as possible in conformity with that EU law,[96] is really a principle of EU law, of national law, or of both.[97] A further question is whether EU law should be understood to be a complete legal system or only as a partial one.[98] And in the latter case, whether EU law depends on national law, or vice versa, or whether they are co-dependent. Each of these are ontological (and hence metaphysical) questions about EU law's mode of being.

C. Constitutional pluralism

Constitutional pluralism offers a particular answer to the question of the relationship between EU law and the constitutions of the member states, in particular the question, of who, the CJEU or

[93] The latter possibility is modelled after the CJEU's view as expressed in landmark cases such as *Costa/ENEL* and *Francovich*. See ECJ, 15 July 1964, C-6/64, *Costa v E.N.E.L.*, ECLI:EU:C:1964:66. See also CJEU, 19 November 1991, joined cases C-6/90 and C-9/90, *Francovich*, ECLI:EU:C:1991:428, 31.

[94] On this question, see generally, Julie Dickson, 'How many legal systems? Some puzzles regarding the identity conditions of, and relations between, legal systems in the European Union', 9 *Problema* (2008), 9–50; idem, 'Towards a theory of European Union legal systems', in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press, 2012), 25–53, and with specific reference to European private law, see Martijn W Hesselink; 'How many systems of private law are there in Europe? On plural legal sources, multiple identities and the unity of law', in: L Niglia (ed), *Pluralism and European private law* (Hart Publishing, 2013), 199–247.

[95] Explicitly in this sense, CJEU, 27 October 2016, *James Elliott Construction*, Case C-613/14, ECLI:EU:C:2016:821, 34.

[96] See, eg, CJEU, case C-106/89, *Marleasing,* EU:C:1990:395; case C-555/07, *Kücükdeveci*, EU:C:2010:21. The limit of this obligation is contra legem interpretation. See, eg, CJEU, 30 April 2014, C-26/13, *Kásler*, ECLI:EU:C:2014:282, para 65.

[97] See Julie Dickson, 'Directives in EU legal systems: whose norms are they anyway?', 17 *ELJ* (2011), 190–212; Claus-Wilhelm Canaris, 'Die richtlinienkonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre' in: H. Koziol & P. Rummel (eds), *Im Dienste der Gerechtigkeit (Festschrift Franz Bydlinski)* (Springer, 2002).

[98] For the latter claim regarding European private law, see Grigorios Bacharis and Szymon Osmola, 'Rethinking the instrumentality of European private law', 30 *ERPL* (2022), 457–480.

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national constitutional courts, has ultimate authority in determining the scope of EU law (*Kompetenz-Kompetenz*). The particular answer, which became quite influential,[99] is one of heterarchy as opposed to hierarchy: neither the member states nor the EU has ultimate authority.

Just as regarding other types of pluralism (such as legal pluralism and value pluralism) also for constitutional pluralism we can distinguish between radical (or foundational) and constrained pluralism. In the former case, each constitutional order produces outcomes that are legally valid on its own terms,[100] while in the latter, although there exists no hierarchy, the member states and the EU (in particular, their courts) are constrained by principles, which may be discursive principles for judicial dialogue or moral principles.[101]

Some contributions to the academic debate consider constitutional pluralism in the EU to be an observable fact;[102] others argue that it is (also) normatively required or desirable.[103] Similarly, opponents reject it as merely the misguided denial of the fact of the supremacy of EU law (offering *Costa/Enel* as evidence) or as politically undesirable. However, the important point here, as it has been rightly pointed out, is that the main disagreements between the different theories about constitutional pluralism go back to their divergent ontological commitments, in particular to their respective legal ontologies, ie their specific understandings of what law is and of its mode of being (notably legal validity).[104]

D. The instrumental nature of EU law

The debate about EU legal instrumentalism is fundamentally concerned with the EU law's mode of being: is EU law essentially instrumental? This question is hotly debated with regard to EPL.[105] Some contributions to the debate are normative or critical, criticising EPL for being instrumental to internal market objectives instead of being concerned with other objectives such as justice, thus claiming explicitly that EPL is (entirely or partly) instrumental. Other contributions challenge this assumption and aim to demonstrate that, despite appearances, EPL is in reality not instrumental but (especially in the case of consumer law) concerned with justice, in particular substantive interpersonal justice.[106]

[99] Cf Joseph HH Weiler, 'Prologue: global and pluralist constitutionalism—some doubts', in: Gráinne De Búrca & Joseph HH Weiler (eds.), *The worlds of European constitutionalism* (Cambridge University Press, 2012), 8–18, 8: 'Is there anyone out there who is not a constitutional pluralist?'.

[100] Neil MacCormick, *Questioning sovereignty: law, state and practical reason* (Oxford, OUP, 1999), 119. Hans Kelsen, *General theory of law and state* [1945] (Transaction Publishers, 2007), 363–364, made very clear how radical the implications of true pluralism are. If pluralists reject hierarchy and coordination between systems, be it direct or indirect (by reference to a third more comprehensive unit), then this absence of any relationship means that the other system must be ignored qua legal system: it is reduced to fact. This is an epistemological position which ultimately leads to state solipsism (*ibidem*, 379).

[101] See respectively Miguel Poiares Maduro, 'Contrapunctual law: Europe's constitutional pluralism in action', in: Neil Walker, *Sovereignty in transition: essays in European law* (Oxford: Hart, 2003), 501–537, and Mattias Kumm, 'The cosmopolitan turn in constitutionalism: on the relationship between constitutionalism in and beyond the state', JL Dunoff & J Trachtman (eds), *Ruling the world? Constitutionalism, international law and global governance* (Cambridge University Press, 2009), 258–324. MacCormick's own later position of pluralism under international law is essentially monist.

[102] See, eg, Michal Ovádek, 'Constitutional Pluralism between normative theory and empirical fact' *VerfBlog*, 2018/10/23.

[103] Nico Krisch, *Beyond constitutionalism: the pluralist structure of postnational law* (Oxford University Press, 2010), argues for radical legal pluralism on normative grounds, ie he advocates it as an attractive option.

[104] Dimitri Van Den Meerssche, 'European perspectives on constitutional pluralism(s): an ontological roadmap', 9 *Transnational Legal Theory* (2018), 1–31.

[105] See, eg, Bacharis and Osmola, 'Rethinking the instrumentality of European private law'; Candida Leone, *The missing stone in the cathedral: of unfair terms in employment contracts and coexisting rationalities in European contract law* (2020) (doctoral thesis University of Amsterdam); Marija Bartl, 'Internal market rationality, private law and the direction of the Union: resuscitating the market as the object of the political', 21 *European Law Journal* (2015), 572–598; Christoph U. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung* (Nomos, 2010); Martijn W. Hesselink, 'European contract law: a matter of consumer protection, citizenship, or justice?', 15 *European Review of Private Law* (2007), 323–348.

[106] In this sense, Leone, *op cit* (for the unfair terms directive), and Bacharis and Osmola, *op cit*.

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These claims are clearly ontological in nature, because they are about what EPL is and about its real mode of being and/or its essential nature (ie that it could not even be otherwise). In other words, they are concerned with the legal ontology of EPL, including the ontological question of whether EPL has an essential nature.

Consider, in this regard, Ralf Michael's striking metaphor of the EU regulatory islands within the ocean of the general private law of the civil code (or the common law, as the case may be), which conveys an explicit ontological message about the mode of being of EPL.[107] Indeed, Michaels' underlying assumption, recently followed by Candida Leone,[108] that the law itself (as opposed to law makers or other agents) has 'rationalities' of its own, reflects a distinct ontological view about the law's mode of being. Specifically, Michaels distinguishes, for the European context, the 'instrumentalist' rationality as the rationality of the *acquis communautaire* from the 'juridical' rationality of the national civil codes and the common law, while Leone distinguishes, with reference to European contract law, between 'private law' and 'regulatory' rationalities. In sum, the scholarly debate about the instrumental nature of the private law acquis, it turns out, is essentially a metaphysical debate.

Note, in this regard, how the ontological idea of legal rationalities, as properties of the law, is distinct from the ideas of 'legal paradigms',[109] 'globalisations of legal thought',[110] 'legal consciousnesses',[111] and 'legal imaginaries',[112] which are epistemic, referring as they do to legal knowledge and understanding.

E. No private law/public law divide

It is a well-known characteristic of EU law that it does not distinguish between private law and public law. Therefore, it could be said that the absence (or transcendence) of the private/public law distinction is a characteristic ontological feature of EU law. However, that is not the only possible position. Alternatively, it could be—and recently has been—argued that the public/private divide in EPL should be 'rediscovered'. That latter argument is based on the epistemological assumption that such rediscovery is possible, which, in turn, presumes, as a matter of EU legal ontology, that the divide between private and public law is there, ie exists in fact, as a matter of EU law's reality, ready to be discovered, and has only been ignored so far or denied by EU law discourse.[113]

F. Neither common law nor civil law

EU law makers and theorists often rely, explicitly or implicitly, on the notion that EU law somehow stands outside the common law *v* civil law divide. Albeit a negative one, the 'no common/civil law divide' view still amounts to an ontological assumption or claim concerning to EU law's mode of being. It is also a remarkable one, in light of the legal self-understandings of the member states. Most member states consider their own national legal systems to be either a common law or a civil law system.

[107] Ralf Michaels, 'Of islands and the ocean: the two rationalities of European private law' in R Brownsword, H-W Micklitz, L Niglia and S Weatherill (eds) *The foundations of European private law* (Hart Publishing, 2011).

[108] Leone, *op cit*, 12ff and passim.

[109] Jürgen Habermas, *Between facts and norms, contributions to a discourse theory of law and democracy* (MIT Press, 1996), ch 9.

[110] Duncan Kennedy, 'Three globalizations of law and legal thought: 1850–2000', in: D Trubek & A Santos (eds), *The new law and economic development: a critical appraisal* (Cambridge University Press, 2006), 19–73, 22–23.

[111] Hans-W Micklitz, *The politics of justice in European private law: social justice, access justice, societal justice* (Cambridge University Press, 2018), Part I.

[112] See Komárek, *op cit*, who understands 'European constitutional imaginaries' as 'ideas that stand behind various conceptualisations of the EU constitution, produced by EU constitutional lawyers and theorists'.

[113] See Olha O Cherednychenko, 'Rediscovering the public/private divide in EU private law' 26 *European Law Journal* (2020), 27–47. Her claim seems indeed ontological (and thus a priori) rather than political, normative and/or empirical.

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This means that the 'neither common law nor civil law' understanding of EU law is connected also to the 'how many systems' question discussed above. The 27 + 1 understanding (where EU law is a system of its own, distinct from the national laws) is easiest to match with a 'neither common law nor civil law' legal ontology of EU law. By contrast, the 'one big system' account immediately raises the question of whether that big system is a common law or civil law system, or a mix, or neither. Similarly, on the 27 systems account (where EU law is part of national law) the EU law element within each system would have the chameleonic nature of switching from common law to civil law, depending on which of the 27 systems one is talking about.

In a lighter version, EU law makers and theorists are committed to a convergence thesis, understood as either independent from or a (part) result of EU integration.[114] On this understanding, similar questions arise, except that the ontology of EU law is understood here as explicitly dynamic. It is important to underline, in this regard, that there have been fierce opponents to the convergence thesis. Think especially of Pierre Legrand, who argues that 'cultural integration or convergence is a promise that law is simply ontologically incapable of fulfilling'.[115]

Brexit has raised new questions concerning this aspect of the ontology of EU law. It may well be that with the departure of the UK, which was the most politically powerful representative of the common law within the EU, EU law will gradually turn more into a civil law system after all—as a civilianisation project all but in name.[116] This raises the question of whether legal ontology has—or at least, can have—a dynamic dimension which allows (ontologically speaking) for legal transformation.

G. The fact/law distinction

In EU regulatory discourse, commitments to the fact/law distinction seem to be shifting. Various forms of what used to be considered private ordering (and therefore factual from the point of view of the law) have been recognised as law, also by the CJEU. Think for example of standard setting, where to CJEU held, in *Fra.bo*, that the standardisation and certification activities of a private-law body may constitute a restriction of the free movement of goods and hence an infringement of Art 28 EC (now 34 TFEU).[117]

The idea of an EU private administrative law, defended by Rodrigo Vallejo, raises similar questions[118]: if various types of private regulation constitute law from the point of view of administrative law, while at the same being also fact from the point of view of private law, where does that leave us with regard to the fact/law distinction? For example, widely applied standard contract terms might be held invalid by EU contract law because they are unfair. Does this then also entail their invalidity qua private regulation and/or qua private administrative law? Would this mean that insofar private administrative law would be subject (as fact) to private law? That would seem odd. Whatever the answers, these are clearly questions of legal ontology, and different answers inevitably will rely on different ontological commitments.

H. EU values and principles

Pursuant to Art 2 TEU, the EU is 'founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. The reference to EU values is not merely ornamental. These values play a

[114] See, eg, Basil Markesinis (ed), *The gradual convergence: foreign ideas, foreign influences, and English law on the eve of 21st Century* (Oxford University Press, 1994).

[115] Pierre Legrand, 'European legal systems are not converging', 45 *International and Comparative Law Quarterly* (1996), 52–81.

[116] Critical of the '*idée fixe*' held by civilians within the European Union of 'civilianising (or, as they no doubt mean, "civilising") the common law', see Pierre Legrand, 'Against a European civil code', 60 *MLR* (1997), 44–62.

[117] CJEU, 12 July 2012, *Fra.bo*, C-171/11, ECLI:EU:C:2012:453.

[118] Rodrigo Vallejo, *The idea of a private administrative law* (PhD thesis EUI, 2021).

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central role both in the EU's internal and its external relations. As to the former, the EU values, in particular respect for the rule of law, are central to the mechanism set out in Art 7 TEU that could ultimately lead to the suspension of some of the rights of a member state (most notably its voting rights in the Council). As to the latter, the EU seeks a special relationship with its neighbouring countries founded on these EU values (Art 8 TEU) and defines and pursues its common foreign policies to 'safeguard its values', among other things (Art 21 TEU). For this to be possible, these values must be real, and it must be feasible to learn about them (notably, about their implications). This means, it would seem, that the EU is committed to ethical realism and cognitivism. As we saw above, these are specific and hardly uncontroversial ontological (ie metaphysical) and epistemic commitments. Interestingly, pursuant to Art 7 TEU, it is part of the legal ontology of EU values (ie their mode of being) that they can be 'breached', while the European Council (acting unanimously) is deemed to have epistemic authority in determining the existence of a serious and persistent breach by a member state of these values. Another interesting specific ontological dimension is that pursuant to the TEU, the values of the Union (cf Arts 13, 21, 32: 'its values') are at the same time 'universal values' (Preamble). The latter seems to express the EU's ontological and epistemological commitment against ethical relativism.[119] In the recent conditionality cases of the Commission against Hungary and Poland, the CJEU's reasoning took a strongly metaphysical turn when it referred to the *'essential characteristics* of EU law, which stem from the *very nature* of EU law'.

Quite similarly, also the general principles of EU law presumably are real. And the same applies, it would seem, for the general principles of civil law.[120] However, an important ontological difference between the general principles of EU law and the general principles of civil law, on the one hand, and the EU's values, on the other, is that the latter apparently exist independently of the EU. This certainly must be the case to the extent that the EU's values are indeed universal: then, their reality cannot be contingent upon the existence of the EU (or on its continued commitment to these values). By contrast, the ontological status of the EU's principles is less clear. Insofar as the EU (or its legal order) has 'recognised' them or they have been 'discovered' by the CJEU, this suggest that they too exist independently of the EU's legal recognition or discovery, albeit presumably not as law. To the extent, however, that they are creations of the CJEU's, by contrast, they seem to be principles that, at least as such, have no existence independent of the EU. The notion that the CJEU protects them is compatible with either and is insofar ontologically noncommittal.

As a specific aspect of their mode of being or of how they can be known, the general principles of EU law are understood, in various views, to stand in a genetic (ontological) or cognitive (epistemological) relationship to the laws of the members states, in particular the constitutional traditions common to them.[121] With reference to the general principles of civil law the CJEU has been less clear in this regard.[122]

It will be apparent that these different views of principles relate to familiar positions in general jurisprudence, in particular exclusive positivism (which does not recognise principles as a source of law),[123] inclusively or soft positivism (which recognises the legality of any principles that the rule of

[119] More precisely, the universalism is the commitment of the masters of the treaty (the heads of state representing the countries party to the treaty) given that it is expressed in the preamble.

[120] CJEU, 18 July 2007, *Société thermale d'Eugénie-les-Bains*, C-277/05, ECLI:EU:C:2007:440. Cf Martijn W Hesselink, 'The general principles of civil law: their nature, roles and legitimacy', in: Dorota Leczykiewicz & Stephen Weatherill (eds), *The involvement of EU law in private law relationships* (Hart Publishing, 2013), 131–180.

[121] CJEU, *Internationale Handelsgesellschaft*, para 4: 'inspired by the constitutional traditions common to the member states'. Rudolf Steiner, *The stages of higher knowledge: imagination, inspiration, intuition* [1896] (SteinerBooks, 2014), ch 4, considered inspiration a (higher) mode of cognition.

[122] Some of the Court's Advocates General have assimilated the general principles of civil law with the model rules in the DCFR. See, eg, CJEU, 10 April 2008, *Hamilton*, C-412/06, ECLI:EU:C:2008:215, Opinion of AG Maduro, ECLI:EU:C:2007:695.

[123] Andrei Marmor, 'Exclusive legal positivism', in: *Oxford handbook of jurisprudence & philosophy of law* (J Coleman and S Shapiro, eds), ch 3.

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recognition refers to),[124] and interpretivism (which holds that the interpretation of legal sources must involve the consideration of principles).[125]

VII. The battle between different approaches to EU law

In Sections V and VI, we saw how in some of the main battlefields concerning EU law participants to the same debate had very different epistemic and ontological starting points. This brings us to the meta-question of how to understand the battle between the different approaches to EU law scholarship, with their divergent epistemic and ontological commitments, discussed in Section IV.

There are various concrete contexts in which this theoretical battle may become very practically relevant. For example, when wondering whether one's paper 'deal[s] with European Union law, and legal issues relating to the European Union' as understood by the editorial board of a leading journal on EU law,[126] or at the defence of a doctoral thesis in EU law, or when responding to a peer review about one's book proposal from Reviewer B, or when assessing applications for an academic post in EU law.

But similar conflicts may arise not only in the academic context. Given the key role EU law scholars play, directly or indirectly, and de facto or in official capacity, in EU law-making, the battle of disciplines whenever EU law scholars exercise a form of authority in shaping, interpreting and developing EU law, be it as a former professor and current judge (or A–G) in the CJEU (or in a national court handling EU law cases), or as an expert writing a report for the European Commission or the Parliament, or indeed as a junior scholar commenting, in an influential blog, upon an EU law case or legislative proposal.

A. A struggle for ideological hegemony

One way to understand this battle—perhaps the most sceptical one—is to see *all* understandings of EU law, including their respective epistemic and ontological commitments, as ideologies, and to regard the clash between them as nothing more than a power struggle for ideological hegemony in Gramscian vein,[127] or as a political struggle between friend and foe in Schmittian-Mouffian style,[128] with no shared background understanding eg about the rules of the game.[129]

Clearly, such an account of the dispute between different approaches to EU law would be radically sceptical, both epistemologically and ontologically. It would mean that the discussion *qua* EU legal epistemology or EU legal ontology would stop here. (It could still be pursued in some politically 'realist' vein, with no *specific* place for either (legal) epistemology or ontology, not even as a distinct type of discourse.) However, most accounts of the conflict between different approaches to EU law are not that sceptical (if at all).

[124] Hart, *The concept of law*, 250 (Postscript).

[125] Ronald Dworkin, *A matter of principle* (Harvard University Press, 1986); idem, *Law's empire*.

[126] Cf the CMLRev's website: 'The Common Market Law Review is the pre-eminent journal dealing with European Union law, and legal issues relating to the European Union.' (https://kluwerlawonline.com/Journals/Common+Market+Law+Review/2).

[127] Cf Antonio Gramsci, *Selections from the prison notebooks* [1929–1935] (Q Hoare and G Nowell Smith, eds) (Lawrence & Wishart, 1971).

[128] Carl Schmitt, *The concept of the political* [1932] (University of Chicago Press, 2007); Chantal Mouffe, *Agonistics: thinking the world politically* (New York: Verso, 2013); Ernesto Laclau and Chantal Mouffe, *Hegemony and socialist strategy: towards a radical democratic politics* (Verso Books, 2014).

[129] For a recent Mouffian take of EU law and democracy, see Christina Eckes, 'How radical is the understanding of democracy in *Justifying Contract in Europe*?', 51 *Netherlands Journal of Legal Philosophy* (2022), 11–17.

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B. The conflict of faculties – resolution through reason

Another way of looking at the question—the opposite way, in a sense—is to understand it as a matter that can be resolved through reason. Indeed, the question recalls one of Immanuel Kant's last essays, from 1798, on the conflict of faculties. Shortly after the French Revolution, this was a highly divisive and politically consequential question.[130] Kant argued that while there was a natural division of labour between the faculties, each academic discipline having its own questions to address, the claims made in the faculties of theology, law, and medicine were all grounded in texts (codes, including the deontological code for medical doctors), and subject to authorities (secular or divine) other than pure reason, only philosophy had the freedom to be concerned exclusively with the truth, and, hence, was the only autonomous discipline. Indeed, while the other faculties defended the statutes of the government only philosophy was critical. Therefore, it should have a certain primacy over the other faculties.

In an early contribution to the EPL debate, with explicit reference to Kant, Christian Joerges pointed to the contest of legal disciplines, between EU lawyers, national private lawyers, and comparative lawyers, over the field of EPL. He questioned whether this struggle should necessarily be understood as a quest for power and hegemony and whether perhaps a different reading was possible, ie as a tentative rationalisation process. He submitted that a selective Europeanisation of private law, through a critical debate informed by these various legal disciples, contained potential for rationalisation, adding that rationalisation processes are always painful and come with loss of illusions.[131]

C. Different views of the cathedral

Yet another way to understand the different approaches to EU law, and their respective epistemological and ontological commitments, would be as merely different views of the same cathedral. The metaphor was introduced by Calabresi and Melamed, when explaining how their contribution (which became one of the foundational texts of the law and economics movement) concerned 'only one possible way of looking at and analysing legal problems'.[132] Referring to a series of paintings made by Claude Monet of the Notre-Dame de Rouen cathedral, they pointed out that 'to understand the Cathedral one must see all of them'.[133] Since then, the metaphor has been picked up frequently, also in EU law scholarship, eg by Daniela Caruso,[134] and most recently by Candida Leone.[135]

The underlying fundamental idea is not only that these are different perspectives on one and the same object, which exists—and has a mode of being—independently of observation, and that are mutually compatible and go together harmoniously, but also that full knowledge of—in our case—EU law is possible only through the combination of all perspectives: 'to understand the Cathedral one must see all of them'.[136] In sum, the metaphor evokes the harmonious possibility of—and the epistemic basis for—methodological pluralism in—in our case—EU legal scholarship.

[130] See Immanuel Kant, *The conflict of the faculties (der Streit der Fakultäten)* [1798] (Mary J Gregor, ed) (University of Nebraska Press, 1992).

[131] Christian Joerges, 'The Europeanisation of private law as a rationalisation process and as a contest of disciplines—an analysis of the directive on unfair terms in consumer contract, 3 *ERPL* (1995), 175–191.

[132] Guido Calabresi & A Douglas Melamed, 'Property rules, liability rules, and inalienability: one view of the cathedral', 85 *Harvard Law Review* (1972), 1089–1128, 1089–1090 (fn 2).

[133] *Ibidem*.

[134] Daniela Caruso, 'The missing view of the cathedral: the private law paradigm of European legal integration', 3 *ELJ* (1997), 27–32.

[135] Candida Leone, *The missing stone in the cathedral*. Arguably, however, this twist in her title represents a shift in the metaphor from an epistemological one (about modes of knowing EU law) to an ontological one (about what is really there in EU law).

[136] Standpoint critique is more radical: it aims at transformation (emancipation) rather than mere observation.

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D. Incommensurable paradigms

There indeed does not seem to exist any prima facie reason why different epistemic claims should be necessarily mutually incompatible. They might just be answering different questions. In particular, they might address the law from different points of view, the legal, moral, empirical, etc, as the cathedral metaphor suggests.

However, that is not how they usually treat each other. Often, they claim epistemic superiority or exclusivity for their own point of view: their (imperialist) aim is to occupy the entire legal field (in this case EU law), critiquing or even discrediting competing points of view (or some of them), or at least to have ultimate authority over the others.

This attitude matches with the intuition that it is impossible to escape one's own vantage point. Therefore, one cannot avoid judging the findings of other disciplines/approach on the terms of one's own discipline/approach. It will be clear that this idea radically questions perspectivism's premise that it is possible ever to see the whole cathedral of—in our case—EU law, ie to have a full picture of it, by combining all the different perspectives.

Perhaps the different approaches to law can be more profitably be understood as paradigmatic differences? Kuhn argued that scientific development should not be regarded as a linear approximation of the truth, but rather as a succession of scientific revolutions, each followed by a period of normal science.[137] In normal science, scientists 'solve puzzles', working within the same scientific paradigm, where they share a series of premises/foundations as given. As Kuhn puts it, 'to desert the paradigm is to cease practicing the science it defines'.[138] By contrast, a scientific revolution changes the paradigm. The key characteristic of a paradigmatic shift is that the old paradigm and the new one are incommensurable: they lack a common measure, using different concepts and methods to address different problems.[139] The scientific knowledge of the old paradigm does not make sense under the new one. The theory of incommensurable scientific paradigms can be understood both as an epistemological thesis and as an ontological one, ie, respectively, as a thesis about knowledge (the mode and possibility of acquiring knowledge) and as a thesis about the nature of reality (what exists out there and what is its mode of being). Insofar, as an epistemological thesis it emphasises the social dimension of knowledge: scientific knowledge is socially constructed in epistemic communities whose scientific paradigms (their established questions, methods, concepts, values, and reasons) differ. It leads to the sociology of science and to social epistemology.[140] As an ontological thesis, it is a thesis about what exists and whether it exists independently of our observation. As Kuhn wrote, 'scientific fact and theory are not categorically separable, except perhaps within a single tradition of normal-scientific practice'.[141]

Maybe the Kuhnian idea of paradigm shifts can be transformed from a diachronic account (a sociological history of science) into a synchronic one, as a metaphor for different and (crucially) incommensurable understandings of—in our case—EU law. This would amount to the radically (ie foundationally) pluralist view that these different approaches ask questions and rely on methods, values, reasons and premises that are so different that their knowledge of EU law is incommensurable. Ontologically this means that they live in different worlds. While the title of Daniela Caruso's path-breaking paper 'the missing view of the cathedral' evokes perspectivism, its subtitle, 'the private law paradigm of European legal integration', in contrast, seems to hint at this idea of synchronic incommensurable paradigms of EU law. Similarly, Christoph Schmid transforms Habermas'

[137] Thomas S Kuhn, *The structure of scientific revolutions* [1962], 3rd ed (University of Chicago Press, 1996).

[138] *Ibidem*, 34.

[139] See Eric Oberheim and Paul Hoyningen-Huene, 'The incommensurability of scientific theories', *Stanford Encyclopedia of Philosophy* (Summer, 2024), Edward N Zalta, ed.

[140] Cf Cailin O'Connor, Sanford Goldberg, and Alvin Goldman, 'Social epistemology', *Stanford Encyclopedia of Philosophy* (Summer, 2024), Edward N Zalta & Uri Nodelman (eds).

[141] Kuhn, *The structure of scientific revolutions*, 7.

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diachronic account of legal paradigms into a synchronic one, where different paradigms overlap and intersect.[142]

E. Eclecticism

Anyone who is interested in general questions of EU law or who wishes to capture EU law—or even just a specific subfield of it, say, internal market law, competition law, or migration law—in its totality, will be confronted with what Duncan Kennedy has called 'the iron law of methodology': 'the more "hard" (capable of being counted, highly verifiable and replicable, intersubjectively "valid"), the more "narrow" (partial, fragmentary, meaningless)'.[143] Therefore, if one addresses wide questions of EU law then inevitably one's epistemic and ontological commitments will have to be softer.

Moreover, while all methods that have been applied to law, and methodology in general, have been subjected to severe epistemic and ontological critique (as we saw in Section IV with regard to EU law scholarship), methodology critique has not even come close to categorically invalidating any one of them.[144] This is why Kennedy advocates methodological eclecticism. For our case, this means drawing on a variety of different approaches to and understandings of EU law, fully aware of their divergent or even incommensurable epistemic and ontological commitments, and combining them in an original way with a view to producing new insights (as modernist artefacts).[145] This argument for eclecticism reminds of Paul Feyerabend's famous claims (with explicit reference to the 'hard' sciences) that 'successful research does not obey general standards',[146] and that 'the only principle that does not inhibit progress is: *anything goes*'.[147]

F. Epistemic injustice

But does it? At least for the field of law, the *laissez-faire* battle cry against methodological constraints sounds distinctly libertarian. This raises the questions: Is there a normative dimension to epistemological and ontological commitments? In particular, can epistemological and ontological practices be unjust? The term 'epistemic injustice' was introduced by Miranda Fricker to refer to the injustice done to a person in their capacity as a knower.[148] Fricker distinguishes two main kinds of epistemic injustice, ie testimonial and hermeneutic injustice. A testimonial injustice is done to someone when they are credited less than others as a trustworthy source of knowledge on arbitrary grounds, for example along racialised or gendered lines. By contrast, hermeneutical injustice is the type of epistemic injustice where a person is inhibited in making sense of their own experience by dominant ways of looking at the world.

It is easy to see how this may apply also to legal knowledge.[149] With regard to EU law, as a salient instance of hermeneutical injustice think of the whiteness of EU law and how its making has been informed predominantly by the lived experience of white members of the European Commission,

[142]Christoph U Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung* (Nomos, 2010), 68–89. For Habermas' historical reconstruction of private law paradigms see Habermas, *Between facts and norms*, section 9.3.

[143]Duncan Kennedy, *A critique of adjudication{fin de siècle}* (Harvard University Press, 1997), 17.

[144]Ibidem, 15.

[145]*Ibidem*, 15. For European law, see Martijn W Hesselink, 'A European legal method? On European private law and scientific method', 15 *ELJ* (2009), 20–45.

[146]Paul Feyerabend, *Against method* [1975], 3rd ed (Verso, 1993), 1.

[147]Ibidem, 14. See also ibidem, 18–19.

[148]Miranda Fricker, *Epistemic injustice: power and the ethics of knowing* (Oxford University Press, 2007).

[149]For the law of contract, see Lyn KL Tjon Soei Len, 'Hermeneutical injustice, contract law, and global value chains', 16 *ERCL* (2020), 139–159.

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Council, Parliament, CJEU and legal scholarship.[150] Think also of the way in which the dominant EU law discourse, eg about 'social Europe', prevents European citizens in countries and regions at the EU's periphery from making sense of their own experience.[151]

At first sight, there may seem to exist potential clashes between epistemic justice and other epistemological (and ontological) considerations, in which case the question might arise what should prevail: the priority of the right over the truth (and the real)? However, this is not necessarily the case. As Fricker explains, ethical virtue may well converge with epistemic virtue. Of course, this raises the question of whether we should adopt a virtue approach to epistemology (and to morality).[152]

G. *Beyond what comes first: immanence*

As we have seen, many debates on EU law go back to the divergent epistemic and ontological premises implied (and sometimes made explicit) in the various views expressed in those debates. In this sense, then, epistemological, and ontological commitments are foundational to those views and, insofar seem logically prior. This matches with the idea, going back to Aristotle, that metaphysics is the first philosophy, where what we call today ontology was considered general metaphysics.

However, ontology, as such, has also been challenged, by logical positivists, who rejected all metaphysics, just like it is done still today by most of analytical philosophy. Moreover, as we saw, constructivists argue that all knowledge and reality is socially constructed, pointing our attention to the power structures underlying knowledge production, and the co-production of scientific knowledge and social order.[153] Yet, to this it has been replied that any power structures are not just there, but made by human beings, who, at least some of the time, try to convince each other with reasons, about what is true or false, right or wrong. And so on. In sum, there seems to be no end to the debate on what comes first. Each discipline or approach situates its knowledge and understanding as prior or more fundamental, going more to the core of the matter or to the root of the problem, than others. And there seems to be no point of view from which we can determine what comes first. Any proposed starting point seems to come with its own presuppositions.

It is this latter insight that motivated critical theory's turn to immanence. As Theodor Adorno put it, 'ostensibly originary concepts—in particular those of epistemology—are totally and necessarily mediated in themselves, or—to use the accepted scientific term—"laden with presuppositions"…. And every universal principle of a first, even that of facticity in radical empiricism, contains abstractions within it…. The first and immediate is always, as a concept, mediated and thus not the first.'[154] It is for this reason, Adorno argues, that 'the concept of the absolutely first must itself come under critique.'[155]

Immanent critique is critique on society's own terms, pointing to internal contradictions, in particular between its ideals and their realisation, and to unrealised normative potentials in existing social practices, thus opening up room for emancipatory social change.[156] But immanent critique too has its own epistemic commitment, as we saw, albeit a negative one, but a commitment nevertheless, ie to the

[150] For the CJEU, see Iyiola Solanke, 'Diversity and independence in the European Court of Justice', 15 *Columbia Journal of European Law* (2008), 89–121. For a critique of the whiteness of EU private law, see Martijn W Hesselink, 'EU private law injustices', 41 *Yearbook of European Law* (2022), 1–47.

[151] See Damjan Kukovec, 'Law and the periphery', 21 *ELJ* (2015), 406–428. Although Kukovec does not frame his argument in terms of justice or epistemology, but in the more materialist terms of interests and ideology, his (influential) argument is otherwise quite similar to the idea of epistemic injustice.

[152] On virtue epistemology, see Ernest Sosa, *Epistemology* (Princeton University Press, 2017); John Turri, Mark Alfano, and John Greco, 'Virtue epistemology', *Stanford Encyclopedia of Philosophy* (Winter 2021), Edward N Zalta (ed).

[153] See Sheila Jasanoff (ed), *States of knowledge: the co-production of science and social order* (Routledge, 2004).

[154] Theodor W Adorno, *Against epistemology: a metacritique* [1970] (Polity, 2013), 6–7.

[155] Ibidem.

[156] Cf Stahl, 'What is immanent critique?'.

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rejection of epistemology or, for that matter, of any project transcending immanence, notably empiricism, ideal moral theory—and we can add, revolutionary utopianism. In other words, everyone does it: *all* positions on EU law come with their own epistemic and ontological commitments.

VIII. Conclusion

This paper has shown how some of the most fundamental disagreements about EU law can be traced back to different epistemic commitments, while some of those—and many others—go back to divergent ontological commitments. Put differently, some of the deepest jurisprudential disagreements about EU law are metaphysical in nature: they are about the metaphysics of EU law.

The aim of this paper was not to take a strong stance with regard the epistemology and ontology of EU law, even though some tentative positions were taken explicitly or reflected by the mode of exposition. This is inevitable as there is no way of knowing EU law without any epistemological and ontological commitments.

At the same time, there is no reason to expect consensus—or even merely convergence—about these commitments any time soon. This raises the further question of whether in the presence of radical methodological pluralism it even makes sense to speak of EU law scholarship, as a single field of scholarship. I think it does, in a way quite similar to the way in which a pluralist society, even one with porous and fluid boundaries and with members whose views are often not only wildly diverging but also often incommensurable, can still meaningfully be understood as a society.

However, I also believe that epistemic and ontological uncertainty calls for a scholarly (pre)cautionary principle. That principle is particularly important in hierarchical contexts and in the presence of other power relationships: scholars whose epistemic and ontological commitments are mainstream or otherwise backed up by power, for example institutional power, should be particularly cautious to ensure that they are not imposing their epistemic and ontological commitments on others, for example, when exercising the power of peer review, or in relationships between senior or junior scholars, or between scholars at the core of EU law knowledge production and those at the periphery.

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