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The Concept of EU Law: A Realist Reappraisal

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Abstract

This Article argues that the classic “what is law” question deserves more attention in EU legal studies. First, it shows that questions about the nature and concept of law are of great practical relevance for EU law. Second, the Article endorses a distinctively realist outlook on EU law. This analysis concludes that a realist(ic) concept of EU law cannot be distilled from legal realism as a theory of adjudication. What is needed instead is a theory of law that can account for the social reality of EU law by weaving together law’s ideational and material dimensions. From the realist perspective, EU law is neither autonomous nor singular. This inquiry into the nature of EU law illustrates why different variants of legal and constitutional pluralism and inter-legality provide insufficient tools for theorizing EU law. Moreover, it challenges the EU’s current “politics of legality” and problematizes the law-power relationship in EU law, depicting the concept of law as key to the EU’s prolonged authority crisis.

Keywords: Theory of EU law; concept of EU law; legal realism; legal pluralism; constitutional pluralism; inter-legality; politics of legality; the autonomy of EU law; Article 2 TEU.

A. Introduction

That European Union (EU) law is “law” is usually taken for granted. Opinions are divided on whether the form of EU law can best be characterized as international, trans- or post-national, or federal. These diverging views result in different normative accounts of how the EU and national legal orders should interact. But they all presuppose the existence of EU law as “law,” in other words, its legality—a term which in legal philosophy broadly refers to the quality of being law. Legality in this broader sense must not be confused with the narrow understanding of legality as lawfulness. When the criteria for legality are established, we answer the “what is law” question and formulate a concept of law. EU law theory, however, has mainly focused on debating the legitimacy of legal integration, whilst the more foundational “what is law” question remains largely undiscussed in EU legal studies. Some authors have pointed in this direction over the years,¹ but none of them has properly addressed the “what is law” question in EU law. The present

¹See, e.g., Alexander Somek, *The Emancipation of Legal Dissonance*, in EUROPE. THE NEW LEGAL REALISM: ESSAYS IN HONOUR OF HJALTE RASMUSSEN 679, 712–13 (Henning Koch et al. eds., 2010) (observing that “[l]egal science needs to . . . confront the question of what we actually mean by ‘law’ in the European Union”); Neil Walker, *The Theoretical Foundations of EU Law*, in CONTEMPORARY CHALLENGES TO EU LEGALITY 15, 20 (Claire Kilpatrick & Joanne Scott eds., 2021) (discussing how different “conceptions of law” present the role of law “in the generation and maintenance of a polity.”); see also Neil Walker, *Legal Theory and the European Union: A 25th Anniversary Essay*, 25 Oxford J. Legal Stud. 581 (2005); Martijn Hesselink, *A European Legal Method? On European Private Law and Scientific Method*, 15 EUR. L.J. 20, 36 (2009) (noting that “a legal method” requires “a theory of law.”). See also more recently Martijn W. Hesselink, *Knowing EU Law*, 26 CAMBRIDGE Y.B. EUR. LEGAL STUD 155 (2024) (exploring the epistemology and ontology of EU law).

Article problematizes this omission by showing that the future of EU law is shaped by our concept and theory of law.

This analysis makes an original contribution to EU legal studies, first, by restating the importance of the “what is law” question in EU law and, second, by demonstrating what it would mean to theorize EU law from a more realist(ic) perspective. It should be noted that my use of the term “realist(ic)” aligns with neither political nor moral realism, nor does it endorse the traditional forms of legal realism. Instead, this Article develops a realist theory of EU law that entwines the ideational and material dimensions of law’s social reality to reveal the emergence of a non-singular form of legality in EU law. In this context, “ideational” refers to collectively accepted ideas, norms, values, and concepts, whereas “material” points to the factual and physical conditions of social reality and its power-relations. In formulating and defending a distinctively realist concept of EU law, this Article will also cast critical light on the assumptions that currently shape the EU’s “politics of legality.”²

Boundedness is normally viewed as a necessary ontological and epistemological precondition for the existence of law. The criteria for legality ultimately determine where the boundary between law and non-law lies. But law’s boundaries are “shifting,” rather than static.³ This dynamism explains why debates about the nature and concept of law are so ardent in legal philosophy. The “what is law” question has traditionally been a target of general analytical jurisprudence. For analytical positivists, legality stems from the formal pedigree of legal sources, as well as from their origin in particular social facts.⁴ For non-positivists, the criteria for legality may entail claims about the content or merits of law.⁵ But a theory of law can also focus on explaining “how people conceive of and utilize law.”⁶ A far-reaching example is Brian Tamanaha’s argument about the “conventional recognition of what is ‘law,’” which entails that law is anything that a group of people decides to label as law.⁷ This premise allows Tamanaha to posit that “[i]nternational law is law, not because it satisfies abstract criteria of legality based on form, function or some other basis (which no theorist has successfully formulated), but because it is conventionally recognized as law by jurists, political leaders and the public.”⁸ Thus, the question of what makes law “law” is more complex than we might first think, and I argue that it is particularly convoluted in the case of EU law.

Because modern law is “a source-based enterprise,”⁹ a simple answer to the “what is law” question might be that we only need to find out what the valid sources of EU law are. But a more difficult question is what determines the validity of these sources—an inquiry that is particularly pertinent in the case of extra-Treaty primary EU law. Moreover, it is arguable that legality cannot be reduced to formal legal validity if the aim is to comprehend the social reality of EU law. A careful analysis of American and Scandinavian legal realism provides a starting point for this attempt to rethink the concept of EU law from a more realist(ic) perspective. But it will be seen that the realist theories of adjudication reinforce the “what is law” question in EU law instead of answering it. Over the years, several authors have identified legal realism as a potentially useful

²See, e.g., BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 120 (2020) (introducing the term “politics of legality”, which points to the choice between different concepts and theories of law). See also *infra* Part F (discussing further the EU’s politics of legality).

³Frederick Schauer, *Law’s Boundaries*, 130 HARV. L. REV. 2434, 2435 (2017). See also, e.g., Hans Lindahl, *A-Legality: Postnationalism and the Question of Legal Boundaries*, 73 MOD. L. REV. 30, 44 (2010) (articulating a “dynamic” approach to legal boundaries).

⁴See, e.g., H. L. A. HART, *THE CONCEPT OF LAW* (1997, 2nd ed. [1961]) (describing a positivist approach).

⁵See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* (1986) (describing a non-positivist approach).

⁶BRIAN Z. TAMANAH, *SOCIOLOGICAL APPROACHES TO THEORIES OF LAW* 4 (2022).

⁷See, e.g., Brian Z. Tamanaha, *A Reconstruction of Transnational Legal Pluralism and Law’s Foundations*, in *ENTANGLED LEGALITIES BEYOND THE STATE* 449, 459 (Nico Krisch ed., 2021). See also BRIAN Z. TAMANAH, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* (1997) (discussing the conventional approach in more detail).

⁸Tamanaha, *A Reconstruction of Transnational Legal Pluralism and Law’s Foundations*, *supra* note 7, at 459.

⁹Schauer, *supra* note 3, at 2435.

theoretical and critical approach to explaining the jurisprudence of the Court of Justice of the EU (CJEU). But the realist analyses of the CJEU's case law have little to say about the concept of EU law. The discussion on legal realism has also remained relatively superficial in EU legal studies. A more detailed study of the realist indeterminacy thesis in this Article will shift the critical focus from legal realism as a theory of adjudication to what a realist concept of EU law would look like.

It is important to notice that a concept of law can implicate a more or a less complex relationship between law and its social, political, and economic context. For example, a reconstruction of the Marxist analysis might view the legal form as fully determined by the capitalist structure.¹⁰ But the problem with simple historical materialism is that it prevents us from “analysing in detail the ideological battles that surround the law and . . . the conditions under which the forms and contents of legal doctrine develop in all their complexity and variety.”¹¹ A more sophisticated analysis of the law's ideological, or ideational, dimension cannot ignore the law's internal point of view, that is, how legal officials and experts explain and justify claims for legal authority and legality. Moreover, it would arguably also need to account for the role that legal norms play in citizens' “practical reasoning.”¹² Therefore, the central premise steering this Article is that a truly realist concept of EU law must account for law's social reality, which is simultaneously both ideational and material.¹³ My analysis thus converges with critical social theory in holding that neither the material nor the ideational dimension of social reality is fully determinative of the other.¹⁴ From this perspective, the law-power relationship appears more complex than under the conditions of simple materialism.

This inquiry into the realist concept of EU law is structured as follows: After this introduction, the Article will first briefly reiterate how legal realism has been popularized in EU law scholarship as a critical lens through which the CJEU's jurisprudence and methodological choices can be analyzed. The central issue for this Article is whether legal realism provides a sufficient answer to the “what is law” question in EU law. The following section will demonstrate that the realist critiques of the CJEU's jurisprudence currently leave the “what is law” question unanswered. This analysis posits that legal realism as a theory of adjudication must be complemented with a realist theory of law in EU legal studies. Against this backdrop, the Article will outline what a realist theory of EU law would look like and what the realist account of law's factual and ideational dual nature can add to the concept of EU law. The last main section will conclude this discussion by illustrating what concrete implications these insights about a realist concept of law would have for the study and practice of EU law, including the CJEU's autonomy thesis and rule of law jurisprudence, and how the failure to account for the emergence of non-singular legality thwarts the progress of EU and transnational legal theory. It is hoped that these findings will pave the way for a more sustainable “politics of legality” in EU law.

¹⁰See, e.g., EVGENY PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* (Barbara Einhorn trans., 1987 [Russ. 1924]) (describing a commodity-form theory of law, which links the legal form to the capitalist relations of production). However, it is worth noting that Marx's own work did not offer a fully developed analysis of law.

¹¹ROGER COTTERRELL, *LAW'S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE* 116 (1995).

¹²Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 *ETHICS* 278, 286 (2001).

¹³See *infra* Parts D, E (providing a more detailed account of this argument).

¹⁴See Päivi Johanna Neuvonen, *A Way of Critique: What Can EU Law Scholars Learn from Critical Theory?*, 1 *EUR. L. OPEN* 60, 72 (2022); Päivi Johanna Neuvonen, *Emancipation, Immanence, Utopia: The Critical Project in EU Law*, in *CRITICAL THEORY AND EUROPEAN UNION LAW: THE QUESTION OF POSTNATIONAL EMANCIPATION* 1, 10–12 (Päivi Johanna Neuvonen and Paul Linden-Retek eds., 2026) (discussing this point in the context of EU legal studies). See generally, e.g., Robert A. Gorman, *Critical Conundrums—Logic and Politics in Frankfurt Critical Theory Prior to the Linguistic Turn*, in *NO SOCIAL SCIENCE WITHOUT CRITICAL THEORY* 65, 67–68 (Harry F. Dahms ed., 2008) (explaining how critical social theory “defends neither the primacy of matter over consciousness (materialism) nor consciousness over matter (idealism)”). See also, e.g., Omar Lizardo & Dustin Stoltz, *Max Weber's Ideal versus Material Interest Distinction Revisited*, 21 *EUR. J. SOC. THEORY* 3, 11–13 (2017) (exploring the distinction between ideal and material interests in classic Weberian sociology).

B. The Realist Critique(s) of the CJEU's Jurisprudence: What and Why?

The CJEU's judicial methodology and reasoning have been objects of intense scrutiny and debate over the years. Some defend the CJEU's reliance on teleological reasoning as "a function of the particular nature of the EU legal order."¹⁵ But the teleological method of interpretation can also be seen as a sign of problematic judicial activism. A related set of criticism focuses on the CJEU's perceived unwillingness to engage in a proper dialogue with its national interlocutors in the preliminary reference procedure.¹⁶ In this section, a closer look at these debates on the CJEU's methodology shows how questions about the nature and concept of law have direct practical relevance for EU law and how legal realism has already been harnessed to explain and critique the Court's methodological choices.

The much-debated *Weiss/PSPP* saga between the CJEU and the German Federal Constitutional Court (FCC) provides a concrete example of how and why the CJEU's methodology fosters criticism. While the CJEU concluded that the European Central Bank's Governing Council had not exceeded its Treaty mandate when the crisis-related asset purchases were extended to cover the public sector purchase programme (PSPP)¹⁷, the FCC held that the CJEU had omitted a full exercise of balancing between different interests in its reasoning.¹⁸ The FCC's take on the proportionality analysis has raised multiple objections from the perspective of EU law.¹⁹ But its criticism highlighted the methodological nature of the dispute under consideration.²⁰ Commentators from different ends of the integrationist spectrum seemed to agree that the style of the CJEU's reasoning may at least partly explain the outcome of the *Weiss/PSPP* saga.²¹

The CJEU's reasoning is presumably shaped by its institutional self-understanding, as well as by the fact that only a consensual majority opinion is published.²² For instance, Christina Eckes argues that the CJEU "faces particular difficulties to theorize completely."²³ This is so because members of the Court may be able to agree on the factual outcome of a particular case even when they disagree on its theoretical basis. The critical literature also highlights that the Court's methodology is hardly ever purely deductive.²⁴ For example, Mark Dawson suggests that the Court's reasoning can be called "ideological" when it relies on "assumptions about society and economy that are implicit in its reasoning yet are in fact highly contested."²⁵ Moreover, Dawson also postulates that the "indeterminacy" about the sources of EU law makes the Court's recourse to

¹⁵Miguel Poiates Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 EUR. J. LEGAL STUD. 137, 145 (2007).

¹⁶See, e.g., Christoph Grabenwarter, Peter M. Huber, Rajko Knez & Ineta Ziemele, *The Role of the Constitutional Courts in the European Judicial Network*, 27 EUR. PUB. L. 43, 57 (2021).

¹⁷CJEU, Case C-493/17, *Weiss and Others*, ECLI:EU:C:2018:1000, para. 100 (Dec 11, 2018).

¹⁸BVerfG, 2 BvR 859/15, paras. 127, 138, 140–41, May 5, 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html (holding that the CJEU's proportionality review was "meaningless" insofar as it "disregarded" the economic policy effects of the PSPP).

¹⁹See, e.g., Franz C. Mayer, *The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP Decision of 5 May 2020*, 16 EUR. CONST. L. REV. 733, 754 (2020); Isabel Feichtner, *The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe*, 21 GERMAN L.J. 1090, 1097 (2020); Ana Bobić & Mark Dawson, *Making Sense of the "Incomprehensible": The PSPP Judgment of the German Federal Constitutional Court*, 57 COM. MKT. L. REV. 1953, 1971, 1975 (2020).

²⁰See Davor Petrić, *Reasoning, Interpretation, Authority, Pluralism, and the Weiss/PSPP Saga*, 6 EUR. PAPERS 1123, 1130–31, 1134–37 (2021) (discussing this point further).

²¹Compare, e.g., Dieter Grimm, *A Long Time Coming*, 21 GERMAN L.J. 944, 948 (2020) with Miguel Poiates Maduro, *Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court*, VERFASSUNGSBLOG (May 6, 2020), <https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/>.

²²Christina Eckes, *European Union Legal Methods—Moving Away from Integration*, in EUROPEAN LEGAL METHOD: TOWARDS A NEW EUROPEAN LEGAL REALISM? 163, 178 (Ulla Neergaard & Ruth Nielsen eds., 2013).

²³*Id.* at 184.

²⁴Mark Dawson, *How Does the European Court of Justice Reason? A Review Essay on the Legal Reasoning of the European Court of Justice*, 20 EUR. L. J. 423, 423 (2014).

²⁵*Id.* at 432.

“extra-legal steadying factors” easier.²⁶ These observations about the CJEU’s reasoning resonate with a realist theory of adjudication, and legal realism has been identified as a useful tool for explaining the CJEU’s jurisprudence and methodology.

In this context, a basic distinction should be made between American and Scandinavian legal realism. In brief, the former focused on how judges in fact decide cases, whereas the latter aimed to remove all metaphysical and ideological content from legal science.²⁷ EU law scholars seem to usually have American legal realism in mind when they depict the CJEU’s jurisprudence as realist. A central thesis of American legal realism, as formulated by Karl Llewellyn, was that “there is less possibility of accurate prediction of what courts will do than the traditional rules would lead us to suppose.”²⁸ Not all legal realists were extreme rule skeptics, as they are sometimes caricatured.²⁹ Yet, American legal realism is often described in terms of its opposition to what is called “legal formalism.” Different authors assign different meanings to legal formalism.³⁰ But a basic account of legal formalism holds that doctrinal tools and methods produce “determinate and *internally* valid right answers” and that the process of deductive legal reasoning can be distinguished from the subject matter of the case.³¹ A rigid distinction between legal formalism and realism was arguably never sustainable.³² But it still seems to inform the realist critiques of the CJEU’s jurisprudence, as this section will next demonstrate.

The CJEU’s alleged realism is described both as a positive and as a negative trait in the relevant literature. For example, Damjan Kukovec has provided a defense of what he calls a “realist trend” in the CJEU’s case law.³³ By this term, Kukovec refers to “[t]he Court of Justice’s increased requirement for deeper assessments of the conduct’s actual effects on the market . . .”³⁴ Kukovec envisages how “increased judicial engagement with social and economic reality enhance[s] the dynamics of the adversarial procedure aiming at a more targeted legal analysis that avoids over and under inclusion.”³⁵ He also argues that the CJEU’s jurisprudence advances “the basic realist insight – that *all* relevant considerations have to be taken into account to have a well-functioning legal system.”³⁶ Kukovec concludes that the Court’s realist tendencies protect the right to effective judicial protection.³⁷ But his normative defense of the CJEU’s perceived realism overlooks the more critical potential of legal realism in EU legal studies.

A diagonally opposite view of the CJEU’s alleged realism is offered by Alexander Somek, who contrasts the traditional methodological analysis with what he calls “pragmatism” in legal reasoning and decision-making. The term “pragmatism” is here adopted from Ronald Dworkin, who seemingly refers to legal realism as “pragmatism.”³⁸ Somek argues that “a strong case can be

²⁶*Id.* at 430. *Id.* at 424 (noting with reference to Beck that “the Court’s oft-heralded teleological approach is a consequence of the indeterminate nature of the legal materials it is asked to interpret.”). See also GUNNAR BECK, *THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EU* (2013) (discussing this further).

²⁷See also *infra* Part E (discussing the relevance of Scandinavian legal realism for EU law).

²⁸Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1241 (1931).

²⁹*Id.* at 1237 (emphasizing that “[d]istrust of traditional legal rules and concepts insofar as they purport to *describe* what either courts or people are actually doing” does not need to amount to their full “negation.”). See generally Dan Priel, *Law Is What the Judge Had for Breakfast: A Brief History of an Unpalatable Idea*, 68 BUFF. L. REV. 899 (2020) (discussing further).

³⁰See Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 111–12 (2010) (providing a distinction between “Sophisticated” and “Vulgar” formalism).

³¹Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 612 (2007).

³²E.g., BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 160, 177–78, 193–94 (2009).

³³Damjan Kukovec, *The Realist Trend of the Court of Justice of the European Union* 1 (EUI L. Working Paper 2021/11), <https://cadmus.eui.eu/handle/1814/72658>.

³⁴*Id.* at 1.

³⁵*Id.*

³⁶*Id.* at 18.

³⁷*Id.* at 18. See also *id.* at 22 (arguing that “anti-formalist reasoning strengthens the quality of the judicial process and thus the rights of citizens generally and of litigants specifically.”)

³⁸Somek, *supra* note 1, at 703. See also Dworkin, *supra* note 5, at 151ff.

made that a more radical form of pragmatism explains much of the practice of the ECJ.”³⁹ By this, he means that “the substance of the Treaty” prevails over “its form.”⁴⁰ For Somek, the cultivation of pragmatism equals to “a momentous transformation of normativity.”⁴¹ Against this backdrop, Somek observes that “we seem to have lost confidence that a methodological critique is capable of achieving something” and that “methodological analysis may have had its day, too.”⁴² Somek recognizes the link between the CJEU’s methodology and the concept of law.⁴³ But instead of taking this analysis further, he focuses on criticizing the “negation” of legality that arguably stems from the pragmatist turn in judicial methodology.⁴⁴

These two examples show how the realist analysis of the CJEU’s jurisprudence has been popularized in EU legal studies although opinions profoundly differ on what normative conclusions should be drawn from the CJEU’s alleged realism. Some defend the CJEU’s pragmatism or realism as a way of making its case law more relevant in the face of complex social and economic challenges, whereas others ponder whether this type of “social engineering”⁴⁵ happens at the cost of legality. It may first seem that the realist critique of the CJEU’s jurisprudence also provides a conclusive answer to the “what is law” question in EU law. For example, Somek postulates that: “In a most profound sense we are all legal realists now. We are inclined to profess faith in the functionalist gospel according to which law is a function of judicial behaviour.”⁴⁶ But it will be seen in the next section that the reference to law as a function of judicial behavior oversimplifies the realist indeterminacy thesis, thus undermining its critical potential in EU law. More importantly, it also obscures the analytical distinction between legal realism as a theory of adjudication and a realist theory of law.

C. Rethinking Legal Realism in EU Law: From a Theory of Adjudication to a Theory of Law

This section will illustrate why legal realism as a theory of adjudication must be complemented with a realist concept of law in EU legal studies. Legal realism presents a methodological approach that radically differs from general analytical jurisprudence. American legal realists argued that their observations about what courts do were best understood as a “descriptive sociology of law.”⁴⁷ It has been noted that the early American legal realists mainly relied on “anecdotal evidence and phenomenological, first-person accounts of the judicial process.”⁴⁸ But the so-called New Legal Realism (NLR) movement has subsequently tried to remedy these flaws in the realist approach.⁴⁹ The empirical orientation of modern legal realism can provide a useful lens for studying the CJEU’s jurisprudence, as is demonstrated by the growing interest in empirical legal studies in EU

³⁹*Id.* at 703. See also ALEXANDER SOMEK, *INDIVIDUALISM: AN ESSAY ON THE AUTHORITY OF THE EUROPEAN UNION* 229 (2008) (providing a similar argument).

⁴⁰Somek, *supra* note 1, at 692.

⁴¹*Id.* at 683, 703–04.

⁴²*Id.* at 681.

⁴³*Id.* at 712–13.

⁴⁴*Id.* at 683.

⁴⁵*Id.* at 697.

⁴⁶*Id.* at 685–86.

⁴⁷Llewellyn, *supra* note 28, at 1251.

⁴⁸Arthur Dyevre, *Outline of a Legal Realistic Approach to Legal Integration*, in *EUROPEAN LEGAL METHOD: TOWARDS A NEW EUROPEAN LEGAL REALISM?* 55, 62 (Ulla Neergaard & Ruth Nielsen eds., 2013).

⁴⁹See generally Stewart Macaulay, *The New versus the Old Legal Realism: “Things Ain’t What They Used to Be,”* 2005 WIS. L. REV. 365 (2005); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORN. L. REV. 61 (2009) (providing an overview of the NLR movement). See also RESEARCH HANDBOOK ON MODERN LEGAL REALISM (Shaughin Talesh et al eds., 2021) (providing a more recent discussion).

law. But it is important to notice that empiricism has limits in realist legal theory. These limits are clarified, for example, by Brian Leiter as follows:

“[W]hile they [i.e. legal realists] may believe the only fruitful account of adjudication is descriptive and empirical, not normative and conceptual, they themselves need a concept of law that is not itself empirical or naturalized.”⁵⁰

Similarly, the realist critiques of the CJEU’s jurisprudence must presume a concept of law that allows us to distinguish legal from non-legal reasons. To clarify this point, this section will have a closer look at the realist indeterminacy thesis.

American legal realists called into question the “orthodox” view that rule-descriptions and other doctrinal means constitute “*the* heavily operative factor” in judicial decision-making.⁵¹ But most legal realists did not argue that primary rules *always* suffer from indeterminacy.⁵² For them, the main source of indeterminacy instead lay in courts’ choice over different “canons of interpretation,” which allow the same statute or precedent to produce “differing rules.”⁵³ A further source of indeterminacy can be located in the variety of doctrinal materials that could potentially be invoked in any individual case.⁵⁴ In short, this means that “rule oriented-realism” is possible insofar as the “stability of rules” is explained by lawyers’ “convergence,” rather than by “the determinacy of the doctrine.”⁵⁵ As has been seen in the previous section, the CJEU’s methods of reasoning generate indeterminacy that can be expressed in realist terms. But it often goes unnoticed that this argument from legal realism simultaneously reinforces the “what is law” question in EU law.

As Leiter notes, a meaningful claim about the indeterminacy of legal reasoning is contingent on the distinction between “legal” and “non-legal” reasons.⁵⁶ However, legal realism as a theory of adjudication fails to articulate such a theory of law.⁵⁷ Leiter’s argument does not stop here, for he also argues that the realist indeterminacy thesis presumes “an essentially positivistic account of the criteria of legality, one in which proper pedigree is the hallmark of a genuinely legal norm.”⁵⁸ This challenges the common view that legal realism and legal positivism contradict each other conceptually.⁵⁹ Leiter does not suggest that all legal realists identified themselves as legal positivists.⁶⁰ But he seems to claim that the explanatory value of legal realism is directly linked to whether “legal positivism is true.”⁶¹ From the perspective of the present Article, the crucial point is that the realist indeterminacy thesis presumes a concept of law that can distinguish legal from non-legal reasons.

As this section has shown, legal realism as a theory of adjudication must be complemented with a realist theory of law in EU legal studies. I cannot fully develop this point here, but the mainstream theories of positivist analytical jurisprudence (e.g. Kelsen, Hart, Raz) are of little help in theorizing EU law, first, because of their either explicit or implicit dependence on the law-state

⁵⁰Leiter, *supra* note 12, at 285.

⁵¹Llewellyn, *supra* note 28, at 1234, 1237.

⁵²Leiter, *supra* note 12, at 300.

⁵³*Id.* at 295. See also Brian Leiter, *Legal Positivism as a Realist Theory of Law*, in *THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM* 79, 91 (Torben Spaak & Patricia Mindus eds., 2021).

⁵⁴Dagan, *supra* note 31, at 614–15.

⁵⁵*Id.* at 647.

⁵⁶Brian Leiter, *What Is a Realist Theory of Law?*, 6 J. INST. STUD. 334, 339 (2020). See also Leiter, *supra* note 12, at 292.

⁵⁷Brian Leiter, *Legal Realism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 261, 268 (Dennis Patterson ed., 1996). See also Leiter, *supra* note 12, at 279.

⁵⁸Leiter, *supra* note 12, at 301. See also Leiter, *supra* note 57, at 268–69 (explaining this claim as follows: “by concentrating on indeterminacy in the interpretation of *statutes and precedents* the realists seem to be supposing that these exhaust the authoritative sources of law, a thesis easiest to justify on positivist grounds”).

⁵⁹Leiter, *supra* note 12, at 278, 280. See also Leiter, *supra* note 56, at 339 (on how Leiter challenges Hart’s account of legal realism). Hart, *supra* note 4, ch. VII.

⁶⁰Danny Priel, *Were the Legal Realists Legal Positivists?*, 27 L. & PHIL. 309, 325 (2008).

⁶¹*Id.* at 312, 325.

paradigm and, second, because the positivist “social fact thesis” fails to properly engage with law’s social facticity and materiality.⁶² However, my argument for the realist concept of EU law is positivist in the broader sense that it views law as a human-made “positive” or “posited” social artifact. Therefore, this Article will next explain why a better understanding of law’s sociality is foundational to a realist concept of EU law and how the realist insight of law’s factual and ideational dual nature elucidates the social reality of EU law.

D. Law’s Sociality as a Basis for the Realist Concept of EU Law

The realist critiques of the CJEU’s jurisprudence and methodology do not provide us with a realist theory of EU law. Instead, the realist critiques of adjudication presume a theory or a concept of law that is often left unpronounced. This raises the question of what a more realist, or “realistic,”⁶³ concept of EU law would look like. Legal realism is sometimes labelled as a predicative theory of law, a term which implies that “an accurate prediction of what a court will do” denotes legality.⁶⁴ But the critical potential of the realist indeterminacy thesis fades away if legality is reduced to a statement of what courts are prone to do in a specific case. And if the realist critique becomes just another name for the fact that the CJEU’s judicial methodology does not always respect the textual limits of the EU Treaties, it does not bring much added value to critical studies of EU law. A different, more promising, understanding of a realist(ic) theory of EU law focuses on how legal theory could accommodate the complex social reality of law.

It is widely accepted that law is a social phenomenon. But legal theorists tend to disagree on what it takes to explain the nature of law within this parameter. The search for general—essential—characteristics of law is typical of both positivist and non-positivist analytical jurisprudence, and the method of conceptual analysis is therefore prominent in general jurisprudence. It has been noted that a conceptual analysis of law “need not be arid or vulgar.”⁶⁵ But the conceptual method is nevertheless vulnerable to the criticism that “[t]he sense of context – save our own, and that typically only assumed – is lost.”⁶⁶ This is problematic because the legal theorist is always bound by a particular time and place.⁶⁷ Moreover, law itself can be understood as “a specific, historical and contextual form of normativity,” which makes it “a contingent fact.”⁶⁸ What can be said about legality in the context of monist state law does not necessarily hold true in the context of non-state or transnational law, and so on.

Therefore, many legal theorists have rejected the idea of a general concept of law. In particular, the search for a general concept of law is called into question by scholars who emphasize the nature of law as a social institution.⁶⁹ But it is important to notice that “social legal theory”⁷⁰

⁶²This point about EU law and legal positivism is developed in more detail in an unpublished part of this manuscript (on file with the author), which was removed before submission to keep the length of the Article manageable.

⁶³BRIAN Z. TAMANAHA, A REALISTIC THEORY OF LAW 2 (2017) (using the term “realistic theory of law” to describe legal theory that “center[s] on law in society”).

⁶⁴Leiter, *supra* note 57, at 262–63 (discussing further).

⁶⁵Seán Patrick Donlan & Lukas Heckendorn Urscheler, *Concepts of Law: An Introduction*, in CONCEPTS OF LAW: COMPARATIVE, JURISPRUDENTIAL, AND SOCIAL SCIENCE PERSPECTIVES 1, 2 (Seán Patrick Donlan & Lukas Heckendorn Urscheler eds., 2014).

⁶⁶*Id.* at 2.

⁶⁷See, e.g., KAARLO TUORI, PROPERTIES OF LAW: MODERN LAW AND AFTER 22 (2021) (using the term “perspectivism” to highlight that “there is no law as such but only law as seen by a particular social or legal actor from a particular perspective”).

⁶⁸Baudouin Dupret, *The Concept of Law A Wittgensteinian Approach with Some Ethnomethodological Specifications*, in CONCEPTS OF LAW: COMPARATIVE, JURISPRUDENTIAL, AND SOCIAL SCIENCE PERSPECTIVES 59, 72 (Lukas Heckendorn Urscheler & Seán Patrick Donlan eds., 2014).

⁶⁹See, e.g., TAMANAHA, *supra* note 63, at 61; COTTERRELL, *supra* note 11, at 276.

⁷⁰TAMANAHA, *supra* note 63, at 9. See also TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW, *supra* note 7, at 7 (referring to “socio-legal theory” as “the speculative side of socio-legal studies, in contrast to the empirical research side”).

cannot distance itself from the “what is law” question although it distances itself from the search for a general concept of law. This is so because “all enquiry into law necessarily starts from some conception of law, however thin, indeterminate and constantly falsifiable.”⁷¹ This is also the case with empirical legal studies, which often overlook the “what is law” question.⁷² For instance, Roger Cotterrell observes that “if . . . legal sociology takes ‘law’ as its unifying field of research, some sense of the scope of this field is needed and rigorous concepts of law help to provide this.”⁷³ Moreover, it is arguable that even descriptive legal sociology must take into account the internal, normative, self-understanding of law when the field of its study is defined.⁷⁴

A seemingly easy way to avoid essentialism is to accept a plurality of concepts of law.⁷⁵ But this, too, would require “a prior analytical position” to decide which concepts can be included in this plurality.⁷⁶ Therefore, the difficult question for social legal theory is whether law should be viewed as an analytical concept at all. If the answer is negative, the term “law” arguably collapses into an “ethnocentric folk category.”⁷⁷ This is exactly how Brian Tamanaha’s conventionalist theory of law responds to the problems of essentialist theory building. As was already briefly noted in the introduction, Tamanaha promotes the view that “[l]aw is whatever people identify and treat through their social practices as ‘law.’”⁷⁸ Critics claim that Tamanaha’s approach “turns the what-is-law question into a descriptive inquiry” and “gives no analytical purchase on the idea of law.”⁷⁹ But conventionalism does not make an internal or immanent critique of law impossible. Tamanaha explicitly states that “the ideal of law in a given community may indeed have an essential nature that can be analytically identified.”⁸⁰ For the purposes of the present Article, a more powerful argument is that Tamanaha fails to properly explicate “how the identity of the social practice [that constitutes law] can be established.”⁸¹

Tamanaha views “collective recognition within a given group” as key to how social institutions are constructed.⁸² Moreover, he posits that “any group within the social arena” can “identify a phenomenon as law through their social practices for it to qualify as such.”⁸³ It has been noted that Tamanaha does not explain “which people’s views” are determinative if disagreements about what counts as law arise in a particular context.⁸⁴ Tamanaha does admit that “law is not just a reflection of social and moral norms but also a site of continuous struggle between individual and social

⁷¹Emmanuel Melissaris, *A Sense of Law: On Shared Normative Experiences*, in CONCEPTS OF LAW: COMPARATIVE, JURISPRUDENTIAL, AND SOCIAL SCIENCE PERSPECTIVES 109, 109 (Lukas Heckendorn Urscheler & Séan Patrick Donlan eds., 2014).

⁷²See, e.g., Roger Cotterrell, *Still Afraid of Legal Pluralism? Encountering Santi Romano*, 45 L. & SOC. INQUIRY 539, 543 (2020).

⁷³*Id.* at 544.

⁷⁴*Id.*

⁷⁵See, e.g., Andrew Halpin, *The Creation and Use of Concepts of Law when Confronting Legal and Normative Plurality*, in CONCEPTS OF LAW: COMPARATIVE, JURISPRUDENTIAL, AND SOCIAL SCIENCE PERSPECTIVES 169, 185 (Lukas Heckendorn Urscheler & Séan Patrick Donlan eds., 2014).

⁷⁶*Id.* at 186.

⁷⁷Franz von Benda-Beckmann, *Who’s Afraid of Legal Pluralism*, 34 J. LEGAL PLURALISM & UNOFFICIAL L. 37, 58 (2002).

⁷⁸TAMANAHA, *supra* note 6, at 58. See also Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J. L. & SOC’Y 296, 314 (2000).

⁷⁹Roger Cotterrell, *Do Lawyers Need a Theory of Legal Pluralism?*, in IN PURSUIT OF PLURALIST JURISPRUDENCE 20, 34 (Nicole Roughan & Andrew Halpin eds., 2017).

⁸⁰TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW*, *supra* note 7, at 128 n. 22.

⁸¹Detlef von Daniels, *A Genealogical Perspective on Pluralist Jurisprudence*, in IN PURSUIT OF PLURALIST JURISPRUDENCE 163, 177 (Nicole Roughan & Andrew Halpin eds., 2017).

⁸²TAMANAHA, *supra* note 6, at 25. But see also TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW*, *supra* note 7, at 152; TAMANAHA, *supra* note 63, at 196 (describing the different “levels of social recognition of law”).

⁸³Tamanaha, *supra* note 78, at 319.

⁸⁴Cotterrell, *supra* note 79, at 34.

interests.”⁸⁵ But the conflictual dimension of social constructivism remains undeveloped in Tamanaha’s work. In particular, his conventionalism leaves the complex relationship between law and power unexplored. It is this last point that in my opinion reduces the critical potential of Tamanaha’s social legal theory, rather than his conventionalism as such. And this gap becomes more consequential when conventional recognition is meant to explain the existence of trans- or postnational law, rather than that of state law.

To sum up, the pressing question for realist social legal theory is how the identity of law as a normative social practice is established. Some argue that a meaningful answer to the “what is law” question must determine “the conditions under which a whole community of people can be bound by the same normative order.”⁸⁶ But community-centered answers to the “what is law” question tend to view law “as always directed towards reasons, which are in turn connected to *some* conception of the good.”⁸⁷ By over-simplifying the law-power relationship, they present an incomplete picture of law’s social reality. This raises the question of whether, and if so, how a realist theory of EU law can avoid these pitfalls. As a way forward, the next section will elaborate how the realist understanding of law’s factual and ideational dual nature can help us to seize the complex social reality of EU law, as well as the way in which it differs from the social reality of state law.

E. The Realist Account of EU Law’s Factual and Ideational Dual Nature

Developing a realist theory of EU law entails spelling out what kind of social phenomenon EU law is. Legal theory has traditionally demarcated the social facticity of law from its more ideological or ideational role in practical reasoning. The realist argument of law’s dual nature is of interest to this Article because it brings these two dimensions of law’s social reality together. Legal realists emphasize that the analysis of law cannot be reduced to “the appeal to existing doctrine.”⁸⁸ Instead, they want to know “which valid norms are actually enforced” and “*how and against whom* they are enforced.”⁸⁹ But the realist interest in law’s social facticity must not be confused with the Critical Legal Studies (CLS) argument that law simply collapses into politics. On the contrary, and as will be seen in this section, the realist understanding of law’s dual nature allows a more complex understanding of the law-power relationship, depicting the constant tension between law’s power and reason, or its facticity and normativity, as the main indicator of legality.

I. Scandinavian Legal Realism on the Law’s Dual Nature

This Article has already explained what the limits of American legal realism are in addressing the “what is law” question in EU law. But a different perspective on legal realism is provided by Scandinavian legal realists who tried to eliminate all metaphysical and idealist elements from legal science. Alf Ross, a prominent Scandinavian legal realist, posited that “[t]he subject of legal philosophy is not law . . . but legal science.”⁹⁰ From this starting point, Ross set out to develop a realist theory about “what the concept ‘scientifically valid (Danish, Swedish etc.) law’ actually means.”⁹¹ For Ross’s realist position, the central problem concerning the scientific validity of law is “the relation between normative idea content and social reality.”⁹² Ross resolved this problem by endorsing a dualist view that “[l]aw is at the same time something factual within the realm of

⁸⁵TAMANAHA, *supra* note 6, at 23.

⁸⁶Melissaris, *supra* note 71, at 109. *See also id.* at 115–16.

⁸⁷*Id.* at 119.

⁸⁸Dagan, *supra* note 31, at 652.

⁸⁹Leiter, *supra* note 56, at 342.

⁹⁰ALF ROSS, ON LAW AND JUSTICE 33 (Jakob v. H. Holtermann ed., Uta Bindreiter, trans., 2019) [1953].

⁹¹*Id.* at 40.

⁹²*Id.* at 84.

reality, and something valid within the realm of ideas.”⁹³ This then led him to argue that the notion of scientifically valid law simultaneously comprises “an order which is actually efficacious” and “an order which is valid by virtue of *a priori* principles.”⁹⁴

It is this dualism that allows the legal scientist to predict “the course which the law is going to take when it is operating in a real world context.”⁹⁵ For Ross, “the administration of justice through the courts” is where “the efficaciousness defining the scientific validity of law” takes place.⁹⁶ Ross concluded on this basis that scientifically valid law can be understood as “the normative ideology which is actually operative, or must be thought operative, in the mind of the judge, because it is felt by him to be socially binding and is, therefore, complied with efficaciously.”⁹⁷ The realist position was accordingly defined as the one that “looks upon the law as a social phenomenon, determined by the application of law by the courts.”⁹⁸ Ross posited in this context that “[a]ll realistic theories agree in interpreting the scientific validity of legal norms as expressing a certain social efficacy.”⁹⁹ Ross’s notion of judicial ideology presumes that “the judge, in his inner thoughts, is governed and motivated by a normative ideology with a certain kind of content.”¹⁰⁰ However, it can be argued that Ross placed too much weight on the explanatory power of normative ideology. As Ross himself noted, not all legal realists agree on this presumption about the effectiveness of shared judicial ideology.¹⁰¹

Ruth Nielsen has already suggested that EU law scholarship can benefit from Ross’s insight of “law as being of a double—combined ideological and factual—character.”¹⁰² The argument about law’s dual nature implies that law becomes “a tangible reality” when it is enforced.¹⁰³ Nielsen applies this insight to EU law by making the following statement:

Seen from the perspective of Scandinavian Legal Realism, nothing is law just because the ECJ says so. A judgment from the ECJ is primarily a statement of the legal ideology of the ECJ and lacks the factual dimension of law unless a national legal/state system chooses to add a factual dimension to the ideological statements of the ECJ.¹⁰⁴

It arguably follows from this that the validity of EU law presumes “a more comprehensive multi-level legal system, where EU law and the national law of its Member States are seen as mutually embedded.”¹⁰⁵ But Nielsen does not explain what these findings mean for the EU’s politics of legality—a question that will be addressed in more detail in the final section of this Article. Moreover, viewing the judicial ideology as a sufficient explanation for law’s social efficacy provides an incomplete picture of law’s ideational and material dimensions and, thus, of the law-power relationship in EU law. This can be illustrated by considering how the argument of the dual nature of law is professed outside Scandinavian legal realism.

⁹³*Id.* at 49 (Ross speaks in this context of both “dualism” and “dual element contained within the concept of scientific validity”).

⁹⁴*Id.*

⁹⁵*Id.* at 40.

⁹⁶*Id.* at 46.

⁹⁷*Id.* at 46. *See also id.* at 53, 57 (emphasizing that “the assertion that a rule is scientifically valid law is indeed something relative . . . depending on the degree of probability with which it can be predicted that the rule will be applied”).

⁹⁸*Id.* at 82.

⁹⁹*Id.* at 85.

¹⁰⁰*Id.* at 88. *See also id.* at 47 (explaining that a “precondition” for this is “that the judges, albeit individually different, are animated by a common supra-individual ideology”).

¹⁰¹*See id.* at 56, 67–68, 81–82 (explaining how Ross distinguishes his “jurisprudential realism” from American legal realism).

¹⁰²Ruth Nielsen, *Legal Realism and EU Law*, in EUROPE. THE NEW LEGAL REALISM: ESSAYS IN HONOUR OF HJALTE RASMUSSEN 545, 563 (Henning Koch et al. eds., 2010). *See also id.* at 553.

¹⁰³*Id.* at 551.

¹⁰⁴*Id.* at 553.

¹⁰⁵*Id.* at 563.

II. The Tension Between Law's Political and Rational Dimensions: From Neumann to Habermas

The idea of law's dual nature is not unique to Scandinavian legal realists. Several legal and social theorists have developed the argument of law's dual or hybrid nature outside the context of Scandinavian legal realism. It can be argued that "[l]aw has always embodied both *ratio* and *voluntas*" although both dimensions may have changed over time.¹⁰⁶ In contemporary legal theory, a common point of reference for this discussion is Franz Neumann's analysis of law's functions in modern society.¹⁰⁷ Neumann identified "two different concepts of law; a political and a rational concept."¹⁰⁸ The political concept entails that "every measure of the sovereign power, regardless of its material content, constitutes law," meaning that "[l]aw is *voluntas* and nothing else."¹⁰⁹ The rational concept views law as "a norm that is intelligible and contains an ethical postulate which is frequently that of equality."¹¹⁰ For instance, Roger Cotterrell, with reference to Neumann, depicts law as "a combination of reason and power."¹¹¹ Similarly, Kaarlo Tuori views both law's *ratio* and *voluntas* as central to understanding "the general sources of law."¹¹² But different scholars give different meanings to these two dimensions of legality, as well as for their relationship and interaction.

Cotterrell equals *voluntas* with the "power element in law"¹¹³ although he notes that the legitimacy of law's *voluntas* requires "some stable relationship with the networks of community that are regulated by law."¹¹⁴ Cotterrell also detects a close link between the production of law's *ratio* and "law's complex, ambiguous, and varied relationships with power."¹¹⁵ From this perspective, the law-power relationship can be seen as "a problem concerning the relation between physical force and ideological bond *qua* elements of motivation within the power relations of the law itself."¹¹⁶ Tuori, for his part, speaks of "the *voluntas* of positive law," thus emphasizing that law's "voluntarism" is not a synonym for "coerciveness."¹¹⁷ Postnational law arguably provides a concrete example of how law's voluntarism can be separated from coerciveness.¹¹⁸ Tuori observes in this context that "coercion . . . ultimately guarantees the realisation of law, both *ratio* and *voluntas*."¹¹⁹ But he does not specify what this concession means for the separation of voluntarism and coerciveness and, thus, for the legality of trans- or postnational law. This latter question about law's social facticity is central to the realist theory of EU law. Moreover, law's ideational dimension is arguably also implicated by power relations in ways that undermine any categorical distinction between law's reason and power.

A more nuanced account of law's dual nature and the law-power nexus is developed, for example, by Jürgen Habermas.¹²⁰ For Habermas, the internal tension between facticity and validity, which is "built into law itself," takes place between law's positivity and its claim for

¹⁰⁶Kaarlo Tuori, *Whose voluntas, What Ratio? Law in the State Tradition*, 16 INT. J. CONST. LAW 1164, 1165 (2018).

¹⁰⁷Franz L. Neumann, *The Change in the Function of Law in Modern Society*, in THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMANN AND OTTO KIRCHHEIMER 101, 101–02 (W.E. Scheuerman ed., 1997) [1937, in German].

¹⁰⁸*Id.* at 104.

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹COTTERRELL, *supra* note 11, at 277–78. *See also id.* at 289.

¹¹²TUORI, *supra* note 67, at 19. *See also* KAARLO TUORI, *RATIO AND VOLUNTAS: THE TENSION BETWEEN REASON AND WILL IN LAW* (2010) (discussing this further).

¹¹³COTTERRELL, *supra* note 11, at 278.

¹¹⁴Roger Cotterrell, *Transnational Communities and the Concept of Law*, 21 *RATIO JURIS* 1, 13 (2008).

¹¹⁵COTTERRELL, *supra* note 11, at 277.

¹¹⁶ROSS, *supra* note 90, at 71.

¹¹⁷TUORI, *supra* note 67, at 20–21. *See also id.* at 38.

¹¹⁸*Id.* at 21.

¹¹⁹*Id.* at 21.

¹²⁰JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 34–35, 20 (Willian Rehg trans., 1996) (discussing the relation between "facticity" and "validity," which plays a central role in Habermas's theory of communicative action and, thus, in his understanding of social reality).

legitimacy.¹²¹ In this context, the “facticity of law” refers to the facticity of law enforcement and law-making, that is, to the “positivity of law.”¹²² Habermas’s account of “the dual character of legal validity” thus conceptually includes the facticity of law enforcement or “factual compliance.”¹²³ But Habermas also discerns a different type of facticity that is external to law.¹²⁴ This “social facticity” refers to “social constraints that actually govern legal decisions.”¹²⁵ This then means that “[t]he normative self-understanding of law can be negated by social facts that intervene in the legal system from without.”¹²⁶ Both Habermas’s understanding of the tension between facticity and validity as the defining characteristic of legality and his more intricate account of law’s facticity are potentially important for the realist theory of EU law.

Accepting the realist idea of law’s dual nature does not resolve or remove the tension between law’s facticity and normativity. On the contrary, it can be argued that a realist theory of law only qualifies as a theory of law insofar as it affirms this tension, as opposed to reducing legality to a mere facticity or materiality. However, unlike Habermas, a realist theory of law cannot categorically distinguish the internal facticity of law from social facticity. As explained above, Habermas is primarily interested in “the internal tension between facticity and validity manifest in the ambivalent mode of legal validity.”¹²⁷ He is able to demarcate the internal from the external tension between facticity and validity in this way because the internal, conceptual, relationship between law and political power in the constitutional state (*Rechtsstaat*) is separated from “social power that penetrates law from outside.”¹²⁸ This separation is not tenable under a realist theory of law. The internal tension between law’s “facticity”—in other words its enforcement—and “validity”—in other words its normative self-understanding—is important when the next section of this Article revisits the EU’s current politics of legality. But the material dimension of legality cannot be reduced to the issue of effective enforcement. As the emerging critical theories of EU law indicate,¹²⁹ the realist concept of EU law would ultimately also need to account for more subtle ways in which social facticity and power are infiltrated into the law of the European Union, including its *ratio* and ideational dimension.

III. An Interim Conclusion

The realist account of law’s dual nature portrays the social reality of EU law as simultaneously both factual/material and ideational. From this perspective, the main contribution of legal realism to EU law is to extend the analysis of legality from formal legal validity to the complex law-power nexus without denying the importance of law’s normative-ideational self-understanding. But opinions diverge on how successfully legal realists have dealt with the complexity of the law-power relationship. For instance, Franz von Benda-Beckmann warns against “the danger of not taking normative phenomena seriously as ‘real’ or ‘empirical’ and so limiting the understanding of the social significance of such phenomena.”¹³⁰ Similarly, Habermas speaks of “false realism” that

¹²¹*Id.* at 95.

¹²²*Id.* at 38 (referring to “positivity” as “an artificial layer of social reality that exists only so long as it is not repealed.”).

¹²³*Id.* at 29, 30.

¹²⁴*Id.* at 34.

¹²⁵*Id.*

¹²⁶*Id.*

¹²⁷*Id.* at 82.

¹²⁸*Id.* at 39. See also *id.* at 336, 449 (discussing further), 136 (describing how “the internal relation between law and political power” is “not concerned with the gap between norm and reality, and thus does not yet approach power as a social facticity able to make ideas look foolish.”).

¹²⁹See, e.g., Neuvonen, *Emancipation, Immanence, Utopia: The Critical Project in EU Law*, *supra* note 14 (offering an overview).

¹³⁰Von Benda-Beckmann, *supra* note 77, at 47.

“underestimates the empirical impact of the normative presuppositions of existing legal practices.”¹³¹ Others, however, posit that the realist account of legality “begins with the idea that law’s power invites reason.”¹³² While these questions about the relationship between law’s *ratio* and *voluntas*, or its normativity and facticity, are not unique to EU law, it will be seen in the next section that the realist focus on law’s facticity reveals a non-singular—or “singular plural”¹³³—form of legality that distinguishes EU law from monist state law.

F. From Theory to Practice: What Difference Would the Realist Concept of EU Law Make?

Legal realism as a theory of adjudication must be complemented with a realist theory of law in EU legal studies. The previous sections laid down a set of parameters for a more realist theory of EU law. This section will illustrate what difference the realist concept of law would make in EU legal studies. First, this analysis shows that EU law cannot be viewed as autonomous if we take seriously law’s facticity and materiality. Second, the realist account of legality critically revisits the mainstream pluralist approaches, including the different variants of legal and constitutional pluralism and inter-legality, in theorizing EU law. As they focus on the co-existence of plural legalities, the pluralist theories overlook the more foundational question about the nature of legality in EU law. As such, they also fail to account for the non-singular form of legality in EU law. Finally, it will be seen that a better grasp of the EU’s partaking in the politics of legality is integral to a more realist(ic) theory of EU law. This discussion highlights the amount of work that remains to be done to mainstream the realist position in EU legal studies. It will also introduce the realist account of legality as key to the EU’s ongoing authority crisis.

I. A Realist Critique of the CJEU’s Autonomy Thesis

The validity of primary EU law, including the unwritten general principles of EU law, is often taken as given by EU law scholars. As Ross notes, “legal science proper” normally ignores questions about the nature of law because the presumption of validity constitutes “an integral element” of doctrinal statements.¹³⁴ But a mere source thesis of legal validity ultimately fails to explain what factors make a particular source of EU law valid law.¹³⁵ The “what is law” question is also obscured by the way in which the validity of EU law is separated from the questions concerning its interpretation and application. As is well known, this distinction guides the division of labor between the EU and national courts.¹³⁶ It may also help to reconcile the primacy of EU law with the fact that the EU cannot be seen as “a self-validating order.”¹³⁷ The categorical distinction between validity and application has long been under pressure from those national constitutional courts and tribunals that claim the right to exercise an *ultra vires* review of EU law under certain circumstances.¹³⁸ But it is also called into question by the realist theory of EU law, as discussed in this Article.

¹³¹HABERMAS, *supra* note 120 (Preface).

¹³²Dagan, *supra* note 31, at 631.

¹³³See generally JEAN-LUC NANCY, BEING SINGULAR PLURAL (Robert Richardson & Anne O’Byrne trans., 2000) (introducing the notion of “singular plural”).

¹³⁴Ross, *supra* note 90, at 13, 19.

¹³⁵The purely formalist source thesis of legal validity should not be confused with the positivist “social source” thesis.

¹³⁶CJEU, Case 314/85, Foto-Frost v Hauptzollamt Lübeck-Ost, ECLI:EU:C:1987:452, paras. 15–18 (Oct. 22, 1987).

¹³⁷See, e.g., Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 EUR. L. J. 389, 415, 420–21 (2008).

¹³⁸See *supra* Part B (discussing this point).

It is a truism that national courts and authorities play a central role in the application and enforcement of EU law.¹³⁹ A vast body of academic literature has explored the role of national courts as “EU courts” over the years.¹⁴⁰ But less attention has been dedicated to what this cooperation between the EU and national courts means for the nature of EU law. For instance, Tuori postulates that “[t]he cure to transnational law’s incompleteness lies in its parasitic character.”¹⁴¹ But his discussion on this incompleteness focuses on normative “distilling techniques” that EU law uses to manage its “parasitic character,” rather than on the legality of EU law.¹⁴² From the realist perspective, the incompleteness of EU law does not just relate to “the legitimating function,”¹⁴³ but extends to the nature of EU law as “law,” that is, its legality in the broad sense. If law’s social reality is simultaneously both factual and ideational, the legality of EU law is not reducible to normative statements about what counts as valid EU law according to the CJEU. Therefore, the legality of EU law looks different depending on how much attention is paid to the facticity and materiality of EU law.

Neither the principle of State liability nor the Article 258 TFEU infringement proceedings—both of which have been used very sparingly against national courts—change the fact that national courts and authorities exercise significant control over the facticity of EU law. National challenges to the absolute primacy of EU law are often problematized because rights that individuals enjoy as subjects of EU law must be upheld equally in all Member States. But this argument for the *effet utile* of EU law ignores the more foundational link between effectiveness and legality. After all, effectiveness is ultimately “decisive for legality.”¹⁴⁴ Against this backdrop, it is difficult to account for the factual dimension of EU law without concluding that the legality of EU law is *non-singular* in ways that differ from state law. Unlike in the case of monist state law, the facticity of EU law is never reducible to a single factual ground, such as a state’s monopoly over the use of force within its territory. This conclusion does not make the existence of EU-level legal authority impossible. On the contrary, the argument of “relative legal authority” can accompany a “notion of degrees of legality.”¹⁴⁵ But any such authority claim under the conditions of non-singular legality would contravene the CJEU’s autonomy thesis as a central building-block of the EU’s current politics of legality.

As is well known, the CJEU claims that “[the] autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the European Union and its law.”¹⁴⁶ These essential characteristics of EU law relate “in particular to the constitutional structure of the European Union and the very nature of that law.”¹⁴⁷ The Court has also frequently emphasized in this context that:

¹³⁹CJEU, Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, ECLI:EU:C:1978:49, para. 16 (March 9, 1978).

¹⁴⁰See generally Imelda Maher, *National Courts as European Community Courts*, 14 LEGAL STUD. 226 (1994); THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT (Anne Marie Slaughter et al eds., 1998); NATIONAL COURTS AND EU LAW: NEW ISSUES, THEORIES AND METHODS (Bruno de Witte et al eds., 2016).

¹⁴¹TUORI, *supra* note 67, at 219.

¹⁴²*Id.* at 227 (describing how these techniques include “direct applicability and direct effect of transnational norms; as well as harmonisation, mutual recognition, and coordination of national legislation”).

¹⁴³*Id.* at 226.

¹⁴⁴Alexander Somek, *Monism: A Tale of the Undead*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 343, 361 (Matej Avbelj & Jan Komárek eds., 2012). See also *id.* at 360 (noting that “it is fair to say that from the perspective of effectiveness, the Member States are free to determine the circumstances under which the Union law’s claim to supremacy must yield to national constitutional concerns.”). But Somek’s turn to monism leaves undiscussed what this link between legality and effectiveness means for the concept of EU law.

¹⁴⁵Cotterrell, *supra* note 114, at 15.

¹⁴⁶See, e.g., CJEU, Case C-621/18, *Andy Wightman and Others v. Secretary of State for Exiting the European Union*, ECLI:EU:C:2018:999, para. 45 (Dec. 10, 2018); CJEU, Case C-284/16, *Slowakische Republik v. Achmea BV*, ECLI:EU:C:2018:158, para. 33 (March 6, 2018). See also Opinion of the Court 2/13, ECLI:EU:C:2014:2454, paras. 164–66 (Dec. 18, 2014).

¹⁴⁷See, e.g., *Wightman*, Case C-621/18 at para 45; *Achmea*, Case C-284/16 at para. 33; see also CJEU, Case C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655, paras. 43–44 (Sep. 2, 2021).

EU law is characterised by the fact that it stems from an independent source of law, namely the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.¹⁴⁸

The autonomy of EU law is sometimes explained by “the *lex specialis* character of EU law,” which the Member States have accepted as signatories of the EU Treaties.¹⁴⁹ But the Treaties are silent about the autonomy thesis and the other “essential characteristics” of EU law are premised on the autonomy of EU law, instead of explaining why it exists.

This circularity suggests that the autonomy thesis ultimately hinges on the CJEU’s reference to the “very nature” of EU law. It is generally accepted that the autonomy thesis protects the unity and the proper functioning of the EU legal order.¹⁵⁰ Along with the functional rationale and the CJEU’s need of self-perseverance, many commentators detect a more axiological/value-laden dimension in the CJEU’s autonomy thesis.¹⁵¹ Autonomy can even be viewed as “existential” to the EU in the sense that it has become “fundamental to the *existence* of the [Union].”¹⁵² While all of these rationales may explain why the CJEU invokes the autonomy thesis, none of them clarifies what it is in the “very nature” of EU law that makes EU law autonomous vis-à-vis both the Member States and international law. This lack of explanation gives the impression that the nature of EU law is something pre-given. In reality, however, the autonomy thesis is a product of a very particular politics of legality. That is, it is preceded by a choice between different concepts of law even though this choice now remains implicit in the CJEU’s reasoning.

The CJEU’s autonomy thesis is inseparable from the concept of law that underlies it. Therefore, the realist theory of EU law questions the CJEU’s autonomy-based authority claim from inside, that is, from within the concept of EU law. Some scholars argue with reference to Joseph Raz’s conditions for the existence of a legal system that “all legal systems are autonomous in their own jurisdiction.”¹⁵³ Yet, Raz’s institutional positivism is contingent on the law-state paradigm in ways that ultimately make it unsuitable for theorizing EU law.¹⁵⁴ Others have proposed that although “EU law appears as a mere component of the applicable legality of the various Member States,” it can simultaneously be viewed as “forming an autonomous legal order, a world of law unto itself.”¹⁵⁵ But the realist theory of EU law cannot dichotomize law’s social reality in this way. The idea of EU law’s autonomous nature can only be maintained if the factual/material dimension of legality is omitted from discussion, and this omission is not possible for realist legal theory. A more qualified—relative—authority claim for EU law could perhaps be justified by the CJEU’s better capacities to steer or coordinate the formation of a non-singular legality in the EU. This, however, would radically differ from the CJEU’s current autonomy-based authority claim. It

¹⁴⁸*Id.*

¹⁴⁹Violeta Moreno-Lax & Katja S. Ziegler, *Autonomy of the EU Legal Order - A General Principle? On the Risks of Normative Functionalism and Selective Constitutionalisation*, in RESEARCH HANDBOOK ON GENERAL PRINCIPLES IN EU LAW 227, 230–31, 233 (Katja Ziegler, Päivi Neuvonen & Violeta Moreno-Lax eds., 2022). See also, e.g., Marja-Liisa Öberg, *Autonomy of the EU Legal Order: A Concept in Need of Revision?*, 26 EUR. PUB. L. 705, 709 (2020).

¹⁵⁰See, e.g., Öberg, *supra* note 149, at 710, 738–39.

¹⁵¹See, e.g., Frank Schorkopf, *Value Constitutionalism in the European Union*, 21 GERMAN L.J. 956, 963 (2020); Damjan Kukovec, *Autonomy: The Central Idea of the Reasoning of the Court of Justice*, 8 EUR. PAPERS 1403, 1436–37 (2023).

¹⁵²Niamh Nic Shuibhne, *What is the Autonomy of EU Law, and Why Does that Matter?*, 88 NORDIC J. INT’L L. 9, 11, 19 (2019).

¹⁵³Justin Lindeboom, *Why EU Law Claims Supremacy*, 38 OXFORD J. LEGAL STUD. 328, 341 (2018).

¹⁵⁴See, e.g., Sean Coyle, *Hart, Raz and the Concept of a Legal System*, 21 L. & PHIL. 275, 296 (2002) (describing how Raz’s institutional positivism ends up “falling back on ‘factual’ and ‘intensional’ grounds” when it distinguishes legal systems from other institutional systems). See also JOSEPH RAZ, *The Identity of Legal Systems*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 78, 98–100 (1979) (suggesting that, in Raz’s case, this grounding is ultimately provided by his theory of the state).

¹⁵⁵Toni Marzal, *Between Integration and the Rule of Law: EU Law’s Culture of Lawful Messianism*, 24 GERMAN L.J. 718, 724 (2023).

would also require a more developed understanding of the emergence of non-singular legality in the EU—a project that has so far escaped the attention of both EU law scholars and legal theorists.

II. A Realist Critique of Legal and Constitutional Pluralism in EU Legal Studies

A realist account of law's dual nature challenges the CJEU's autonomy thesis from within the concept of EU law. But it also has implications for EU and transnational legal theory. Legal pluralism presents one of the main alternatives to the monist law-state paradigm in analytical jurisprudence. Constitutional pluralism as a specific reinterpretation of legal pluralism has played a prominent role in EU legal studies for more than thirty years. Both a pluralist critique of the monist law-state paradigm and the socio-legal focus of early legal pluralism are relevant for the realist theory of EU law. However, the realist theory of EU law depicts the legality of EU law internally disunified, or non-singular, in ways that the mainstream pluralist approaches cannot sufficiently account for. As this section demonstrates, legal and constitutional pluralism are too focused on "external pluralism,"¹⁵⁶ that is, on how different legalities co-exist and interact. Similarly, the emerging theory of inter-legality presupposes the existence of interacting legalities. This means that the existing theories of pluralism and inter-legality are of little avail to theorizing EU law from a realist perspective.

The central claim of legal pluralism is that multiple legal systems can "co-exist" in the same socio-political space.¹⁵⁷ But no consensus exists on the meaning of legal pluralism beyond this point. From a sociological perspective, the pluralist position equals to a simple statement that "multiple [overlapping] communities assert norms that have impact."¹⁵⁸ But it has been noted that "nothing can obviously follow from the strong pluralist premise that each normative order is authenticated on its own terms."¹⁵⁹ This is why many authors distinguish pluralism from mere "plurality" or "simple diversity."¹⁶⁰ The pluralist challenge also extends to "what counts as law."¹⁶¹ In practice, however, the pluralist position can be reconciled with "widely divergent concepts of law."¹⁶² Tamanaha accordingly detects the following problem in legal pluralism: "While they agree on the initial proposition that there is a plurality of law in all social arenas, legal pluralists immediately diverge on what this assertion entails because there is no agreement on the underlying concept of law."¹⁶³ This same analytical problem underlies constitutional pluralism in EU legal studies.

Legal pluralists can circumvent these conceptual and analytical challenges by adopting a "juristic" approach to the pluralist challenge. The so-called pluralist jurisprudence focuses on studying the "plurality of legal systems" by developing solutions to their coexistence and interaction.¹⁶⁴ In this vein, it has been argued that the very idea of legal pluralism is to advance "some degree of [normative] accommodation of diversity."¹⁶⁵ The so-called "classic legal pluralism"

¹⁵⁶See BRIAN Z. TAMANAHA, *LEGAL PLURALISM EXPLAINED: HISTORY, THEORY, CONSEQUENCES* 209 (2021) (describing the distinction between "external pluralism" and "internal pluralism").

¹⁵⁷Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869, 870 (1988) (defining legal pluralism as "a situation in which two or more legal systems coexist in the same social field."). See also Von Benda-Beckmann, *supra* note 77, at 60.

¹⁵⁸Paul Berman, *The New Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 225, 238 (2009).

¹⁵⁹Nicole Roughan & Andrew Halpin, *The Promises and Pursuits of Pluralist Jurisprudence*, in IN PURSUIT OF PLURALIST JURISPRUDENCE 326, 343 (Nicole Roughan & Andrew Halpin eds., 2017).

¹⁶⁰TUORI, *supra* note 67, at 39.

¹⁶¹See, e.g., Ralf Michaels, *Law and Recognition – Towards a Relational Concept of Law*, in IN PURSUIT OF PLURALIST JURISPRUDENCE 90, 92 (Nicole Roughan & Andrew Halpin eds., 2017).

¹⁶²von Benda-Beckmann, *supra* note 77, at 72.

¹⁶³Tamanaha, *supra* note 78, at 297.

¹⁶⁴Margaret Davies, *Plural Pluralities of Law*, in IN PURSUIT OF PLURALIST JURISPRUDENCE 239, 251, 252 (Nicole Roughan & Andrew Halpin eds., 2017).

¹⁶⁵Nicole Roughan & Andrew Halpin, *Introduction*, in IN PURSUIT OF PLURALIST JURISPRUDENCE 1, 5 (Nicole Roughan & Andrew Halpin eds., 2017).

explored the existence of plural legalities in colonial and post-colonial societies, whereas “new legal pluralism” extended the analysis of “plural normative orders” outside that context.¹⁶⁶ But the term “new legal pluralism” can also refer to the emergence of transnational or global legal pluralism.¹⁶⁷ The pluralist challenge to the law-state paradigm is attractive to scholars of transnational and global law. Therefore, the focus of the pluralist debate has over time moved from “infrastate” to “suprastate” legalities.¹⁶⁸ Contrary to the sociological orientation of early legal pluralism, transnational legal pluralism almost unequivocally forms a branch of juristic pluralism.¹⁶⁹

Interaction between different systems or sites of law is a central theme in juristic pluralism. In practice, however, the operation of juristic pluralism requires shared criteria for “the validity, authority and jurisdiction of particular rules.”¹⁷⁰ The EU’s relationship with the national legal orders can be viewed an example of “juristically recognised” pluralism.¹⁷¹ But such an arrangement is ultimately more monist than pluralist if it is based on a shared understanding of “what is to count as law” and of “the legal relationship between different systems of law.”¹⁷² At the same time, it is questionable whether the “juristic techniques” and “legal methodology” are capable of addressing the pluralist challenge.¹⁷³ This is so because a pluralist scenario is often prone to controversies that are deeply political.¹⁷⁴ These issues that are critical for juristic or juridical pluralism also underlie the discussion on transnational legal pluralism. Although there are important differences between legal and constitutional pluralism, the discourse on constitutional pluralism in EU legal studies can be depicted as a reinterpretation of transnational juridical pluralism.¹⁷⁵

As is well known, the central idea of constitutional pluralism is that the EU and national constitutional traditions can exist alongside one another without a clear resolution to the question of jurisdictional authority. From this starting point, constitutional pluralism proposes a non-hierarchical, “heterarchical,” approach, which leaves jurisdictional boundary disputes unresolved.¹⁷⁶ Instead of making absolute claims for primacy, the conflicting systems are expected to engage in dialogue and mutual accommodation. Constitutional pluralism presents itself as an alternative to the monist and dualist approaches to how the relationship between the EU and its Member States could be understood. But constitutional pluralists, too, can be criticized for being “closet monists.”¹⁷⁷ For instance, Cormac Mac Amhlaigh uses the term “monist pluralism” to describe the way in which “a series of norms external to, or shared by, both systems . . . provide a normative resource for the management of interactions and conflicts.”¹⁷⁸ Even Neil MacCormick,

¹⁶⁶See, e.g., Merry, *supra* note 157, at 872, 873. See also, e.g., Tamanaha, *A Reconstruction of Transnational Legal Pluralism and Law’s Foundations*, *supra* note 7, at 451–52 (discussing this further).

¹⁶⁷See, e.g., DE SOUSA SANTOS, *supra* note 2, at 103. See also Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANSNAT’L LEGAL THEORY 141 (2010) (discussing this further).

¹⁶⁸DE SOUSA SANTOS, *supra* note 2, at 103. See also, e.g., Halpin, *The Creation and Use of Concepts of Law when Confronting Legal and Normative Plurality*, *supra* note 75, at 170–71.

¹⁶⁹Tamanaha, *A Reconstruction of Transnational Legal Pluralism and Law’s Foundations*, *supra* note 7, at 452, 454.

¹⁷⁰Cotterrell, *supra* note 114, at 7.

¹⁷¹*Id.*

¹⁷²*Id.* See also Cotterrell, *supra* note 79, at 25.

¹⁷³Cotterrell, *supra* note 79, at 24–25, 27; Cotterrell, *supra* note 72, at 539. See also Cotterrell, *supra* note 114, at 6–7.

¹⁷⁴Roughan & Halpin, *supra* note 159, at 336.

¹⁷⁵See, e.g., Tamanaha, *A Reconstruction of Transnational Legal Pluralism and Law’s Foundations*, *supra* note 7, at 451 (identifying a close link between the doctrinal or juridical constitutional pluralism and transnational legal pluralism).

¹⁷⁶E.g., Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 337 (2002); Neil Walker, *Constitutional Pluralism Revisited*, 22 EUR. L. J. 333, 341 (2016). See also MATEJ AVBELJ, *THE EUROPEAN UNION UNDER TRANSNATIONAL LAW: A PLURALIST APPRAISAL* (2018); Matej Avbelj, *Constitutional Pluralism and Authoritarianism*, 21 GERMAN L.J. 1023, 1027–28 (2020) (attempting to rethink the “normative core” of pluralism in EU law).

¹⁷⁷Somek, *supra* note 144, at 360. See also *id.* at 347.

¹⁷⁸Cormac Mac Amhlaigh, *Pluralising Constitutional Pluralism*, in *IN PURSUIT OF PLURALIST JURISPRUDENCE* 64, 86 (Nicole Roughan & Andrew Halpin eds., 2017).

who coined the term “constitutional pluralism” in EU legal studies, acknowledged that “this is a kind of ‘monism’ in Kelsen’s sense.”¹⁷⁹

A parallel, more normative, strand of critique holds that constitutional pluralism conflicts with the very idea of constitutional law. In particular, juridical constitutional pluralism is criticized for neglecting “the question of political authority.”¹⁸⁰ In response to this critique, the focus of constitutional pluralism moved from juridical to political constitutional pluralism.¹⁸¹ But political constitutional pluralism can also be criticized for presuming that “an independent source of authority” exists at the EU level.¹⁸² The common denominator for the juridical and political variants of constitutional pluralism is that they focus on how the EU and national-level authority claims can co-exist. This may be understandable insofar as constitutional pluralism seeks to provide an alternative to both European and national monism. But the solution offered by constitutional pluralists is arguably that of “external pluralism,” which tries to reconcile two sets of monist law.¹⁸³ Therefore, and somewhat paradoxically, theories of constitutional pluralism have little to say about the nature of EU law, which is nevertheless the main problematic if we want to rethink the relationship between the EU and national legal orders.

When MacCormick presented the idea of constitutional pluralism, he also promised to articulate “what becomes of our concepts of law and legal system in the light of that all.”¹⁸⁴ In practice, however, his focus lay in how EU and national legal systems interact.¹⁸⁵ According to MacCormick, both state and non-state law can be understood as institutional normative orders, but non-state law lacks the feature of being “physically coercive.”¹⁸⁶ For MacCormick, this was not a problem because his institutional positivism focused on the “normative power” of law.¹⁸⁷ That is, his theory of law “stresses the kind of normative system law is, rather than some particular or exclusive set of power relations as fundamental to the nature of law.”¹⁸⁸ For instance, Michael Wilkinson argues that MacCormick’s concept of law overlooks “the process through which political power is generated and acquires legitimacy” because “[t]he focus on legality displaces the question of legitimacy.”¹⁸⁹ From the perspective of this Article, the problem is not MacCormick’s focus on legality as such. Instead, the problem lies in his theory of law; namely, the narrow focus on intra-systemic validity leaves much of law’s social reality unexplored.

Contrary to MacCormick’s intention, his work fails to properly unpack what legal integration does for our concept of law. A key tenet of MacCormick’s constitutional pluralism is that accepting the higher “validity-ranking” of EU law does not need to mean that there is only “a single legal system, with as many sub-systems as there are member states.”¹⁹⁰ But he also maintains that the EU legal system “constitutes in its own context and over the relevant range of

¹⁷⁹NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH* 121 (1999). See also HANS Kelsen, *PURE THEORY OF LAW* 336 (Max Knight trans., University of California Press 1967) (Ger. 1934).

¹⁸⁰Martin Loughlin, *Constitutional Pluralism: An Oxymoron?*, 3 *GLOB. CONST.* 9, 18–19 (2014).

¹⁸¹See Walker 2016, *supra* note 176, at 335 (articulating this turn from judicial to political constitutional pluralism).

¹⁸²Loughlin, *supra* note 180, at 23.

¹⁸³TAMANAH, *supra* note 156, at 209. See also Pavlos Eleftheriadis, *Pluralism and Integrity*, 23 *RATIO JURIS* 365, 373 (2010) (providing a similar point about “conflicting monisms”).

¹⁸⁴Neil MacCormick, *Beyond the Sovereign State*, 56 *MOD. L. REV.* 1, 1 (1993).

¹⁸⁵Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 *EUR. L. J.* 259, 263 (1995) (implying that constitutional pluralism is primarily a “theory about interaction of distinct systems”).

¹⁸⁶*Id.* at 261.

¹⁸⁷MacCormick, *supra* note 184, at 11.

¹⁸⁸*Id.* at 8.

¹⁸⁹Michael A. Wilkinson, *Beyond the Post-Sovereign State?: The Past, Present, and Future of Constitutional Pluralism*, 21 *CAMBRIDGE Y.B. EUR. LEGAL STUD.* 6, 11 (2019).

¹⁹⁰MACCORMICK, *supra* note 179, at 116; MacCormick, *supra* note 185, at 264. See also MACCORMICK, *supra* note 179, at 116 (indicating that the higher “validity ranking” of EU law ultimately relies on reasons of necessity).

topics a source of valid law superior to other sources recognized in each of the member-state systems.”¹⁹¹ This position presumes “the existence of EC [now EU] law as an ‘independent legal order.’”¹⁹² Yet, the more foundational question about the legality of EU law remains unexplored. I have developed this critique in relation to MacCormick’s work because his discussion on constitutional pluralism is explicitly rooted in a theory of law. But these observations reveal a broader problem in constitutional pluralism: neither juridical nor political constitutional pluralism provides a satisfactory answer to the “what is law” question in EU law.

III. A Realist Critique of the Emerging Theory of Inter-legality

Constitutional pluralism is often depicted as a break from the earlier jurisprudential discourse on the concept and nature of law.¹⁹³ But it has been seen in this section that different variants of constitutional pluralism ultimately suffer from the same problem: they overlook the “what is law” question in EU law. This is so because constitutional pluralists tend to follow MacCormick in taking the internal validity of EU law for granted. This section will next consider whether the emerging theory of inter-legality could remedy some of the issues that the pluralist approaches leave unresolved in EU legal studies. The term “inter-legality” is sometimes used interchangeably with legal pluralism.¹⁹⁴ But inter-legality, when properly understood, is a concept distinct from legal and constitutional pluralism. The appeal of inter-legality lies in its shift away from the co-existence of plural legalities to how these legalities interact. The central question for this article is whether the emerging theory of inter-legality could provide analytical tools for explaining the emergence of non-singular legality in EU law.

Inter-legality has become something of a buzzword in legal theory studying transnational law.¹⁹⁵ But the concept of inter-legality was initially popularised by Boaventura de Sousa Santos already in the 1980s.¹⁹⁶ De Sousa Santos’s phenomenological analysis of inter-legality focuses on how legal subjects experience plural legalities.¹⁹⁷ As such, it is heavily indebted to legal pluralism. A different interpretation of inter-legality has more recently been offered by Jan Klabbers and Gianluigi Palombella, who distinguish their analysis of inter-legality from De Sousa Santos’s phenomenological and sociological approach.¹⁹⁸ Klabbers and Palombella invoke the concept of inter-legality to explain how “different legal orders may overlap normatively and reach beyond their own limits.”¹⁹⁹ But they explicitly state that “inter-legality does not, in and of itself, clarify much about what others refer to as transnational law.”²⁰⁰ Instead, their analysis of inter-legality focuses on the “empirical puzzle” of how courts utilize rules from other legal systems.²⁰¹ Although

¹⁹¹MACCORMICK, *supra* note 179, at 117.

¹⁹²MacCormick, *supra* note 185, at 261. *Compare also id.* at 263–64 (outlining MacCormick’s early, more radical, vision of pluralism), with MACCORMICK, *supra* note 179, at 118 (describing MacCormick’s later “pluralism under international law”).

¹⁹³Mac Amhlaigh, *supra* note 178, at 72.

¹⁹⁴*See, e.g.*, WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* 121 (2009).

¹⁹⁵*See, e.g.*, TUORI, *supra* note 67, at 239 (stating that “post-national plurality invites us to conceive of the global constellation of law as interlegality”).

¹⁹⁶Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J. L. & SOC’Y 279, 288 (1987).

¹⁹⁷DE SOUSA SANTOS, *supra* note 2, at 118–19.

¹⁹⁸Jan Klabbers & Gianluigi Palombella, *Introduction: Situating Inter-legality*, in *THE CHALLENGE OF INTER-LEGALITY* 1, 1 (Jan Klabbers & Gianluigi Palombella eds., 2019); Gianluigi Palombella, *Theory, Realities, and Promises of Inter-Legality A Manifesto*, in *THE CHALLENGE OF INTER-LEGALITY* 363, 374–75 (Jan Klabbers & Gianluigi Palombella eds., 2019).

¹⁹⁹Klabbers & Palombella, *supra* note 198, at 1.

²⁰⁰*Id.* at 10.

²⁰¹Jan Klabbers, *Dystopian Legalities: A Reply to Nico Krisch*, 20 INT’L J. CONST. L. 507, 510 (2022). *See also* Klabbers & Palombella, *supra* note 198, at 2; Palombella, *supra* note 198, at 382.

the theory of inter-legality could try to account for the non-singular form of legality in EU law, it currently leaves this potential unrealized.

First, the recent reworkings of inter-legality focus on exploring “legal relations” and “interlocking of legal regimes”²⁰² instead of the “what is law” question. Palombella posits that “[w]hile *legality* and *validity* decouple, *inter-legality* construes a kind of *continuum* – it captures the legal compound.”²⁰³ But neither Palombella nor Klabbers substantiates this statement about decoupling legality from validity. Second, the idea of inter-legality itself has remained under-theorized.²⁰⁴ Nico Krisch’s argument of “entangled legalities” can be viewed as an attempt to re-theorize inter-legality.²⁰⁵ In brief, Krisch posits that “legalities are entangled when norms from different origins are in practice brought into a relation that is not merely one of systemic separation or integration, and when the interaction between them plays a constitutive role for the legal context it relates to.”²⁰⁶ For Krisch, the relationship between EU law and national law provides an example of entangled legalities.²⁰⁷ He also suggests that viewing law as entangled in this sense would affect the way in which law is cognized.²⁰⁸ But the analysis of entangled legalities does not vindicate the concept of inter-legality for the purposes of this Article.

Krisch’s argument about entangled legalities does not offer a theory of law—let alone a realist theory of non-singular legality. Krisch briefly refers to “the legal forms it [entanglement] generates.”²⁰⁹ But he ultimately leaves unanswered the crucial question of how entanglement affects “our understanding of the concept of law.”²¹⁰ The “what is law” question is more directly addressed by Ralf Michaels, whose idea of the “external recognition requirement” as “a general requirement of law” informs Krisch’s work.²¹¹ Although the idea of external recognition is meant to imply that “there no longer is an independent position from which to determine the nature of law,” Michaels maintains that “there are separate legal orders, each of which determines what counts as law for itself (through a rule of internal recognition) and for other orders (through a rule of external recognition).”²¹² Like Krisch, Michaels indicates that his account of external recognition can explain the relations between EU and domestic legal orders.²¹³ But his assumption of pre-existing internally valid legal orders leaves the nature of EU law as “law” unexplored.

In sum, the pluralist approaches are of little use to a realist theory of EU law as long as their focus lies in “external pluralism”. The phenomenological account of inter-legality is virtually indistinguishable from legal pluralism, whereas the recent re-workings of inter-legality circumvent the more foundational questions about the changing nature of legality by framing the theory of inter-legality as empirical and “case-related.”²¹⁴ These approaches presume the existence of internally validated legalities or legal orders. Moreover, none of these approaches properly links the idea of inter-legality to questions that realist legal theory views central to the analysis of legality. Due to their insufficient engagement with law’s social reality, these approaches fail to shift

²⁰²TUORI, *supra* note 67, at 240.

²⁰³Palombella, *supra* note 198, at 378.

²⁰⁴See Sanne Taekema, *Navigating Law’s Complexities: Concepts for Postnational Law—A Reply to Nico Krisch*, 20 INT’L J. CONST. L. 514, 515 (2022) (making a similar point). See also Neil Walker, *Legalising Inter-legality*, 1 EUR. L. OPEN 216, 225 (2022).

²⁰⁵Taekema, *supra* note 204, at 515, 516. See also Klabbers, *supra* note 201, at 511.

²⁰⁶Nico Krisch, *Entangled Legalities in the Postnational Space*, 20 INT’L J. CONST. L. 476, 488 (2022).

²⁰⁷Nico Krisch, *Framing Entangled Legalities Beyond the State*, in ENTANGLED LEGALITIES BEYOND THE STATE 1, 10–12 (Nico Krisch ed., 2021).

²⁰⁸*Id.* at 2.

²⁰⁹*Id.* See also *id.* at 10–11 (referring to “a broader understanding of law” as developed by legal pluralists).

²¹⁰Taekema, *supra* note 204, at 515, 516. But see Krisch, *supra* note 206, at 489 (positing that “[l]egality is better conceived as a matter of degree rather than a binary attribute”).

²¹¹Michaels, *supra* note 161, at 108. See also, Krisch, *supra* note 206, at 491; Krisch, *supra* note 207, at 21.

²¹²Michaels, *supra* note 161, at 110.

²¹³*Id.* at 101, 102.

²¹⁴Palombella, *supra* note 198, at 382. See also Klabbers, *supra* note 201, at 511.

the analytical focus from the co-existence and interaction of plural legalities to how legality itself becomes non-singular—or pluralized—in EU law. This is not to say that the social reality of law remains unnoticed in the theory of inter-legality.²¹⁵ But this Article has already demonstrated that law’s sociality cannot be reduced to the social legitimacy of law without considering the complex ways in which law and power interact in society.

IV. Towards a More Realist “Politics of Legality” in EU Law

A closer look at the facticity of EU law in this section has revealed a non-singular form of legality that distinguishes EU law from monist state law and renders the existing pluralist discourse largely obsolete in theorizing EU law. These negative findings are important because they reveal the intellectual and conceptual vacuum that currently surrounds the concept of law in EU law. But this inquiry into the “what is law” question also serves a different purpose; namely, it shows that statements about the nature of EU law are based on either an implicit or explicit politics of legality. The term “politics of legality,” which I borrow from De Sousa Santos, gives expression to the contingent nature of our concepts of law.²¹⁶ Law’s “what” is always shaped by its “where” and “when.”²¹⁷ The criteria for legality accordingly comprise a political choice between different concepts of law, rather than an abstract conceptual truth about the nature of law.²¹⁸ This, however, does not amount to the statement that nothing distinguishes law from politics.²¹⁹ For this Article, the important point is two-fold: (1) the politics of legality is also in operation in EU law and (2) we must understand how the EU’s politics of legality operates before we can critically re-evaluate it.

A better grasp of the EU’s partaking in the politics of legality is integral to developing a realist theory of EU law. Viewing the “what is law” question from this perspective recognizes law’s “performativity,” that is, its capacity to reproduce and create social relations.²²⁰ It also acknowledges that law’s boundaries, however defined, are likely to “work differently on different groups.”²²¹ The idea of autonomy, which has already been refuted above in this section, is constitutive of the EU’s current politics of legality. The CJEU’s engagement with the rule of law provides another prominent example of the EU’s ongoing politics of legality. The rule of law clause in Article 2 TEU plays an important role in upholding the community of law, or a “common legal order,” as the CJEU understands it.²²² The judicialization of Article 2 TEU has already been extensively discussed by EU law scholars.²²³ Critics have noted that the CJEU’s engagement with the rule of law may disturb the balance of governmental powers in a democratic “Rechtsstaat.”²²⁴ Moreover, the very idea of a “rule of law State” has been criticized for implying that “the political

²¹⁵See, e.g., Krisch, *supra* note 207, at 22 (highlighting the need “to get closer to the ‘social life’ of postnational law in order to understand the way it works”). See also Krisch, *supra* note 206, at 489.

²¹⁶DE SOUSA SANTOS, *supra* note 2, at 120 (coining the term “politics of legality”). See also *id.* at 102 (highlighting “the political nature of many claims that seem to be purely analytical.”).

²¹⁷See, e.g., Davies, *supra* note 164, at 247.

²¹⁸*Id.* at 240. See also, e.g., DE SOUSA SANTOS, *supra* note 2, at 102, 106, 119.

²¹⁹See *supra* Part E (discussing this point further). See also, e.g., Paul Linden-Retek, *A Post-National Bearing Europe’s Legal Form and the Hope of Constitutional Critique*, in CRITICAL THEORY AND EUROPEAN UNION LAW: THE QUESTION OF POSTNATIONAL EMANCIPATION 227, 236-237 (Päivi Johanna Neuvonen and Paul Linden-Retek eds., 2026) (exploring how “the legal form” could become “a critical force” in postnational law).

²²⁰Davies, *supra* note 164, at 246.

²²¹Chris Rumford, *Towards a Multiperspectival Study of Borders*, 17 GEOPOLITICS 887, 894 (2012).

²²²See, e.g., CJEU, Case C-156/21, Hungary v. European Parliament and Council of the European Union, ECLI:EU:C:2022:97, para. 127 (Feb. 16, 2022); CJEU, Case C-204/21, Commission v. Poland, ECLI:EU:C:2023:442, para. 67 (June 5, 2023). See also CJEU, Case 294/83, Parti écologiste “Les Verts” v. European Parliament, ECLI:EU:C:1986:166, para. 23 (Apr. 23, 1986) (providing an early reference to “a Community based on the rule of law”).

²²³See generally LUKE DIMITRIOS SPIEKER, EU VALUES BEFORE THE COURT OF JUSTICE: FOUNDATIONS, POTENTIAL, RISKS (2023) (providing a comprehensive overview of this discussion).

²²⁴See Pieter-Augustijn Van Malleghem, *Legalism and the European Union’s Rule of Law Crisis*, 3 EUR. L. OPEN 50, 63–64 (2024) (providing a recent discussion). See also generally, e.g., MARTIN LOUGHLIN, THE FOUNDATIONS OF PUBLIC LAW 312–

entity has no existence outside the law.”²²⁵ But this debate generally overlooks the fact that a choice between different concepts of law precedes the CJEU’s rule of law jurisprudence.

It is problematic to entrench the rule of law clause without articulating what the “law” in that constellation entails—a question that still lacks a definitive answer in EU law. Therefore, the CJEU’s rule of law rhetorics remains tenuous as long as the “what is law” question is not properly addressed in EU law. However, on a more optimistic note, the CJEU’s value jurisprudence under Article 2 TEU²²⁶ could perhaps pave the way for a more realist theory of EU law. It has rightly been noted that “the substantiation and procurement of values . . . requires an appropriate form, which facilitates societal understanding.”²²⁷ Against this backdrop, it is difficult to see how the Court could maintain any type of value jurisprudence over time without considering, first, how these values may reify social reality, which varies not just from one Member State to another but also within them, and, second, how EU law forms part of that social reality, including its unequal power relations. But neither the Court nor the EU legislature is likely to succeed in accomplishing such a task on its own. Instead, a realist(ic) concept of EU law must be accompanied by a more developed critical theory of EU law. This seems even more urgent now that the ambiguous concept of “European society” has been endorsed by the CJEU and EU law scholars.²²⁸

While the political economy analyses of EU law can help to map the material foundations of the EU legal order under the conditions of late capitalism,²²⁹ the realist understanding of law’s dual nature calls for a more holistic social critique of EU law.²³⁰ Both the classic Marxist critique of political economy and the more recent Law and Political Economy (LPE) scholarship challenge the rigid distinction between economic, political, and cultural fields in society.²³¹ In doing so, they suggest that the political economy analysis of law “does not mean focus on the economic to the exclusion of the social.”²³² In practice, however, EU law scholars need critical social theory to substantiate this broad “social” account of political economy.²³³ And by depicting the material and ideational dimensions of social reality as co-constitutive, critical social theory challenges the view that the capitalist relation alone would suffice to explain the form of legality and the law-power relationship in EU law.

To conclude, any simple reference to the nature of EU law is problematic because it conceals the EU’s politics of legality. In the end, the EU’s politics of legality matters because it has implications for the authority and legitimacy claims that the EU makes. However, contrary to the view that often seems to prevail in critical studies of EU law, the analysis of legality cannot be replaced with the discussion on legitimacy. It is important to understand that the “what is law” question can be answered in more than one way to fathom how this choice affects the legitimacy of EU law. The EU’s legitimacy crisis is often depicted as a crisis of political authority that cannot be

341 (2010); Jens Meierhenrich, *Rechtsstaat versus the Rule of Law*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW* 39 (Jens Meierhenrich & Martin Loughlin eds., 2021).

²²⁵Marzal, *supra* note 155, at 729.

²²⁶See, e.g., CJEU, Case C-769/22, *Commission v. Hungary*, ECLI:EU:C:2026:326, paras. 527–28 (Apr. 21, 2026) (offering a recent articulation of the Court’s position on the “legally binding nature” of the Article 2 TEU values).

²²⁷Schorkopf, *supra* note 151, at 967.

²²⁸See generally the different contributions in the *Symposium on European Society*, 4 EUR. L. OPEN 626 (Loïc Azoulai & Armin von Bogdandy eds., 2025).

²²⁹See, e.g., *Transformative Law of Political Economy in Europe*, 1 EUR. L. OPEN (SPECIAL ISSUE) 749 (Anna Beckers, Klaas Hendrik Eller & Poul F. Kjaer eds., 2022).

²³⁰See CRITICAL THEORY AND EUROPEAN UNION LAW: THE QUESTION OF POSTNATIONAL EMANCIPATION (Päivi Johanna Neuvonen & Paul Linden-Retek eds., 2026) (developing such a project).

²³¹See, e.g., Ntina Tzouvala, *International Law and (the Critique of) Political Economy*, 121 S. ATL. Q. 297, 304, 310 (2022); Corinne Blalock, *Introduction: Law and the Critique of Capitalism*, 121 S. ATL. Q. 223, 223 (2022).

²³²Blalock, *supra* note 231, at 229. See also, e.g., Ivana Isailović, *Gender in Political Economy and EU Law*, 15 TRANS’L. LEGAL THEORY 525, 527 (2024) (discussing how the feminist political economy analysis of EU law “embeds the market and its laws in their social contexts”).

²³³Neuvonen, *Emancipation, Immanence, Utopia: The Critical Project in EU Law*, *supra* note 14, at 11–12.

resolved by legal means.²³⁴ Moreover, some argue that the discussion on the legitimacy of EU law “can and should take place as a matter of Union politics, without questioning the nature of EU law.”²³⁵ But this suggestion implies a problematic view of the nature of EU law as something *apolitical*. Therefore, the present Article posits that questions about legality and the concept of law deserve more attention in critical studies of EU law. But this inquiry cannot be limited to a formalist account of legal validity and pedigree. Instead, the realist theory of EU law calls for a better understanding of how law’s ideational and material dimensions interact—a question that also brings forth the law-power relationship in all its complexity.

G. Conclusion

This Article set out to explore what a more realist(ic) theory and concept of EU law would look like. Considering the EU’s self-proclaimed status as a community of law, leaving this question unanswered is not an option for EU legal studies. A theory of law is needed to explain what determines the validity of sources of law in EU law. The unanswered “what is law” question also underlies the controversy over the CJEU’s reasoning and methodological choices. In this Article, a closer look at the realist critiques of the CJEU’s jurisprudence demonstrated that legal realism as a theory of adjudication does not provide a sufficient answer to the “what is law” question in EU law. What is needed instead is a realist theory of EU law that is properly informed by law’s social reality, which is simultaneously both ideational and material. From this starting point, this Article demonstrated how the realist theory of EU law discloses the non-singular form of legality in EU law that the mainstream pluralist approaches fail to account for. This analysis highlighted that the concept of EU law is not something pregiven and that the EU is actively engaged in the politics of legality. In doing so, the Article depicted the concept of law as a key independent variable in the EU’s authority crisis. But enacting the realist theory of EU law remains difficult without a more developed social critique of EU law.

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²³⁴See generally J. H. H. Weiler, *The Authority of European Law: Do We Still Believe in It?*, in *THE AUTHORITY OF EU LAW: DO WE STILL BELIEVE IN IT?* 3 (Wolfgang Heusel & Jean-Philippe Ragueau eds., 2019) (discussing the different dimensions of this crisis).

²³⁵See, e.g., Julio Baquero Cruz, *Another Look at Constitutional Pluralism in the European Union*, 22 *EUR L. J.* 356, 374 (2016).