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CORE ANALYSIS

A way of critique: What can EU law scholars learn from critical theory?

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Abstract

This article detects a persistent imbalance between the zest for critical research and the thinness of critical methodology in the study of European Union (EU) law. The question that drives this investigation is: What can critique contribute to EU legal studies? The article draws on the methodological wealth of critical social theory to explicate how the critique of EU law could further evolve and why it matters. This analysis posits that the lack of adequate methodological engagement leaves EU law scholarship to drift between the problematic idea of unmasking critique, on the one hand, and that of supposedly non-normative critique, on the other hand. The article makes a case for a more dialectical method of critique to clarify how the critique of EU law is always preceded by a choice between competing rationalisations of society. These findings highlight that social theory should be of continuous interest to EU law scholars and that a socio-legal critique of EU law is not reducible to empirical research alone.

Keywords: EU law; critique; crisis law; social theory; socio-legal studies; critical theory

1. Introduction

In the European Union (EU), legal integration faces resistance from several directions. This reality is also reflected in the study of EU law. The unifying theme of critical EU law scholarship is to problematise the role of law in the integration project. A classic argument in critical research on EU law is that the proactive role of law as a driver of more or deeper integration undermines political decision-making processes and democratic institutions both in the EU and in its Member States. More recently, the EU's arduous ventures through various crises have added new layers to critical interventions. The law arguably runs into the risk of becoming reactive at best, and obsequious at worst, when rapidly escalating eventualities called for swift intergovernmental actions between the Member States in response to the financial and migration crises. The rule of law crisis within some Member States has simultaneously added a more inward-looking tenet to the EU's crisis management. The prolonged COVID-19 outbreak, together with the EU's pandemic recovery package, also raised the concern that the crisis mode is subtly becoming a new normalcy in the EU – a scenario which enhances the need for further critical scholarship.

It must be noted that the term 'critical scholarship' has various meanings. Legal scholars may deliberately engage with critique at different analytical levels, some of which go deeper into

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methodological questions than others.[1] On one level, all scientific research, including legal research, claims to be critical. On another level, the meaning of critical research can be narrowed down so that only projects that explicitly identify with the substantive research themes raised by the Frankfurt-style critical theory and its offspring,[2] including the Critical Legal Studies (CLS) movement, would count as critical.[3] This article concedes to neither of these claims. Different branches of the CLS movement should be of interest to EU law scholars to the extent that they 'interrogate the deeper political, historical and philosophical logics which underpin the power of law'.[4] But reinventing EU legal studies as one subfield of CLS is not a solution to the current divisions within EU law scholarship. This is so because the challenge is more methodological than substantive. That is, the question of what critique means to EU legal studies in fact asks how EU law is and should be researched.

The central question in this article is what additional value critique can bring to the study of EU law at the time of various and prolonged crises. In answering this question, the article maintains that the methodological underpinnings of critical EU law scholarship call for a closer scrutiny and that the absence of such scrutiny undermines critique's ability to contest and transform the law. This analysis highlights that calling research critical does not automatically make it critical from a methodological perspective and that critical EU law scholarship can learn from critical social theory in recasting critique as a method. This quest for a more elaborate *critical method* is important because the methodology of critique always feeds into what critique tells us about its object (ie EU law). One might assume that the strong emphasis on research that self-identifies as critical would have generated an equally strong interest in the methodology of critique in EU legal studies. However, questions concerning the critical method have gone largely unnoticed in this context. This observation applies both to the *revisionist* and the *rejectionist* strands of critique. The former refers to critical scholarship that seeks to transform and rejustify EU law. The latter describes critical interventions that focus on contesting, rather than transforming, EU law.[5]

This article responds to the perceived lack of methodological engagement in critical EU law scholarship in two consecutive steps: The article first illustrates how much of the contemporary critical discourse on EU law remains confined to the so-called role of law debate, sidestepping the underlying methodological questions about the law and critique. It then explains how the necessary methodological turn in the critical study of EU law can be advanced with reference to the critical theory of society.[6] This analysis accredits critical social theory for introducing a dialectical method of critique that is not readily available in the legal-normative critique of EU law.[7] The

[1]It goes without saying that one and the same scholar can also deliberately engage with different levels of critique in different projects.

[2]For a short introduction, see eg J Bohman, 'Critical Theory' in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/win2019/entries/critical-theory/> accessed 15 December 2021.

[3]For an overview of Critical Legal Studies (CLS), see eg R Mangabeira Unger, *The Critical Legal Studies Movement Another Time, a Greater Task* (Verso 1986).

[4]This expression is borrowed from N Lacey, 'Normative Reconstruction in Socio-Legal Theory' 5(2) (1996) Social & Legal Studies 131, 131 which defines 'critical legal theory' as 'that portion of normative legal theory which is specifically concerned to dig beneath the surface of legal doctrines and practices; to go beyond a project of explication and rationalization and to interrogate the deeper political, historical and philosophical logics which underpin the power of law'. Different branches of critical legal theory include, eg, critical race theory, postcolonial theory, feminist theory, American critical legal studies, Marxist legal theory, postmodern jurisprudence, and law and literature. Lacey also observes that critique can take 'more or less radical, searching forms', ibid. 132 and 138.

[5]The distinction between a *revisionist* and a *rejectionist* critique is just a crude attempt to highlight the fact that critical EU law scholars themselves are divided in their views on what kind of transformative potential critique can have. For more on this, see Section 3.

[6]Eg Bohman, 'Critical Theory' (n 1) provides the following definition: 'In both the broad and the narrow senses,. .. a critical theory provides the descriptive and normative bases for social inquiry aimed at decreasing domination and increasing freedom in all their forms.' For more discussion on what the 'critical theory of society' means in this article, see Section 4.

[7]The reader may find the quest for a methodological turn convincing, without having to necessarily agree on the second, more philosophical, argument about how these methodological questions can be resolved.

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value of critical social theory to EU law scholarship lies in clarifying what a methodologically more self-conscious *normative* critique of EU law looks like – both in theory and in practice.[8] This inquiry into the potential synergies between EU legal studies and the critical theory of society invites us to explore one aspect of EU law scholarship from the perspective of another discipline, that is, critical social theory. This approach has repercussions that need to be explained before proceeding any further.

First, launching a meaningful cross-disciplinary discourse requires a certain degree of familiarity with the terminology of both disciplines. Second, some concepts in social theory and philosophy are identical to legal concepts but their actual meaning is different. One key example is 'positivism', which means different things in law, philosophy, and sociology. The term 'positivism', when used in social philosophy, refers to the (contested) view that all genuine knowledge can be verified through empirical analysis and that empirically observable 'factual' data constitutes the only possible object of social scientific knowledge.[9] This article makes a particular effort to ensure that the terminology of critical social theory is accessible to a reader who might be curious about critical theory without being fully versed in the conceptual jargon of critical theorists. But there is no way around the fact that a meaningful engagement with critical social theory requires some willingness to expose oneself to a conceptual apparatus that may at times seem 'too general, theoretical, and abstract' to a legal scholar.[10] How the reader experiences this exposure is linked to a broader question of how theory is perceived in EU law scholarship – a topic that will be discussed in more detail at the end of this article.

The present article does not dismiss any of the existing critical interventions in the field of EU law. On the contrary, it seeks to complement them – looking for the ways in which EU law scholarship can further evolve in its critical ambition. Thus, the critical theory of society is not viewed as a panacea for the complex substantive issues raised by critical EU law scholars,[11] but as an instructive example of how normative critique can coexist with a heightened sensitivity to methodological and epistemological choices that underpin critical projects in law. Here epistemological claims are defined as claims about what can be known. The links between epistemology and critical methodology highlight the way in which both the critic and critique are always shaped by a preceding rationalisation of society.[12] From this perspective, it appears problematic that EU law scholars[13] often identify the 'critical project'[14] with the substantive content of their research – meaning that research is viewed as genuinely critical only to the extent that it is sceptical about some aspects of legal integration. In this article, placing the analytical focus on the methodology of critique indicates that it is necessary to make a clearer distinction between substantive criticism and critique as a methodological commitment in the study of EU law.

[8]This article does not adopt an uncritically positive view of critical social theory. The various flaws of critical social theory are discussed in Section 4.A. Neither does this article suggest that the critical theory of society is less normatively laden than the critique of EU law. Instead, the interesting question is how the critical theory of society deals with its normativity at the level of critical methodology.

[9]Recourse to philosophical and sociological positivism is problematised as reductionist in this article, but this should not be confused with 'legal positivism'.

[10]This also works the other way around: when scholars from other disciplines engage in discussing law, legal scholars usually assume that they are willing to absorb the 'legal jargon', which may also seem inaccessible from outside.

[11]See eg AJ Menéndez, 'The Existential Crisis of the European Union' 14(5) (2013) German Law Journal 453, 521.

[12]The rationalisation of society was introduced as a central question for social theory by Max Weber. For an overview, see eg S Kalberg, 'Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History' 85(5) (1980) The American Journal of Sociology 1145.

[13]It should be noted that the author also belongs to this group and much of what is said about the problems of EU law scholarship applies to the author's work as well.

[14]The term 'critical project' is used, for instance, by A Honneth, *Pathologies of Reason: On the Legacy of Critical Theory* (J Ingram tr, Columbia University Press 2009) 41–2. In this article, I use that term as a genus for different critical approaches in EU law scholarship. This usage does not imply that there would, could, or should be any shared agenda between them.

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The article is structured as follows: After this introduction, Section 2 offers a short overview of how critique has gained more ground in the study of EU law in parallel with the EU's attempts to manage its various crises. Section 3 clarifies where the alleged methodological gaps lie in the critical study of EU law. This analysis lays the groundwork for the argument that the critical project, in all its diversity, needs to be rethought in methodological terms. Section 4 considers what specific lessons EU law scholars could draw from the critical theory of society to strengthen the methodology of critique. This part of the article uses the alienation critique and the ideology critique of EU law to illustrate what a more dialectical method of critique requires from the critical study of EU law and how a methodologically more self-reflexive critique of EU law might develop. Section 5 ends the article with a discussion on how to overcome the existing obstacles to critical engagement, as discussed here. This includes considering what factors may prevent EU law scholars from adopting a cogent critical method, why even scholarship that self-identifies as critical falls short of achieving this goal, and how this could be remedied.

In the absence of a more developed critical method, competing rationalisations of society that inform the critique of EU law remain undiscussed and concealed. Here the term 'social rationalisation' refers to cognitive processes that make certain forms of society and social relations look normal to us and that are often partly subliminal. The critic, too, examines social reality through his/her socialisation into a particular place and time. A deliberate engagement with such rationalisations is difficult without a more dialectical critical method, which unfolds the intersections between conceptual ideas and material reality not just in EU law, but also in its critique. Placing the critical focus on this interplay rejects any simple idea of non-normative empirical research as a solution to the methodological challenges of EU law scholarship. This means that the 'critical turn'[15] in EU legal studies cannot be reduced to a mere empirical turn and that the critical potential of mere 'facticity' is always limited.[16] These findings highlight the need to integrate social theory into the critical study of EU law. As such, this article contributes to a much broader discussion on the role of socio-legal research in EU law.[17] That the rich tradition of critical social theory is still largely absent in EU law scholarship sets the field apart, for instance, from the study of international law. It is a collective task of EU law scholars to mend this rupture.

2. Crises and critique: on the growth of critical voices in EU legal studies

The growing interest in the critique of EU law can be explained by multiple factors, some of which are old and some more recent. The diversity of critical voices means that any attempt to systematise them is vulnerable to the charge of over-simplification. A classic argument against the 'integration through law'[18] paradigm holds that the law cannot legitimately replace political decision-making processes in the EU.[19] From this perspective, a significant turning point in the study of EU law was when EU law scholars started to more systematically cast critical light on the progressive

[15]This term comes from Editorial Comments, 'The Critical Turn in EU Legal Studies' 52(4) (2015) Common Market Law Review 881, 883.

[16]In this article, the term 'facticity' refers to the realm of empirically observable, supposedly non-normative, social facts. More discussion on this follows in Sections 2, 3, and 4.

[17]For recent discussion, see eg A Vauchez, 'The map and the territory: Re-assessing EU law's embeddedness in European societies' 27(2) (2020) Maastricht Journal of European and Comparative Law 133, 135.

[18]On the original 'Integration through Law' project, see M Cappelletti et al (eds), *Integration Through Law: Europe and the American Federal Experience* vols 1–3 (de Gruyter and Co 1985–88) and, for a recent historical appraisal of the project, eg R Byberg, 'The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe' 18(6) (2017) German Law Journal 1531.

[19]For a summary of the 'democratic deficit' argument and its different dimensions in the literature, see eg A Folledal and S Hix, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' 44(3) (2006) Journal of Common Market Studies 533–62. For the early discussion, see eg JHH Weiler et al, 'European Democracy and Its Critique' 18(3) (1995) West European Politics 4, 6–9.

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narratives of constitutionalisation in the EU legal order.[20] Many of the subsequent critical claims directly follow from, or were intensified by, the Eurozone crisis,[21] which triggered an intense debate on the use of crisis law[22] and the so-called authoritarian turn[23] in the EU. These openings raise paradigmatic questions about where the political authority lies in the EU. But the financial crisis is not the only crisis that has afflicted the EU.[24] The EU's responses to the more recent economic and humanitarian crises within and outside its borders have generated criticism that the EU legal order yields to the politics of integration with too much complacency. At the same time, the ongoing, and seemingly intensifying, rule of law crisis in some EU Member States exposes the complex interaction between political and legal dimensions of the EU's internal crisis management strategy.

Critical EU law scholarship is divided between what can be called the *rejectionist* and the *revisionist* forms of critique. The central difference between these two approaches is how redeemable they envisage EU law. The rejectionist critique depicts EU law as potentially undemocratic by nature, whereas some of the crisis-related critical interventions call for a renewed normative justification for the law and its application in the EU. For instance, Joerges and Kreuder-Sonnen refer to 'undemocratic processes which undermine the legal authority structures . . . and which are ruled by executive discretion beyond judicial review' in their analysis of EU crisis law.[25] Simultaneously, judicial review, in general, and the post-crisis case law of the Court of Justice of the European Union, more particularly, constitute part of the problem insofar as they legitimate controversial measures and policies by EU institutions, which lack direct democratic control by EU citizens.[26] The Court's role in justifying the actions of the European Central Bank in the so-called *Weiss* saga provides a recent, much-debated, example of these concerns.[27] These differences notwithstanding, both the rejectionist and the revisionist forms of critique proceed from the legitimacy of legal integration, or its legitimacy deficit, read in conjunction with the EU's perceived democratic and justice deficits.[28] Critical scholars diverge in how they define the root causes and mutual relations of these three deficits. But contesting the present role of law in the project of European integration emerges as a major unifying theme between them.[29]

[20]For an overview of this development, see eg J Hunt and J Shaw, 'Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration' in D Phinnemore and A Warleigh-Lack (eds), *Reflections on European Integration: 50 Years of the Treaty of Rome* (Palgrave Macmillan 2009) 93–108.

[21]For more on the Eurozone crisis itself, see eg K Tuori and K Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014) and A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015).

[22]Eg M Dani et al, '"It's the political economy . . . !" A moment of truth for the eurozone and the EU', 19(1) (2021) International Journal of Constitutional Law 309. See also different contributions in E Nanopoulos and F Vergis (eds), *The Crisis behind the Eurocrisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU* (Cambridge University Press 2019).

[23]Eg C Kreuder-Sonnen, 'An authoritarian turn in Europe and European Studies?' 25(3) (2018) Journal of European Public Policy 452, 453, and 458–60. For the more complex argument that 'authoritarian liberalism' is in fact a continuous development, rather than a rupture, in the course of European integration, see MA Wilkinson, 'Authoritarian Liberalism: The Conjuncture behind the Crisis' in Nanopoulos and Vergis (eds), *The Crisis Behind the Eurocrisis* (n 22) and MA Wilkinson, 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union' 14(5) (2013) German Law Journal 527.

[24]See eg Menéndez (n 11) 464 for the argument that it is important to 'disaggregate' the crises more carefully if the aim is to 'move from crisis talk to crises talk in a structured way'.

[25]C Joerges and C Kreuder-Sonnen, 'European Studies and the European Crisis: Legal and Political Science between Critique and Complacency' 23(1–2) (2017) European Law Journal 118, 128.

[26]Ibid., 129.

[27]In terms of the relevant case law, see especially *Thomas Pringle v Government of Ireland and Others*, C-370/12, EU:C:2012:756, *Peter Gauweiler and Others v Deutscher Bundestag*, C-62/14, EU:C:2015:400, and *Heinrich Weiss and Others*, C-493/17, EU:C:2018:1000.

[28]For an overview of these 'deficits', see different contributions in D Kochenov et al (eds), *Europe's Justice Deficit?* (Bloomsbury 2015).

[29]For a recent argument concerning a 'general failure to consider the limits of law' in this context, see eg Dani et al (n 22).

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EU law, in general, and EU crisis law, in more particular, have been criticised for 'technical formalism' and for replacing such formalism by what some authors call 'empty functionalism'.[30] In legal theory, formalism refers to the idea that legal rules can exist and operate independent of the surrounding social and political realities.[31] Functionalism, for its part, refers to a mindset that is mainly interested in the functions that the law can serve in society. The combined critique of formalism and functionalism points to the ways in which the law arguably 'contends itself with political obedience' and operates as a tool for validating political and economic 'necessities' of European integration.[32] Critical scholars perceive a distorted relationship between the economic and political goals of integration and their implementation by legal means in the courts. Again, the Eurozone crisis is the primary example of how the analytical distinction between the law and the extra-legal has become blurred in EU law. The EU's dealings with the COVID-19 pandemic recovery package may mirror some of these concerns – although the different circumstances also suggest a different degree of social, if not political, legitimacy.

The proximity between critique and crises in the study of EU law indicates that the role of critical scholarship is unlikely to diminish in the near future.[33] But critical interventions on and around the legitimacy of EU law are by no means limited to the EU's response to the recent crises. EU free movement law, with its core principles of non-discrimination on grounds of nationality and market access, also raises concerns about the potentially depoliticising and alienating effects of EU law in the Member States.[34] Since much of EU citizenship law is based on a similar logic of prohibited restrictions and accepted justifications, it is likewise vulnerable to the criticism that it may have alienating effects – particularly from the perspective of those nationals of the Member States who have not exercised their right to free movement and are not direct beneficiaries of EU citizenship rights. Unlike the critique of EU crisis law, this type of critical scholarship usually depicts the EU judiciary too independent, rather than too obedient. As such, the critique of EU free movement law aligns itself with the classic opposition to the 'integration through law' paradigm and highlights the value of democratic politics and governance over legal interventions not just at the level of EU institutions, but also within the Member States.[35]

Although few of these concerns are new as such, the seemingly perpetual cycle of crises reinforces the need to rethink the fundamentals of European integration, including what role(s) the law can and cannot assume in the EU. At the same time, it is problematic if critical scholarship fails to look beyond the confines of the traditional 'role of law' debate. As will be seen in the next section, this focus unhelpfully binds the critical project to the functionalist and instrumentalist

[30]Eg Joerges and Kreuder-Sonnen (n 25) 122 and 125 and M Everson and C Joerges, 'Facticity as validity: the misplaced revolutionary praxis of European law' in E Christodoulidis et al (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019) 407. For more discussion on the alleged functionalism of EU law, see also eg A Somek, 'Europe: Political, Not Cosmopolitan' 20(2) (2014) European Law Journal 142, 143–4.

[31]In legal theory, 'formalism' is commonly contrasted with and attacked by 'legal realism', which (both in its American and Scandinavian versions) questions the idea of law's autonomy, and by the CLS movement insofar as the latter builds on the heritage of legal realism.

[32]Eg Joerges and Kreuder-Sonnen (n 25) 122 and 129.

[33]The dynamic link between the two has arguably shaped the European experience since the 18th century, as noted by eg R Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (MIT Press 1988). However, in Koselleck's analysis, critique became a trigger for crisis, not the other way around.

[34]For discussion from different perspectives, see eg M Everson, 'A Very Cosmopolitan Citizenship: But Who Pays the Price?' in M Dougan et al (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012); A Somek, 'The Individualisation of Liberty: Europe's Move from Emancipation to Empowerment' (2013) 4(2) *Transnational Legal Theory* 258; G Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People' in Kochenov et al (n 28).

[35]See eg Somek (n 30) 152 for the observation that 'Union law, using the European Court of Justice as its *bouche*, claims to possess authority regardless of its pedigree from any national or popular *pouvoir constituent*'. For earlier discussion, see also eg AJ Menéndez, 'The European Democratic Challenge: The Forging of a Supranational *Volonté Générale*' 15(3) (2009) European Law Journal 277.

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paradigms, which critique seeks to attack. A further source of concern, also discussed in the next section, is how critical EU law scholarship exerts the analytical distinction between 'validity' and 'facticity' as a tool for critique.[36] This question about the critical potential of 'facticity', understood here as the realm of non-normative and empirically observable facts, is a recurring theme both in critical theory and in this article. Since our perceptions of reality are always mediated, a categorical distinction between facticity and validity may do more harm than good to the critical study of EU law. This means that the relationship between an empirical and a normative critique of EU law must be carefully rethought if the objective is to avoid these qualms.[37]

To sum up, the critique of EU crisis law is not exhaustive of the breadth of critical research on EU law. But the strong links between crisis and critique mean that the recent analyses of EU crisis law offer a particularly illuminating case study of what general concerns motivate critical interventions in EU legal studies. This is so because the EU's turn to crisis law has accentuated the existing concerns about the legitimacy of EU law. Moreover, it can safely be hypothesised that many of the methodological grievances that are visible in those branches of EU legal studies that explicitly self-identify as critical will be even more persistent in scholarship that is less articulate about its critical commitment. Although the observations made in relation to one specific field of critical EU law scholarship (ie the study of EU crisis law) cannot be generalised into the other branches of EU legal studies without a careful case-by-case consideration, they are indicative of a further research need in this area. The next section of this article will accordingly have a closer look at why the critical project in EU legal studies still appears lacking from a methodological perspective.

3. Critique vs. criticism: on the incompleteness of the critical method in EU legal studies

While it is not always easy, or even advisable, to draw a line between mainstream and critical approaches, few authors seem to disagree on the presumption that critically oriented research has a legitimate place in EU legal studies. This positive mindset towards critical scholarship is captured in the statement that critique has a 'value all of its own'.[38] What may first sound like a truism about the value of critical scholarly engagement opens up a more difficult question of under what conditions critique will add something fruitful to the study of EU law. Classifying scholarship as critical does not automatically mean that it is critical in any analytically distinctive sense. Furthermore, calling a piece of research critical does not denote that it would be non-normative or less normative than the seemingly non-critical forms of legal scholarship. What ideally distinguishes critical from non-critical research is the critical method. This inquiry into the methodology of critique gains additional weight from the premise that, as a potential discourse of power,[39] critique plays a role in shaping social reality in which it is articulated. Therefore, it is worrying if EU law scholarship falls short of articulating what the methodological commitment to critique means. This section will set the parameters for the ensuing methodological discussion by unpacking the relationship, first, between critique and criticism and, second, between a normative and a non-normative critique of EU law.

[36]In critical theory, the tension between 'facticity' and 'validity' is discussed in detail, for instance, by Jürgen Habermas. Habermas defines the facticity-validity tension, inter alia, as 'the counterfactual moment of idealization, which always overshoots the given'. In relation to the law, this tension translates into a distinction between 'rationally motivated beliefs' and 'the imposed force of external sanctions'. J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (W Rehg tr, MIT Press 1996) 22 and 25(–8).

[37]For more on this, see Section 3.B.

[38]Everson and Joerges (n 30) 424.

[39]Discourses, including scholarly discourses, may sometimes (although not always) transmit power. Eg S Miller, 'Foucault on Discourse and Power' 76 (1990) Theoria: A Journal of Social and Political Theory 115, 117, and 120–1.

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A. What makes the critique of EU law critical?

A recent definition of the 'critical turn' in EU legal studies refers to 'a growing current of thought which considers the model of integration through law a failure'.[40] There is no doubt that this characterisation is descriptively accurate. The previous section demonstrated that critical EU law scholarship, either directly or indirectly, challenges the presumption of law as a legitimate and/or effective tool for deeper integration between the Member States. This type of critique promises to redeem the law from functionalism coated in unfounded idealism. From a more positive angle, it can be seen as a first step towards redefining the role of law in the European project.[41] The charge of functionalism is commonly linked to an instrumentalising conception of law in the EU legal order.[42] As noted in Section 2, instrumentalism refers to the view that the law is justified to the extent that it serves particular policy goals. The 'instrumentalisation of law' may also explain the general lack of interest in methodological questions in EU legal studies.[43] But focusing on what roles the law cannot and should not have in the integration project means that critique is still defined by the traditional paradigms of European integration theory. Even when critical research seeks to rethink the fundamentals of EU law (eg its alleged functionalism and instrumentalism), it seems unable to operate outside the framework which analyses the law in terms of its effects.

The difficulties of breaking through the boundaries of the functionalist discourse not only create a paradox at the heart of critical EU law scholarship, but also risk leaving critical interventions underdeveloped by not taking notice of critique's methodological underpinnings. Much of critical EU law scholarship operates at the level of normative political theory and legal philosophy, with little or no discussion on what other meanings could be assigned to critique. The post-Kantian idea of critical philosophy wanted to separate critique from purely justificatory arguments. In EU legal studies, however, the need for critique is often explained by the perceived lack of 'normative vision' and 'theoretical foundations' in EU law.[44] Comparing and evaluating different normative theories against one another without question forms an important part of critical EU law scholarship. But a genuinely 'critical turn' in EU legal studies cannot be accomplished without a more intentional and systematic engagement with the critical method. Otherwise, the risk is that qualifying research as critical simply becomes a tool for defending the author's preferred political theory of the EU and its Member States against other feasible, but allegedly non-critical, normative-theoretical approaches to European integration.

Moreover, the critical study of EU law often presents itself as capable of straightforwardly uncovering the potentially harmful effects of EU law. As such, it seems to imply that a purely unmasking critique is possible. This framing of critique appears questionable if we take even half-seriously the argument that '[c]ritique is always motivated'.[45] It is not enough to argue that critique is needed to expose the possible ideology of EU law. On the contrary, it is equally important to explore the potentially ideational, or even ideological, elements of critique itself. A basic definition of ideology is a system of ideas, ideals, or beliefs. But the term 'ideology' is often used with a more negative connotation to describe how the dominant social groups use their particular ideas to maintain and justify their power over other groups in society. The term 'ideational' can be

[40]Editorial Comments (n 15) 883, and L Azoulai, '"Integration through law" and us' 14(2) (2016) International Journal of Constitutional Law 449, 461.

[41]See eg H-W Micklitz, 'A European Advantage in Legal Scholarship' in R van Gestel et al (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017), 276, on 'how is the role of law changing?'.

[42]But even the original 'Integration through Law' project arguably claimed an 'implicit' propensity to explore 'the meaning of law rather than its instrumental legal content'. JHH Weiler, 'Epilogue' in D Augenstein (ed), *"Integration Through Law" Revisited: The Making of the European Polity* (Ashgate 2012) 176.

[43]For this point, see eg R van Gestel and H-W Micklitz, 'Why Methods Matter in European Legal Scholarship' 20(3) (2014) European Law Journal 292, 303–305.

[44]Eg Joerges and Kreuder-Sonnen (n 25) 134, and Everson and Joerges (n 30) 408.

[45]Eg D Kennedy, 'The Critique of Rights in Critical Legal Studies' in W Brown and J Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002) 178–228, 218.

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used as a less politically charged alternative to 'ideological'. These observations about unmasking critique also apply to a rejectionist critique of EU law, which no longer looks for a revised normative justification for legal integration. Probing into the underlying rationalisations of critique is nevertheless difficult without a more developed critical method. Here the nodus is not that critique is inherently normative (as it often is), but that its normativity becomes concealed when critique lacks adequate methodological reflexivity.

From this perspective, it appears problematic that the critical motif in EU law scholarship is commonly equated to the substance of research, that is, to whether a given piece of scholarship adopts a negative or sceptical view on European legal integration. This is illustrated in how the term 'fundamental critique' is used to describe how rejectionist critique is, that is, how uncompromisingly it argues that EU law has harmful effects either at the level of the EU's own institutions and governance or within the Member States.[46] While substantive criticism has a valid place in the study of EU law, it would be unsatisfactory to discern the growing interest in critical research as a mere raise of scepticism amongst EU law scholars. For instance, Geoffrey Samuel points out that 'methodology and the source of knowledge cannot be divorced' and '[t]o take the methods seriously is to take knowledge (epistemology) seriously'.[47] Here the term 'epistemology' refers to what can be known and why. That the link between methodology and epistemology has not received sufficient attention in EU legal studies means that critique is frequently assimilated with criticism, without considering what further criteria define a fully developed critical method. Moreover, as will be seen in the next part of this section, recourse to supposedly non-normative, quantitative and qualitative, empirical research cannot alone fill these methodological gaps in the normative critique of EU law. Empirical critique, while important, comes with its own baggage of often unpronounced assumptions of social reality.

B. The complex relationship between a non-normative and a normative critique of EU law

The rise of empirical research methods in the study of EU law owes to the earlier scholarship, which demonstrated that political science research in the European Studies movement needs to integrate the study of legal integration into its research agenda.[48] But it is clear that the empirical analysis of European law also has value that is independent of political science. EU environmental law scholarship offered an early example of how a critical sociological perspective confronted the more traditional narratives and conceptions of EU law.[49] The sociological analysis challenged the dominant view of law 'as formal, relatively autonomous and instrumental in character' in the study of EU law.[50] In particular, it promised to 'distinguish more clearly between questions about the nature of law and its role in EU integration'.[51] By now, the use of empirical sociological and socio-legal research methods has expanded from environmental regulation to

[46]Eg Editorial Comments (n 15) 883 and 886 defines 'fundamental critique' from this perspective as the view that 'EU law is ontologically bound to produce de-regulatory and de-socializing effects'. The distinction between 'fundamental' and 'instrumental' critique originates from Weiler (n 42) 178. Weiler, too, depicts the 'fundamental critique' as 'substantive, normative, outcome critique' (ibid.).

[47]G Samuel, 'Taking Methods Seriously (Part One)' 2(1) (2007) Journal of Comparative Law 94, 118. For more discussion on epistemological assumptions, see eg R Banakar, *Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity* (Springer 2015) 233–4.

[48]Eg K Armstrong and J Shaw, 'Integrating Law: An Introduction' 36(2) (1998) Journal of Common Market Studies 147, 147–8 and C Joerges, '"Taking the Law Seriously": On Political Science and the Role of Law in the Process of European Integration' 2(2) (1996) European Law Journal 105, 107–8.

[49]Eg B Lange, *Implementing EU Pollution Control: Law and Integration* (Cambridge University Press 2008) 56.

[50]Ibid., 29 and 78. Here the perceived problem is that law is too often understood as an 'independent, pre-given variable', meaning that the analysis fails explore 'the nature of law', ibid., 28 and 30.

[51]Ibid., 56.

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several other fields of EU law.[52] While a sociological critique can have significant implications for how legal integration is theorised,[53] socio-legal research on EU law primarily draws on the quantitative or qualitative primary data, rather than on social theory.[54] Because descriptive research designs tend to leave the relationship between normative and non-normative critique unexplored, they also leave the methodological turn for critical EU law scholarship unfulfilled.

A non-normative critique promises to describe social reality without making any normative-evaluative claims. The so-called new or critical history of European law provides a prominent example of how the critique of EU law can learn from other disciplines, while simultaneously reflecting the difficult relationship between a non-normative and a normative critique of EU law.[55] The historical study of legal institutions and practices applies the non-normative methods of historical analysis to the study of EU law. Here the promise is that the study of primary archival sources 'significantly amends the conventional understanding of the legal dimension of European integration as reflected in the work of legal scholars and social scientists'.[56] Yet, in critical history, the analysis often takes a normative turn at the end: what distinguishes critical history from other forms of historiography is that critical history extends from the descriptive to the interpretative analysis of empirical findings. One example of this is when the history of European law is interpreted through the lens of 'judicialisation'.[57] As soon as the critical focus moves from describing archival sources to their normative-interpretative analysis, the above questions about the critical method will resurface. This is why the critical history of EU law should pay attention to the ongoing discussion on the limits of history as a tool for critique in international law.[58]

These observations about sociological and historical critiques of EU law explain why the use of empirical research methods cannot replace the search for a more developed critical method in the study of EU law. This is so because the idea of a purely descriptive, non-normative critique is an oxymoron. When the findings of empirical research are used to advance the critical project, the critic faces a set of methodological questions that are not different from methodological and epistemological challenges that foil a purely unmasking critique of EU law. It has been noted that socio-legal research often lacks 'a sophisticated approach to the complexity of interactions between legal and extra-legal practices'.[59] The lack of social-theoretic analysis is particularly problematic for EU law scholarship because the relationship between EU law and its social, political, and economic contexts is meant to carry so much explanatory weight in the critique of EU law. If these relationships remain under-theorised, that will undermine the credibility of critical EU law scholarship.

[52]See eg Vauchez (n 17) 135 on the need for 'empirical substantiation' in the study of EU law. For concrete examples, see different quantitative and qualitative empirical research projects conducted in the area of European law by the members of the No-Les-Law (Network of Legal Empirical Scholars) <https://noleslaw.net/> accessed 15 December 2021.

[53]Lange (n 49) 56, 95, and 102. Note, however, that sociology is also divided into several sub-disciplines.

[54]See eg Lacey (n 4) for the observation that 'social legal studies have been relatively "untheorized"' (at 132) and that 'while socio-legal scholarship has certainly fed a critical understanding of law, it has often been unreflective about both its socio-theoretic underpinnings and its ethical orientations' (at 138). Lacey also points out in this context that a 'social theoretic understanding' would need to recognise the 'importance of critical method', ibid., 141.

[55]Eg B Davies and M Rasmussen, 'Towards a New History of European Law' 21(3) (2012) Contemporary European History 305, 309, and P Lindseth, 'The Critical Promise of the New History of European Law' 21(3) (2012) Contemporary European History 457.

[56]Davies and Rasmussen (n 55) 310.

[57]Ibid., 309. For more on judicialisation, see eg A Vauchez, 'The transnational politics of judicialization. *Van Gend en Loos* and the making of EU polity' 16(1) (2010) European Law Journal 1, and 'EU Law Classics in the Making' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).

[58]See eg A Orford, 'International Law and the Limits of History' in W Werner et al (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017).

[59]Lacey (n 4) 138. However, for a less pessimistic view, see eg Banakar (n 47) 233.

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The limits of non-normative empirical research bring us back to the question of how 'facticity' and 'validity' interact in the critique of EU law.[60] When critical EU law scholars contrast the law with political, economic, or social facts, they often draw on what counts as the 'external' tension between facticity and validity in the Habermasian account of modern law.[61] The non-normative analyses of EU law go further to expose what Habermas calls the 'internal' tension between facticity and validity in the law: 'the facticity of the *enforcement* of law is intertwined with the legitimacy of a *genesis* of law that claims to be rational'.[62] For Habermas, however, the internal tension between facticity and validity is not limited to the law, but the ideational element of validity has its origins in the forms of language and communication.[63] In other words, claims to validity, understood as rationality, form an integral part of all social relations (not just legal relations) that are based on linguistic interaction. This short glimpse of Habermas' thought further supports the argument that, for the purposes of EU law scholarship, the critical method cannot be purely descriptive and that the crucial question is how critical EU law scholars navigate the entanglement between facticity and validity not just in law, but also in critique.

To sum up, the visible growth in critical scholarship is not yet matched with a sufficiently developed methodology of critique in the study of EU law. A *revisionist* critique, which calls for a renewed normative-theoretical vision of EU law, would benefit from contemplating the facticity of law itself, that is, the ways in which the world of social, political, and economic facts is not external to the law. A more *rejectionist* critique of EU law, for its part, cannot hide behind the veil of facticity but needs to encounter the normative-ideational dimension of the critical project itself. These blind spots in different types of critical interventions go unnoticed insofar as the focus on substantive criticism eclipses methodological and epistemological choices that shape critique from the outset. The relevant methodological openings, such as critical history or sociological critique, raise important questions about how EU law is researched. Because these approaches tend to remain confined to specific sub-fields of EU law, their contribution to a broader debate on the methodology of critique in EU legal studies is not yet fully visible. Moreover, the critical potential of empirical socio-legal research on EU law is hindered by the lack of engagement with social theory. With these concerns in mind, the next section will consider what methodological lessons the *normative* critique of EU law could draw from critical social theory.

4. Enhancing the critical method in EU legal studies: a view from critical social theory

Theoretical socio-legal study is still underrepresented in EU legal studies and its elision is particularly problematic for the critical study of EU law. Social theory is a broad and diverse sphere of study – and so is critical theory as one of its branches. Social theory investigates the nature of society by combining theoretical and empirical analyses of social conditions. One definition of social theory is 'systematic, historically informed and empirically oriented theory seeking to explain the nature of the "social"'.[64] The social, for its part, can be defined as 'the general range of recurring forms, or patterned features, of interactions and relationships between people'.[65] Questions posed by social theory become relevant from the perspective of EU law as soon as

[60]In critical theory, the term 'validity' is not limited to formal legal validity but validity claims, broadly defined, are claims for rationality. The claim for legal validity provides just one example of validity claims.

[61]Habermas (n 36) 33.

[62]Ibid. 28. For Habermas, legitimacy is just one aspect of legal validity, ibid. 28–31 and 38–9.

[63]Ibid. 34, where Habermas notes that 'the facticity of linguistic signs and expressions as events in the world is internally linked with the ideal moments of meaning and validity'. For more on '[t]hese idealizations inhabiting language itself', see ibid. 17 and 13–16.

[64]R Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Routledge 2006) 15. Cotterrell describes how 'philosophical analyses, reflections on historical experience and systematic empirical observations of social conditions can be combined to explain the nature of society', ibid. 17.

[65]Ibid. 15.

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we accept the claim that '[l]aw presupposes a conception of the social'.[66] Although sociological analyses cannot account for the 'inner' normativity of the law, they play an important role in clarifying how this normativity is generated and sustained at different times and in different places.[67] Here the law's sociality refers to how 'socio-historical contexts of law and other institutions' give rise to normative content.[68] Social theory provides a lens through which this question can be examined in the study of EU law. But it also highlights the complexity of this task because social reality is neither pregiven nor purely material but is shaped by a complex web of social rationalisations.

The previous section demonstrated how the lack of adequate methodological engagement conveys a problematic presumption of neutrality and objectivity, that is, 'facticity', in the critical project in EU law. This charge was brought against both the theoretical and the empirical forms of unmasking critique. As a way out of this impasse, this section will discuss how critical social theory can enrich the methodology of critique in EU law scholarship. This analysis will first briefly explain what it means to discern critical social theory as a method of critique, rather than as a comprehensive substantive theory of society. It will then introduce the dialectical method of critique, as it emerges from the critical theory of society. The central question in this section is what these methodological insights can add to the critical study of EU law. Two examples, the alienation critique and the critique of ideology, clarify how a more dialectical mode of critique can elucidate critique's underlying social rationalisations. A reader who disdains anything resembling abstract theory may want to skip Section 4.B. This, however, would leave the emerging picture of critical dialectics incomplete.

A. Critical social theory as a method

This article views the critical theory of society as a method, rather than as a comprehensive theory of society. This qualification is important because it allows us to draw on critical social theory, without succumbing to its more problematic claims about society and social rationality. Developing both empirically and philosophically grounded theory was central to critical theory from the outset.[69] The main focuses of social critique were political economy, social psychology, and cultural theory. The interdisciplinary research agenda of the early Frankfurt School critical theory held that philosophical reflection cannot be dissociated from social reality, although it cannot be reduced to a mere description of social reality either.[70] This approach resulted in a critique of positivism in social sciences,[71] and in an equally strong critique of idealism[72] in philosophy.[73] This type of social critique required a 'philosophical-historical' starting point that could locate theory in the 'historical process'.[74] In the early stages of critical theory, this was a materialist (Marxist) account of history, as opposed to the idealist (Hegelian) theory of history.

[66]Ibid. 20.

[67]For instance, Banakar observes that 'sociological analysis cannot unearth the inner reality of law's normativity but it can analyse and explain how the various expressions of its "being" are generated discursively and produced and reproduced over time'. Banakar (n 47) 236.

[68]Ibid. 235.

[69]A Honneth, 'Critical Theory' in A Honneth, *The Fragmented World of the Social: Essays in Social and Political Philosophy* (ed CW Wright, State University of New York Press 1995) 62.

[70]Eg P Gordon, *Adorno and Existence* (Harvard University Press 2016) 4–5.

[71]As explained in Section 1 (eg fn 9), the use of the term 'positivism' in philosophy differs from how it is used in legal science.

[72]In philosophy, idealism refers to approaches that understand reality, or the representation of reality, as a construction of human perception, meaning that reality is indistinguishable from ideas/concepts. For different versions of idealism, cf eg Kant's transcendental idealism and Hegel's absolute idealism. The idealist view is challenged both by philosophical materialism and realism. For an accessible summary of philosophical idealism, see <https://www.britannica.com/topic/idealism> accessed 15 December 2021.

[73]Eg Honneth (n 69) 64; Honneth (n 14) 31–3; Gordon (n 70) 46.

[74]Honneth (n 69) 65.

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A common vantage point in different branches of critical theory was to view late capitalism as an expression of distorted social rationality.[75]

A strictly materialist theory of society came with a set of reductive philosophical and historical assumptions. First, the early critical theory generated 'closed functionalism' in social analysis and obscured the line between descriptive and prescriptive analysis.[76] For instance, Axel Honneth argues on this basis that 'the basic historical-philosophical and sociological assumptions of the Frankfurt School can no longer be defended'.[77] Second, the early critical theory failed to address questions concerning gender and race. As Honneth notes, it is important to recognise the unique methodological bequest of critical theory, while maintaining distance from its more problematic claims about social rationality.[78] For it is not the reductionist materialism of the early critical theory, but its understanding of the critical method, which can contribute to the study of EU law. This is not to say that the analysis of EU law cannot benefit from the materialist theories of society, as is demonstrated by the recent scholarship on the 'material constitution' both in the EU[79] and beyond.[80] But neither the material nor the ideational analysis of social reality is adequate on its own because there is a constant interplay (and mutual dependence) between the two.

The central role of methodological questions in critical social theory is captured in the statement that: 'Critical theory, after all, is not a homeland but a method. It is a strategy of reflection that aims to trouble all forms of untroubled cathexis [emotional investment] – even the cathexis with critical theory itself.'[81] The point is not that social critique would be non-normative – on the contrary, it is openly normative. The major difference in comparison to the legal-normative critique of EU law is that, in its normativity, critical social theory appears more reflexive and, thus, methodologically more developed than critical EU law scholarship. The next part of this section will clarify this by exploring in more detail the following methodological commitments within the critical theory of society: the co-existence of meta-critique and critique's immanence, the role of mediation and contingency in social critique, and the negativity of critical dialectics. The crucial question for this article is how critical dialectics can strengthen the critical method in the study of EU law. The subsequent part of this section will seize this question with a particular focus on the alienation critique and the ideology critique as two tentative examples of how the critique of EU law can build on the methodological commitments of critical theory.

B. Re-assembling the critical method for EU law: the four components of critical dialectics

What differentiates the critical theory of society methodologically from other branches of social theory? And in which sense can critical social theory steer the critique of EU law? The dialectical method of critique is based on 'the ongoing determination of the relation, opposition, and necessary connection'.[82] It will be introduced by explaining why the commitment to metacritique,

[75]The historical Frankfurt School linked 'the institutional framework of injustice' to a 'particular type of society'. Honneth (n 14) 20(–1 and 29–30).

[76]Honneth (n 69) 69–70 and Honneth (n 14) 29 and 21. Honneth particularly criticises these approaches for ignoring the non-systemic dimensions of social action. Honneth (n 69) 70–1. For more discussion on the philosophical-historical reductionism and functionalism in critical social theory, see also ibid. 71–6.

[77]Honneth (n 14) 45. Similarly, Honneth (n 69) 62: '[o]nly with the awareness of all its deficiencies can one today productively continue the theoretical tradition originated by Horkheimer'.

[78]Honneth (n 69) 62.

[79]For the application in the EU context, see eg M Goldoni and MA Wilkinson, 'The Material Constitution' 81(4) (2018) Modern Law Review 567 and MA Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021) 10–13, as well as the subsequent discussion throughout the book.

[80]For the recent application outside the EU context, see eg C Vergara, *Systemic Corruption: Constitutional Ideas for an Anti-Oligarchic Republic* (Princeton University Press 2020) 102–20.

[81]Gordon (n 70) xii.

[82]K Ng, 'Ideology Critique from Hegel and Marx to Critical Theory' 22(3) (2015) Constellations 393, 396. Recourse to dialectics also signals 'the ongoing significance of the concept of reason for critical social theory', ibid. 396.

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critique's immanence, contingency, and negativity are so important to critical theory and how these methodological dispositions frame the relationship between theory and practice. But before having a closer look at the methodology of critical dialectics, it is important to reiterate that critical theory is particularly interested in, and sensitive to, interactions between ideas and materiality. In the end, the dialectical method of critique helps us to discern how social rationalisations are always embedded in particular social realities – and vice versa. This finding is important because it has direct implications for what type of validity claims critique can make. The dialectical method of critique defies both the theoretical and the empirical versions of purely unmasking critique in the study of EU law. This means that the critique of EU law will need to reconsider its validity claims if it strives for a more dialectical mode of critique.

The first key component of critical dialectics is that a methodologically sound critique requires *metacritique*. The aim of metacritique is 'to develop a self-reflexive examination. .. of the conditions for the possibility of a critical inquiry'.[83] This type of critical self-reflexivity is not prominent in critical EU law scholarship at the moment.[84] This is problematic because the lack of metacritique may easily produce a misleading idea of purely unmasking critique, which remains oblivious both to the epistemological and the ideational underpinnings of critique. Metacritique is driven by the idea that 'every epistemology is determined by a normative commitment to how the world ought to be'.[85] The exercise of metacritique seeks to clarify this underlying 'normative commitment' and 'its entanglement in a host of social conditions that would remain otherwise obscured'.[86] It is important to integrate a meta-critical perspective into the critique of EU law. However, in critical theory, the argument for metacritique comes with a further qualification: metacritique is not universally applicable but requires a conception of social rationality. Critical theory accordingly links the possibility of meaningful metacritique to critique's immanence.

The second key component of critical dialectics is *critique's immanence*. The notion of immanent critique derives the standards of critique from social practices that are critiqued.[87] In other words, these standards are viewed as internal to the object of critique. A metacritique that is aware of its immanence needs to consider whether critique always requires prior identification with the 'existing value horizon'.[88] That the question about critique's immanence remains largely unaddressed in the critical study of EU law creates a stark contrast with the critical method in social theory.[89] This is clearly an area where critical theory can show the way for EU law scholars – although it does not offer any easy answers in this context. The immanence of critique does not automatically exclude 'context-transcending' claims of validity. In critical theory, the term 'context-transcendence' refers to normative propositions that 'are at once immanent to the sociocultural context in question and transcend it'.[90] But recourse to context-transcendent claims creates a difficult justification problem at the heart

[83] Gordon (n 70) 62.

[84] For instance, there is not much discussion available on what epistemological commitments the critique of EU law makes.

[85] B O'Connor, *Adorno's Negative Dialectic: Philosophy and the Possibility of Critical Rationality* (MIT Press 2004) 1.

[86] Gordon (n 70) 62. Gordon also observes that, through metacritique, 'a given philosophy is shown to have hidden complicities with social and material conditions', ibid. 80–1.

[87] Eg RJ Antonio, 'Immanent Critique as the Core of Critical Theory: Its Origins and Development in Hegel, Marx and Contemporary Thought' 32(3) (1981) British Journal of Sociology 330, 338 offers the following definition: 'Immanent critique attacks social reality from its own standpoint, but at the same time criticizes the standpoint from the perspective of its historical context.'

[88] Honneth (n 14) 48 (and 34, 44, and 50). In practice, the exercise of metacritique includes considering what validates the normative ideals of 'one's own culture', ibid. 50.

[89] For a reference to immanent critique in the study of EU law, see F de Witte, 'Interdependence and Contestation in European Integration' 3 (2018) European Papers 475, 497.

[90] M Cooke, *Re-Presenting the Good Society* (MIT Press 2006) 15. In other words, the term 'context-transcending' refers to 'validity that extends beyond the assignments of meaning and value in a historically specific, sociocultural context'. M Cooke, 'Resurrecting the Rationality of Ideology Critique: Reflections on Laclau on Ideology' 13 (2006) Constellations 4, 6.

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of critical theory.[91] Critical theory has not always succeeded in solving this justification problem although connecting an immanent critical project with a context-transcending concept of rationality is what distinguishes critical theory from other forms of social critique.[92]

One way forward is to reframe metacritique as a *genealogical critique*, which explores how normative ideas change over time and how these 'shifts of meaning' affect different social groups.[93] In the context of European integration, a genealogical critique can explore, for instance, how the ideas of democracy, equality, or constitution have changed over the course of the integration project and what implications these changes have from the perspective of varied social groups. Different offspring of critical theory agree that social reality is contingent – and that this claim of contingency also applies to concepts that describe social reality.[94] This is yet another area where critical EU law scholarship can fruitfully draw on critical social theory. Max Horkheimer's early distinction between traditional and critical theory proceeded from the claim that 'the facts which our senses present to us are socially preformed'.[95] T. W. Adorno, another key figure in the early critical theory, held that '[t]here is nothing that is not transmitted'.[96] This premise about the mediated (or 'transmitted') nature of social reality is methodologically important because it highlights that critique remains trivial unless it comes into terms with its social embeddedness.[97] From this perspective, the *normative critique* of EU law needs to more explicitly articulate and defend its underlying social rationalisations.

The third key component of critical dialectics is accordingly *the principle of mediation* and the related *claim to contingency*. Insofar as all 'meanings are mediated', social analysis necessarily includes 'interpretation' instead of 'passive endorsement'.[98] A major concern both in the *revisionist* and the *rejectionist* analyses of EU crisis law is that the law has become a tool for political necessity. This concern refers to the ways in which the legal form is used to legitimise and justify the EU's various external and internal crisis management strategies. When critical scholarship points to the 'death of law in facticity',[99] it uses vocabulary that is familiar to critical social theory. In critical theory, however, the principle of mediation also problematises the very idea of 'facticity'[100] or 'givenness'.[101] In Adorno's thought, placing the critical focus on the non-conceptual reality results in materialism, understood as the object's 'primacy' over subjective reason.[102] But the

[91]Cooke, *Re-Presenting the Good Society* (n 90) 4, observes that: 'the justificatory dilemma facing contemporary critical theories is how to maintain an idea of context-transcending, ethical validity without violating their own antiauthoritarian impulses'.

[92]Honneth (n 14) 51. Honneth points out how the Frankfurt School critical theory 'uses a concept of reason that can justify the normative validity of the immanently raised ideals', (ibid. 50).

[93]For instance, Foucault speaks of 'criticism' that is 'genealogical in the sense that . . . it will separate out, from the contingency that has made us what we are, the possibility of no longer being, doing, or thinking what we are, do, or think', M Foucault, 'What Is Enlightenment?' in P Rabinow (ed), *The Foucault Reader* (Pantheon 1984) 32–50, 46. For more discussion on the genealogical critique, see eg A Allen, *The Politics of Our Selves: Power, Autonomy, and Gender in Contemporary Critical Theory* (Columbia University Press 2007) 25 and Honneth (n 14) 48 and 52–3.

[94]Eg E Christodoulidis, 'Critical theory and the law: reflections on origins, trajectories and conjunctures' in E Christodoulidis et al (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019) 6, on how 'critical theory renegotiates the boundary between contingency and necessity'.

[95]M Horkheimer, 'Traditional and Critical Theory' in M Horkheimer, *Critical Theory Selected Essays* (M O'Connell et al tr, Continuum, reprint 2002) 188–243, 200. For discussion, see eg Christodoulidis (n 94) 17.

[96]TW Adorno, *Negative Dialectics* (E Ashton tr, Continuum 1973) 171. For more discussion, see eg B O'Connor, 'Adorno and the Problem of Givenness' (2004) *Revue Internationale de Philosophie* 85, 92–3, and Gordon (n 70) 73 and 76.

[97]This premise about the mediated (or 'transmitted') nature of social reality challenges both 'crude sociologism' and 'philosophical transcendence' in social critique. Gordon (n 70) 63.

[98]O'Connor (n 96) 92–3.

[99]Everson and Joerges (n 30) 419. However, compare this also to the statement in Joerges and Kreuder-Sonnen (n 25) 126, that 'theory-guided political science would benefit from taking the "facticity" of normative concerns into account'.

[100]Eg Gordon (n 70) 76 notes that '[e]specially revealing is the term "facticity" itself'.

[101]Eg O'Connor (n 96) 92.

[102]Adorno (n 96) 183–97. For discussion, see eg Gordon (n 70) 155 and 156, and O'Connor (n 85) 45–6.

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central role of mediation in social critique simultaneously helped Adorno to avoid 'naïve realism'[103] and to maintain the possibility of a critical subject.[104] In other words, the mediated nature of the social calls for a critical analysis of facticity itself – as opposed to using facticity as a self-explanatory critical lens.

For instance, Brian O'Connor observes that 'Adorno regards the notion of a "social" given as thoroughly suspicious'.[105] For Adorno, the principle of mediation expressed a reciprocal relationship between the subject (ie the critic) and the object (ie reality).[106] At the same time, the 'otherness' of the object (ie its facticity) countered any totalising vision of conceptual reasoning over the object.[107] The way in which Adorno questioned the unity of the subjective/conceptual reason and the objective reality provides an example of how mediation operates as a methodological tool in social critique.[108] This reinforces the claim that the methodological gaps within critical EU law scholarship cannot be filled by a descriptive, supposedly non-normative, critique (eg sociology and history) alone because the way in which social facts and practices are framed always depends on theoretical and epistemological assumptions that underpin such studies. In facing this challenge, the *non-normative critique* of EU law also needs to more explicitly articulate and defend its underlying social rationalisations.

The fourth key component of critical dialectics is its *negativity*. The negativity of critical dialectics seeks to 'identify distortions, inversions, pathologies, illusions, paradoxes, contradictions, and crises'.[109] Negative dialectics hopes to avoid 'essentialist theorisation'.[110] It does so by asserting that negative concepts do not require 'pure' or 'positive' versions of these same concepts.[111] The term 'essentialism' refers to a mode of thinking that reifies social identities (eg nationality or gender) as essential characteristics of people who belong to those groups. In contrast to Hegel's 'dialectical overcoming of difference', negative dialectics aims at 'sustaining difference and negativity rather than seeking their premature reconciliation'.[112] The important point from the perspective of this article is that negativity in critical social theory is first and foremost a methodological standpoint – although it is often misunderstood as a substantive disposition.[113] In EU law scholarship, the distinction between substantive and methodological negativism becomes blurred when the methodological commitment to critique is confused with substantive criticism. This is problematic because substantive criticism often operates in ways that would be labelled as ideological

[103]O'Connor (n 85) 50–1.

[104]Adorno (n 96) 170–1: 'To give the object its due instead of being content with the false copy, the subject would have to resist the average value of such objectivity and to free itself as a subject.' This indicates that, despite its priority, the object is 'mediated by subjectivity at various points in its history'. O'Connor (n 96) 86–7.

[105]O'Connor (n 96) 91–2. For discussion on what even Adorno nevertheless had to assume as 'given', see eg Honneth (n 14).

[106]Adorno (n 96) 171 on how '[t]he subjective mechanisms of mediation serve to lengthen the objective ones to which each subject, including the transcendental one, is harnessed'. For discussion, eg O'Connor (n 85) 48, and Honneth (n 14) 79–82.

[107]Honneth (n 14) 77, and O'Connor (n 96) 90.

[108]This argument is known as Adorno's critique of the 'identity theory', where the term 'identity' refers to the presumed oneness between the subjective reason and the objective reality. Adorno (n 96) 146–9. Note, however, the observation that: 'Anyone who is not convinced that all philosophical efforts revolve in the end around aligning concept and actuality. .. will accordingly also not share the conclusion from its failure that it must restrict itself to the critical investigation of all conceptual claims', Honneth (n 14) 75.

[109]Ng (n 82) 397.

[110]E Laclau, 'The Death and Resurrection of the Theory of Ideology' 112(3) (1997) Modern Language Notes (MLN) 300.

[111]Ng (n 82) 398. Ng points out that '[p]resupposing that critique requires such a position of transcendence is to revert to the false and absolute opposition between immanence and transcendence that critical theory. .. explicitly rejects', ibid. 398. Similarly, eg D Cook, 'From the Actual to the Possible: Nonidentity Thinking' 12 (1) (2005) 12(1) *Constellations* 21–35, 30: 'Criticism of damaged life can do no more than to raise the specter of what is other, the nonidentical, by using concepts that are themselves contaminated by what exists.'

[112]Gordon (n 70) 185 (and 164). See also eg O'Connor (n 85) 58.

[113]Honneth (n 14) 22 (fn 3 and 4) on the distinction between 'methodological negativism' and 'content centered negativism'. See also ibid. 73 on 'the extent to which the necessary "concretion" in philosophy can only be achieved by way of negatively composed dialectic'.

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by critical social theory.[114] This point will be discussed in more detail in the next part of this section.

Negative dialectics dismisses any totalising attitude over the object of critique. As such, it raises the question of how EU law as an object of study relates to the critical observer. This question is closely linked to the relationship between theory and practice in critical social theory and, also, in critical EU law scholarship. The 'unity'[115] of theory and practice is generally regarded as a central characteristic of critical social theory.[116] It implies that social critique cannot be separated from the need of social emancipation and change. The negative dialectical method rejects any simplistic vision of the 'political realization' of theory.[117] But critical theory cannot abandon the 'confidence in the critical potentialities of human reason' to the same extent as, for instance, poststructuralist or postmodern philosophy does.[118] Peter Gordon points out in his reading of Adorno that: 'The primacy of the object. .. entails the *persistence* of the subject who confronts it. This subject. .. remains the only source of critical resistance against [philosophical] positivism.'[119] Axel Honneth, for his part, emphasises that: 'Without a realistic concept of "emancipatory interest" that puts at its center the idea of an indestructible core of rational responsiveness on the part of subjects, this critical project will have no future.'[120]

Similarly, the critique of EU law cannot avoid the difficult questions of what it means to reconcile the 'diagnostic' and 'transformative' aims of critique and whether the two can ever be meaningfully separated without annihilating the critical project as a whole.[121] The critique of EU law remains methodologically incomplete insofar as it builds on the idea of a purely unmasking critique – whether theoretical or empirical. It has been noted that '[a] method means a path: not the path that a thinker follows but the path that he/she constructs. . .' and that '[e]xamining a method thus means examining how idealities are materially produced'.[122] This reference to materially produced idealities highlights that the critical project never exists in a vacuum but is always shaped by the same social dynamics that form its object. A metacritical standpoint that is aware of its own immanence, the recognition of the mediated/contingent nature of social facts, and the negativity of critical dialectics enable critical research to come into terms with its social embeddedness. But how could the critical study of EU law operationalise these seemingly very abstract methodological positions? And what difference would that make? The next part of this section will explore these questions in more detail.

C. From an unmasking to a dialectical critique of EU law: two examples

The idea of 'contestability' is one of the guiding normative premises in critical theory. This means that the critical project has failed methodologically and intellectually as soon as it seems to reach a

[114]For more on this, see eg Cook (n 111) 23 and 25. Cook observes that 'it is this identificatory subsumption of objects under concepts that Adorno labeled ideology and criticized throughout his work', ibid. 26.

[115]Christodoulidis (n 94) 9. This presumed unity ensues from Marx's 11th thesis on Feuerbach concerning the tasks of critique and the move from interpretation to social change. K Marx, 'Theses on Feuerbach' in R Tucker (ed), *The Marx-Engels Reader* (2nd ed, Norton & Company 1978).

[116]For instance, Honneth observes that 'Critical Theory. .. considers the initiation of a critical practice that can contribute to the overcoming of social pathology to be an essential part of its task. Even where skepticism regarding the possibility of practical enlightenment prevails. .. the question of enlightenment arises out of the mere necessity of an internal connection between theory and practice,' Honneth (n 14) 37.

[117]A Honneth, 'From Adorno to Habermas: On the Transformation of Critical Social Theory' in A Honneth, *The Fragmented World of the Social: Essays in Social and Political Philosophy* (CW Wright ed, State University of New York Press 1995) 95. See also Honneth (n 14) 37 and 77.

[118]Gordon (n 70) 10.

[119]Ibid. 173.

[120]Honneth (n 14) 41–2.

[121]See eg Allen (n 93) 3 on these twin objectives of critique.

[122]J Rancière, 'A few remarks on the method of Jacques Rancière' 15(3) (2009) parallax 114, 114.

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conclusion, beyond which no critical reflection is required. In practice, the underdeveloped methodology of critique leaves the critique of EU law to drift between Scylla and Charybdis, that is, between epistemological and cognitive authoritarianism, on the one hand, and philosophical and sociological positivism, on the other hand. In this context, epistemological authoritarianism refers to 'restriction of knowledge of what counts as a rational interest to the epistemically privileged theorist'.[123] This warning against the hazards of authoritarianism may sound familiar to many EU law scholars, taking into account the recent discussion on latent authoritarian tendencies in the project of European integration.[124] While recourse to the law as a means of integration may be susceptible to turning democratic politics into 'authoritarian liberalism',[125] the unmasking critique of EU law is vulnerable to more subtle forms of epistemological authoritarianism. Therefore, it is important to consider how the critique of EU law could develop in a non-authoritarian way, without collapsing into reductionist philosophical and sociological positivism.

The alienation critique and the ideology critique provide two concrete examples of how a more deliberate engagement with critical dialectics can help the critique of EU law to navigate these pitfalls. These examples were selected because of 'alienation' and 'ideology' are familiar concepts both in critical EU law scholarship and in the critical theory of society. The alienation critique has its focus on how the individual subject relates both to itself and to the world, whereas the critique of ideology examines EU law from a more systemic/structural perspective. The *alienation critique* essentially asks 'does EU law alienate citizens of the Member States?' and, if so, 'how does it alienate them?' The *ideology critique* asks 'does EU law have an ideology?' and, if so, 'what is that ideology?' These two examples clarify what needs to change if critical EU law scholars seek to follow the methodological commitments of critical theory, as discussed in the previous part of this section. However, this discussion can only scratch the surface of what the methodological shift from an unmasking critique towards a dialectical critique means in practice.[126]

Example I: The alienation critique of EU law

Alienation is a theme that recurs in critical EU law scholarship with some frequency but is not yet fully theorised. On the one hand, the concept of alienation is used as a seemingly self-explanatory critical device with little or no discussion on what it means in EU law. On the other hand, contributions that engage in discussing alienation in more detail do not necessarily do justice to the full potential of alienation critique in EU law scholarship. Both lapses are arguably due to the underdeveloped methodology of critique. In everyday language, alienation can be defined as 'estrangement' and 'withdrawal'.[127] But alienation is also 'the key concept of diagnoses of the crisis of modernity and one of the foundational concepts of social philosophy'.[128] For this reason, the alienation critique of EU law provides a particularly illuminating example of how critical dialectics can enrich the study of EU law.

The roots of alienation critique can be traced back to the Marxist tradition of social theory and to existential philosophy. Both the Marxist and the existentialist forms of alienation critique

[123]M Cooke, 'Resurrecting the Rationality of Ideology Critique' (n 90) 4 and 13. Cooke further observes that 'epistemological authoritarianism has an ethical aspect, for it specifies what counts as thought and action directed towards the good independently of the rational convictions of the thinking and acting subjects concerned' (ibid. 4).

[124]See the literature cited in n 23 and n 79.

[125]Wilkinson (n 79).

[126]The main objective of this article is to demonstrate why the 'methodological turn' is needed in the critical study of EU law. This article does not alone aim to complete that turn.

[127]Eg Oxford Reference <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095402623> accessed 15 December 2021.

[128]R Jaeggi, *Alienation* (F Neuhouser and A Smith tr, Columbia University Press 2014) 6.

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explore how self-alienation and social alienation are intertwined.[129] However, they offer profoundly different answers to this question.[130] The classic existential definition of alienation is presented by Sartre in *Being and Nothingness*.[131] For existentialists, the experience of self-alienation stems from our freedom to choose what meanings we give to life.[132] At the same time, alienation from others is viewed as unavoidable because consciousness arguably resists the way in which it is seen by others in inter-subjective relations.[133] The existential concept of alienation is often commended for how it explains the experience of self-alienation. But existential philosophy and critical social philosophy diverge on what role they assign to an 'unalienated' condition in the alienation critique. The existential accounts of alienation imply that alienation constitutes a diversion from authentic experience.[134] For critical theory, the existential critique of alienation is problematic insofar as it depicts political and social life as a cause of alienation.[135] These differences are not just substantive but also methodological. Therefore, the way in which the alienation critique of EU law develops has broader relevance to critical EU law scholarship.

EU citizenship and free movement law is the main context for the alienation critique in EU law scholarship. It was noted early on that:

> These very values, which find their legal and practical expression in, e.g., enhanced mobility, the breakdown of local markets, and the insertion of universal norms into domestic culture, are also part of the deep modern and post-modern anxiety of European belongingness and *part of the roots of European angst and alienation* [italics added]. A meaningful concept of European citizenship must address this paradox.[136]

The presumed link between European citizenship and alienation is also established in the following statement:

> The social legitimacy that citizenship case-law lends to the EU in some groups may be more than matched by *alienation that it will inspire* [italics added] in others. Moreover, the asymmetry between the capacity of the Court to present the underlying values and vision of this part of EU law so powerfully, and its inability to articulate or recognise the underlying values and visions of national measures when these are challenged, is striking.[137]

[129] Ibid. 11 (and 219–20).

[130] The former focuses on the alienation of labour and searches for 'appropriating the world through production'. The latter views alienation as the 'objectification' of the world (ibid. 11 and 16).

[131] J-P Sartre, *Being and Nothingness: An Essay on Phenomenological Ontology* (HE Barnes tr, WSP 1956). Sartre, however, built on Heidegger's *Being and Time*.

[132] Existential philosophy highlights that existence (ie life) always precedes the essence or meanings that must be given to life by each human being him/herself. In this context, the concept of 'bad faith' refers to ways in which humans deceive themselves by getting completely caught up either by facticity or by transcendence. From this perspective, authenticity would refer to an equilibrium between facticity and transcendence. For more discussion, see eg K Kirkpatrick, *Sartre on Sin: Between Being and Nothingness* (Oxford University Press 2017).

[133] Jaeggi (n 128) 19–20.

[134] It has been noted that '[w]ith the existential generation, philosophical reason escaped unscathed from the question of its historical responsibilities in perpetuating models of exclusion'. R Braidotti, 'Identity, Subjectivity and Difference: A Critical Genealogy' in G Griffin and R Braidotti (eds), *Thinking Differently: A Reader in European Women's Studies* (Zed Books 2002) 163. However, Sartre's 'historical materialism' did recognise that social relations take place both between human beings and within historically shaped institutions, which means that the struggle for the subject position is never fought on equal terms.

[135] Jaeggi (n 128) 9.

[136] JHH Weiler, *The Constitution of Europe. 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press 1999) 343.

[137] G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' 21(1) (2015) European Law Journal 2, 20.

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Neither of these examples develops the theme of alienation further. However, a more detailed account of alienation in the study of EU law is provided by Alexander Somek.[138] Because Somek's study on alienation is one of the few attempts, if not the only one, to dig deeper into the meaning of alienation in EU law, this section will use it as a basis for discussing how the alienation critique of EU law would benefit from a more dialectical method of critique.

Somek defines alienation both as 'the experience of a *lack or loss of free agency*' and as 'the emotional recognition that the free agency is unavailable that is possible under conditions of social freedom'.[139] Somek observes in this context that '[i]t remains an open question, however, whether structures of social freedom are part of the ethos of the European Union and of its law.'[140] Somek, with reference to Marx, defines rights that individuals derive from EU law as 'the rights of the egoistic man, of man separated from other men and from the community'.[141] Following Marx, Somek also links alienation to the relations of economic power: '[t]he root cause of alienation is that it is inherent in economic power to transform all economic relations into struggles over economic power.'[142] How economic power is generated arguably explains why '[a]lienation from others is the root of self-alienation'.[143] This is so because 'the pursuit of economic power forces one to be indifferent to one's own needs'.[144] However, as will be shown in this section, economic power alone is too narrow a perspective here. In addition to the economic relations of power, another key theme in Somek's analysis of alienation is that of sociality.

The experience of alienation makes individuals 'aware of the *false* realisation of human sociality'.[145] For Somek (and Marx), this observation about human sociality translates into a search for a 'true community': 'Through our explicit embrace of our sociality the true community (*das wahre Gemeinwesen*) would appear before us in virtue of reflective insight.'[146] The quest for a 'true community' is contrasted with a 'community in alienated form'.[147] Somek is aware that this vision of a 'true community' is vulnerable to the charge of essentialism.[148] However, instead of looking for a methodologically less essentialist theory of alienation, Somek states that:

> This point may even have to be conceded inasmuch as a certain structure of interaction is deemed appropriate to human flourishing. But it does not entail the belief that individuals are the owners of some inner essence that becomes eclipsed by forms of system integration.[149]

[138]A Somek, 'Alienation, Despair and Social Freedom' in L Azoulai et al (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart 2016).

[139]Ibid. 35. Somek further clarifies that 'analyses by Marx. .. have helped us realise that alienation is first and foremost about the loss of individual agency' (ibid. 49) but that 'both Marx and Hegel were right in believing that free individual self-realisation is fully possible only within structures of interaction' (ibid. 35).

[140]Ibid. 36. For more on this, see also ibid. 52 and 53.

[141]Ibid. 36. According to Somek, this is so because '[t]heir exercise does not give rise to that social solidarity which is conducive to universal individual self-realisation' (ibid. 36) and because '[t]he European Union. .. empowers those who are agile and adaptable and relieves them from dependence on received social bonds and hierarchies' (ibid. 52).

[142]Ibid. 39. For how Somek draws on Marx's theory of labour production to develop his alienation critique in the context of EU law, see also ibid. 36–7 and 40–1. In this scenario, alienation follows from the fact that, instead of 'true production qua self-realisation', 'the producer is working to satisfy the wants of the others' to gain economic power over them.

[143]Ibid. 41.

[144]Ibid. This is arguably so because: '[s]ince the point of economic activity is the generation of economic power, it is essential that one takes advantage of others' (ibid. 41).

[145]Ibid. 44.

[146]Ibid. 42. Somek also engages in discussing Marx's concept of 'species-being' in this context (ibid. 43).

[147]Ibid. 43.

[148]Ibid. 43 ('the belief in alienation seems to presuppose some form of "essentialism"').

[149]Ibid. 44. Somek also argues in this context that 'the recognition of alienation does not, contrary to its appearance, presuppose an essence' because '[i]t merely requires recognition that one's own agency is really not what it appears to be', that is, '[i]t is not agency of the self' (ibid. 44).

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Be that as it may, the proposition that the 'community in alienated form' is 'challenged through the anticipation of a community in non-alienated form'[150] has an essentialist tone. Besides the essentialist vision of a true and non-alienated community, Somek's account of alienation problematically links social freedom to a communitarian ethos of sociality.

Somek emphasises that his preferred approach to alienation 'is essentially conservative, not only because it leaves the market principally in place, but because it looks back to traditions of de-commodified human dealings'.[151] He mentions Michael Walzer's communitarianism as one representative of the proposed approach.[152] Somek, now drawing on Hegel, envisages that 'individual freedom can be "actual" only if it fits into an already existing social world' and that 'the participants in such an institutional setting recognise their mutual dependence and embrace it either affectionately or in a spirit of loyalty and solidarity'.[153] While I agree with Somek on the importance of a social/relational perspective on human agency,[154] I find his approach to intersubjective dynamics problematic. The communitarian ideal of a 'true community' offers an oddly idealised picture of human social relations.[155] It can even be asked whether 'traditions of de-commodified human dealings'[156] have ever existed, taking into account the human capacity for greed, envy, and egoism. This relates to the earlier observation that placing the analytical focus on economic power relations may easily result in a one-sided picture of both individual and social alienation.

To sum up, the alienation critique of EU law can be problematised on more than one axis: First, confining the analysis of alienation to economic power ignores other potentially relevant power relations. Second, externalising the source of alienation to the processes of commodification may produce an incomplete picture of what constitutes alienation both in relation to the self and in relation to the world. Third, the opposition between a 'true community'[157] and a 'community in alienated form'[158] gives the alienation critique a problematic essentialist tone. This essentialism is further developed in the communitarian vision of social freedom. On top of these observations, there is a parallel tendency in critical EU law scholarship to use the term 'alienation' without any attempt to theorise it. By way of provisional conclusion, it can be argued that the alienation critique either remains under-theorised or presents a series of problematic assumptions about social relations and power. But the purpose of this discussion is *not* to revisit the alienation critique of EU law in substantive terms. Instead, the critique of alienation is used here as an example of how a dialectical method of critique would remodel the critique of EU law.

If the alienation critique of EU law remains incomplete, how would a more dialectical method of critique ameliorate this? This can be clarified by having a closer look at how contemporary critical theory deals with alienation. Rahel Jaeggi's book *Alienation* provides an instructive example of this. Jaeggi wants to challenge essentialism that 'haunts' the conception of alienation.[159] By essentialism, she refers to the substantive ideas of the nature and essence of the human being that characterise the idea of an unalienated condition.[160] In Jaeggi's view, any such 'theory of good life' is vulnerable to the 'charge of paternalism'.[161] Jaeggi redefines alienation as a failure to

[150]Ibid. 45.
[151]Ibid. 51.
[152]Ibid. 51.
[153]Ibid. 51 and 52.
[154]For more on my approach to relationality, see PJ Neuvonen, *Equal Citizenship and Its Limits in EU Law: We the Burden?* (Hart 2016) 131 (and 114).
[155]For more on why communitarianism is a problematic approach in the study of EU law, see ibid. 128–9 and 137.
[156]Somek (n 138) 51.
[157]Ibid. 42.
[158]Ibid. 43.
[159]Jaeggi (n 128) 27.
[160]Ibid. 27 (and 40).
[161]Ibid. 28.

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'appropriate', that is, to make one's life one's own.[162] For her, the experience of self-alienation does not follow from 'a falling away from one's essence' but, rather, it equals to 'a disturbed relation to our own actions, desires, projects, or beliefs'.[163] From this perspective, establishing 'a relation of appropriation' to self and the world becomes a means of overcoming alienation.[164] Jaeggi maintains that this type of self-realisation is only possible 'in relation to the social and material worlds'.[165] However, she argues that these relations require 'conceptual clarification'[166] and moving away from 'essentialist conceptions of self and community'.[167]

Jaeggi's alienation critique maps how relations of appropriation are 'disturbed'.[168] The methodological negativism of this exercise seeks to clarify the 'character' of appropriated relations.[169] Here the negativity of critique entails that 'the positive. .. can only be determined through the mediation of what should not be'.[170] Jaeggi suggests that analysing 'successful and disturbed or deficient relations to self and world' provides a necessary basis for studying social conditions, institutions, and practices.[171] Jaeggi, like Somek, views solidarity as 'the opposite of social alienation'.[172] But she maintains that '[t]he rich social and ethical dimension of alienation critique can be made accessible without the strongly objectivistic interpretive scheme that is frequently associated with it'.[173] Thus, Jaeggi's account of social solidarity differs from the more essentialist account of a 'true community' in the alienation critique of EU law. Jaeggi's non-essentialist account of appropriation, together with her negative method, also calls into question the conservative idea that 'appropriation is always to be understood as a *re*appropriation of something that already exists'.[174]

Jaeggi's non-essentialist theory-building is interesting from the perspective of European integration because the EU cannot compete with Member States in essentialist terms. However, for the purposes of the present article, the important question is not whether Jaeggi's account of alienation is suitable for studying alienation in contemporary European societies. For instance, it can be argued that Jaeggi's analysis of social institutions remains underdeveloped.[175] Neither was the aim of this brief discussion to fix the meaning of alienation for the study of EU law. Instead, this inquiry into the essentialist and the non-essentialist versions of alienation critique offered just one tentative example of how critical dialectics can change the critique of EU law. The alienation critique of EU law currently circumvents the more methodological questions about whether an unalienated condition is ever possible and how our preferred conception of unalienated life is always contingent, rather than pregiven. A metacritical standpoint reopens these questions in the study of EU law. The negativity of critique, together with the principle of mediation, further clarifies how any substantive theory of authentic life is preceded by a choice between competing

[162]For Jaeggi, the capacity for 'appropriation' indicates that, in living one's own life, the subject/person is 'identifying' both with him/herself and with the world. Appropriation is defined as a 'praxis' of 'making something one's own' (ibid. xxi and 38 and 39).

[163]Ibid. 48.

[164]Ibid. 1.

[165]Ibid. 200.

[166]Ibid. xxi.

[167]Ibid. 40.

[168]Ibid. 1.

[169]Ibid.

[170]R Jaeggi, '"No Individual Can Resist": *Minima Moralia* as Critique of Forms of Life' (2005) 12(1) *Constellations* 65, 75 and 72.

[171]Jaeggi (n 128) xxii.

[172]Ibid. 219.

[173]Ibid. 32.

[174]Ibid. 15.

[175]Jaeggi herself acknowledges this, ibid. 220. Jaeggi's focus on self-realisation can also be problematised.

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social rationalisations.[176] This inquiry into the alienation critique also illustrates how difficult it is to demarcate between the substance and the methodology of critique. But that reinforces, rather than dispels, the argument for strengthening the critical method in EU law scholarship.

Example II: The ideology critique of EU law

The alienation critique provided one example of how the critique of EU law can benefit from a more deliberate engagement with critical dialectics. But it is important to look beyond that example. A dialectical method of critique challenges the very idea of unmasking critique in critical EU law scholarship. This shift away from a purely unmasking critique can be examined by using the critique of ideology as a further example. The concept of ideology, understood as false consciousness, used to explain what distorted emancipatory processes according to the early critical theory. This understanding of ideology is no longer popular because the idea of a critic who is capable of unmasking ideological distortions is vulnerable to the charge of epistemological authoritarianism.[177] For instance, Ernesto Laclau explicitly rejects 'the possibility of a metalinguistic vantage point which allows the unmasking of ideological distortion'.[178] Maeve Cooke, for her part, points out that, insofar as 'theories of objectively necessary false consciousness seem to deny the capacity of human subjects to act in their own rational interests', they 'open themselves to accusations of epistemological and ethical authoritarianism'.[179] Here the important question is whether the unmasking critique of EU law can avoid this type of authoritarianism without collapsing into uncritical philosophical and sociological positivism. In answering this question, it is useful to have a closer look at how contemporary critical theorists deal with the issue of ideology.

Laclau asserts that a non-essentialist critique of ideology is possible and can provide a viable alternative to 'new positivism and objectivism' in social theory.[180] For Laclau, '[t]here is ideology whenever a particular content shows itself as more than itself'.[181] Ideology accordingly refers to 'the illusion that the desired state of completion is actually accessible' and to the ways in which '[d]esire for completion is projected onto some *representation* of the absent transcendent object'.[182] Laclau's discourse theoretical approach to ideology is closely linked to his neo-Gramscian understanding of hegemonic articulation and struggle in the project of radical democracy.[183] For the purposes of the present article, the important observation is that the critical subject, too, may search for ideological closure by replacing a transcendent object with its historically particular representation. What is particularly interesting for EU law scholarship is that democracy is listed as the main example of 'transcendent objects to which empty signifiers . . . refer'.[184] Because

[176] Such competing rationalisations also exist within societies, not just between them.

[177] As explained above in this section, epistemological authoritarianism refers to a 'restriction of knowledge of what counts as a rational interest to the epistemically privileged theorist', Cooke (n 123) 4.

[178] Laclau (n 110) 319–320.

[179] Cooke (n 123) 4. Cooke also argues for a 'non-authoritarian model of justification', meaning that that 'critical social theories must open the validity of their critical analyses of false consciousness to the reasoning of the human subjects whose consciousness is held to be faulty' (ibid. 7).

[180] Laclau (n 110) 299, 300, and 320.

[181] Ibid. 303. Laclau accordingly develops a non-essentialist theory/conception of ideology by analysing what makes 'the creation of the illusion of closure' possible' (ibid. 300 and 320).

[182] Cooke (n 123) 11 (and 9–10).

[183] For more discussion on Laclau's political thought, see eg L Worsham and GA Olson, 'Hegemony and the Future of Democracy: Ernesto Laclau's Political Philosophy' 19(1) (1999) Journal of Advanced Composition (JAC) 1, and L Thomassen, 'Antagonism, hegemony and ideology after heterogeneity' 10(3) (2005) Journal of Political Ideologies 289 and G Colpani, 'Two Theories of Hegemony: Stuart Hall and Ernesto Laclau in Conversation' (forthcoming) (2022) *Political Theory*. In brief, Gramsci complemented Marx's economism with the idea of cultural, intellectual and moral hegemony, ie a 'hegemonic bloc'. Laclau, for his part, reappropriated Gramsci's theory of hegemony with the argument that the process of 'hegemonic struggle' is not reducible to the elite's intellectual domination but is also constitutive of the social and the political under the conditions of radical democracy.

[184] Cooke (n 123) 9.

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democracy is a 'floating signifier',[185] fixing its meaning happens 'by making of it one of the names of the fullness of society'.[186] From this perspective, a 'shared belief' that a specific representation of the transcendent object is 'adequate' explains how social groups are formed and maintained.[187] This highlights that democracy, while important, cannot provide a self-explanatory critical lens for unmasking the deficits of EU law.[188]

In the study of EU law, unmasking critique promises to expose the ideology or ideologies of EU law. A more developed methodology of critique complements this by highlighting the need of an 'intra-ideological' critique of EU law. For Laclau, '[t]he illusion of closure is something we can negotiate with, but never eliminate'.[189] This means that 'what is impossible is *a critique of ideology as such*; all critiques will necessarily be intra-ideological'.[190] But it has been noted that Laclau may proceed too swiftly 'from the thesis of the necessity of the transcendent object to the thesis of the necessity of belief in its attainability'.[191] To avoid positivism, Laclau should arguably either clarify the rationality of 'intra-ideological' critique or to 'allow for a reference point for criticism that goes beyond the ensemble of practices in a given social order'.[192] In other words, Laclau's discourse theoretical approach is not able to fully account for what it actually means to replace a purely unmasking critique with a critique that is aware of its own ideological tendencies. This latter question is pressing for the critique of EU law. As will be seen in this section, it reinforces the earlier question of how critique can come into terms with its social embeddedness without losing its critical force.

The critique of ideology persists as an 'indispensable method' for critical social theory.[193] However, in contemporary critical theory, the critique of ideology extends to the critical project itself. The notion of ideology continues to refer to distorted forms of social rationality, that is, to 'social pathologies'.[194] But ideology is now viewed both as 'cognitive' and 'material', including 'habits and dispositions, in patterns of behavior and social practices'.[195] From this perspective, critical rationality becomes distorted if it fails to acknowledge the effects of 'material conditions and practices' on conceptual thinking.[196] The critique of ideology accordingly explores the 'embeddedness' of critical ideas and concepts in social reality.[197] A revised ideology critique can be understood as a form of immanent critique because it can no longer detach itself from the 'social formation that it seeks to understand, critique, and transform'.[198] Similarly, a methodologically sound critique of EU law must deal with its own ideational and ideological tendencies.

[185]Laclau (n 110) 306 states that: 'A signifier like "democracy". .. is certainly a floating one: its meaning will be different in liberal, radical anti-fascist and conservative anti-communist discourses.'

[186]Ibid. 306.

[187]Cooke (n 123) 11. See also E Laclau, 'Identity and Hegemony: The Role of Universality in the Constitution of Political Logics' in JP Butler et al (eds), *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (Verso 2000).

[188]For more discussion on this, see PJ Neuvonen, 'A Revised Democratic Critique of EU (Citizenship) Law: From Relative Homogeneity to Political Judgment' 21(5) (2020) German Law Journal 867, 880–2.

[189]Laclau (n 110) 311.

[190]Ibid. 299. For Laclau, this also means that 'ideological in the strict sense of the term. .. does not involve any pejorative connotation' (ibid. 311).

[191]Cooke (n 123) 12 (and 15).

[192]Ibid. 16 and 17.

[193]See eg Ng (n 82) 393 on how '[t]he critique of ideology becomes necessary as soon as reason ceases to be pure reasons, as soon as the actuality of freedom becomes wedded to social reality'. Similarly, eg Cooke observes that 'abandoning the concept of ideological distortion is not an option for theories that adopt a critical perspective on society', Cooke (n 123) 8.

[194]Ng (n 82) 393. On the notion of 'social pathology' in critical theory, see eg PJ Verovšek, 'Social criticism as medical diagnosis? On the role of social pathology and crisis within critical theory' (2019) Thesis Eleven 109, and J Mills, 'Dysrecognition and social pathology: New directions in critical theory' 24(1) (2019) Psychoanalysis, Culture & Society 15.

[195]Cooke (n 123) 5, fn 11 (referring to Pierre Bourdieu's work).

[196]Ng (n 82) 399.

[197]Ibid. 394 and 399. Similarly, eg O'Connor (n 85) 12–13 on how 'forms of philosophy are manifestations of the forms of rationality that are constitutive of social life'.

[198]Ng (n 82) 394.

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This means that a plausible critique of EU law is not possible without a simultaneous critique of its 'own constitutive conditions'.[199] Awareness of the inherent links between 'critique', 'self-critique' and 'self-referentiality' is central to a fully developed critical method.[200] An unmasking critique accordingly becomes 'a form of self-critique, one in which reason itself is continually put on trial'.[201]

In critical theory, the continuing relevance of ideology critique is supported by the view that social change is not unfeasible. For instance, Cooke argues that the concept of ideology is useful to social critique because it draws attention to 'the difficulties that cognitive change for the better may involve', as well as to the ways in which the reproduction of 'social oppression' may remain 'hidden from the human subjects concerned'.[202] In this reading, the critique of ideology reflects the fact that theory and practice cannot be meaningfully separated in the critical project and that '*praxis*' consists of 'intentionally guided thought and action aimed at changing the social order for the better'.[203] In critical dialectics, methodological negativism explains how critique can detect social pathologies and distortions without falling into essentialist theorisation. But, as has been seen above in this article, the negativity of critical dialectics does not offer the critic any easy exit from the problematic of emancipation. Dismissing the transformative aspect of critique raises the concern that the critical project becomes radically disoriented. Interestingly, however, the unmasking critique of EU law often remains reticent about whether post-critique transformation is possible and/or even desirable. For this reason, the critical project comes across as incomplete in EU law.

This discussion on the problematic of unmasking/ideology critique clarifies what options are available to critical EU law scholarship: The critical project can strive for strong context-transcending validity claims, with all the difficulties that relate to epistemological authoritarianism. Or, critique can retreat into philosophical and sociological positivism and a schematic distinction between 'facticity' and 'validity'. But this would dilute both the diagnostic and the transformative force of critique. Neither of these two options is satisfactory if the critical project takes seriously the interplay between the material and the ideational aspects of social reality. The third option would be to moderate critical claims by more explicitly linking them to particular models of social rationality that steer critique. This, however, is difficult without a more developed critical method. If 'ideological closure'[204] can occur as part of the critical project itself, the critical method becomes the only available safeguard against such uncritical tendencies. Therefore, the critique of EU law needs a methodology that is alert to how competing social rationalisations (and pathologies) shape the critical project from the beginning because every critic is socialised at a particular time and place. This essentially means that the critique of EU law must come to terms with its nature as 'intra-ideological' critique – a concession that may not be easy for legal scholars. The next section will clarify why and what could be done about it.

5. Overcoming obstacles: how to advance critical engagement in EU law scholarship?

The EU is a deeply ideational project.[205] This is confirmed by the current EU Treaties,[206] as well as by the way in which the integration project emerged as a counter-reaction to fascism and totalitarianism. However, it is important to notice that, from the outset, there were several competing

[199]Ibid. 394.

[200]Ibid. This also means that '[c]ritical theories. .. find themselves on both sides of the subject/object divide and must be able to account for themselves as parts of their objects of investigation' (ibid.).

[201]Ibid. 393 and 394. Similarly, eg O'Connor (n 85) 3 and 13 on how 'the metacritique of epistemology is implicitly a critique of models of rationality' and how 'the critique of philosophy as the product of this [social] rationality must entail the critique of rationality in the broader sense'.

[202]Cooke (n 123) 6.

[203]Ibid. 5.

[204]Ibid. 12.

[205]For more on the term 'ideational' and its use in this article, see Section 3.A.

[206]Eg Art 2 and 3(5) TEU. Consolidated Version of the Treaty on European Union (2016) OJ C 202/13.

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visions of what this project should entail and where its focus should lie.[207] The ideational nature of European integration has direct implications for what it means to study EU law. From the internal perspective, the EU legal order may have no other option than to claim for the autonomy of EU law in formalist terms. But it is problematic if EU law scholars adopt this intra-systemic justificatory perspective on EU law. This is also an area where the critical history of EU law has made a useful contribution in clarifying the peculiar symbiosis between the EU's early institutional framework and its academic research.[208] The nature of the EU as an inherently ideational project requires a particular critical mindset from EU law scholars. At the same time, the EU's prolonged crisis mode suggests that the need of critical research is increasing, rather than decreasing, in the foreseeable future. But the main thrust of this article was not that more critical research on EU law is needed. On the contrary, this article demonstrated that EU law scholars should more carefully reflect on what it means to conduct a methodologically sound critique of EU law.

Here the guiding premise is that EU law deserves to be critiqued better. In EU law scholarship, both the *revisionist* and the *rejectionist* strands of critique have methodological caveats that prevent them from reaching their full potential. Specific questions that merit further investigation in critical EU law scholarship include, but are not exhausted to, the following: What different purposes does critique serve in the study of EU law? Is it primarily deconstructive, constructive, or reconstructive? When is critique normative? Can it not be normative? If not, is the normativity of critique recognised or overlooked? Above all, from which standpoint is critique conducted? To what extent is critique immanent and/or genealogical? This article explained the silence of critical EU law scholarship on many of these questions by the general failure to transform the quest for critique into a methodological recalibration of how EU law is criticised – a matter that is arguably beyond the reach of the traditional 'role of law' debate. The perceived lack of interest in the critical method is problematic because the methodology of critique, that is, how critique is conducted, will always shape the findings of critique. Therefore, it is important to consider what factors may currently hinder more thoughtful critical engagement in EU law scholarship and what steps are needed to encourage such engagement.

The lack of methodological engagement may at least partly stem from the nature of legal training and its focus on reasoning and argumentation at the expense of methodological and epistemological questions.[209] This means that a more deliberate engagement with critical social theory will quickly take the legal scholar outside his/her 'zone of proximal development' (and also of his/her zone of comfort).[210] While most EU law scholars are not trained in the methods of social sciences or social theory, political and social scientists studying EU law may espouse the idea of facticity too uncritically. It can even be argued that a shift towards a more social-scientific study of law merely substitutes 'one kind of normativity for another'.[211] But this article demonstrated that the focal point is not the normativity of critique as such. What is more important is whether critical scholarship is aware of the contingency and immanence of different critical interventions, and what epistemological commitments may inhibit this awareness in the study of EU law. This is

[207]For a recent discussion on the competing starting points of European integration, see eg K Patel, *Project Europe: A History* (Cambridge University Press 2020).

[208]See eg the literature discussed in n 55–7. This of course is not to say that one and the same person could not act both in the institutional and the scholarly capacity as long as the relationship between the different capacities is not left unproblematised.

[209]For discussion, see eg Samuel (n 47) 94; Samuel (n 213) 210; Micklitz (n 41) 308–9; van Gestel and Micklitz (n 43) 314; Westerman (n 211) 91.

[210]The concept of a 'zone of proximal development' is important in educational psychology. Eg LS Vygotsky, *Mind in Society: The Development of Higher Psychological Processes* (Harvard University Press 1978) 86–87.

[211]Eg P Westerman, 'Open or Autonomous: The Debate on Legal Methodology as a Reflection of the Debate on Law' in M van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart 2011) 87–110, 109.

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important because, in the absence of adequate methodological engagement, the driving force of critique, that is, how the critic rationalises society tends to remain unpronounced.

Another explanation for this lethargy may relate to the common perception of EU law as a stabilising and integrating mechanism, rather than as a site of social or political struggle. Questioning this narrative of EU law would also recast what the EU as a 'Community of law' means and does not mean. It is also clear that EU law is researched differently if it is viewed as a 'lesser evil', rather than as a superior normative solution to the intricate coordination problems and interdependencies between the EU Member States. These are topics that critical EU law scholarship promises to cover, but its ability to do so is currently hampered by the lack of methodological sophistication. The central argument in this article was that neither EU law nor the critique of EU law can escape their embeddedness in a complex web of competing social rationalities. For this reason, the argument for a more developed critical method is necessarily an argument for a more prominent role of social theory in EU legal studies. But making this link between critical EU law scholarship and social theory unveils a deeper question of how the relationship between theory and practice is understood in the study of EU law.

In brief, a closer engagement with critical social theory may require that EU law scholars rethink what theory is and how it relates to the study of EU law. In critical theory, the theory-practice relationship is never just a one-way relationship. If theory is only viewed as a tool, it too becomes vulnerable to the charge of functionalism. Instead of viewing abstract theory as a synonym for bad or useless theory, it is important to consider for what purposes critical theory uses abstraction. In addressing this question, it is good to bear in mind that abstraction (eg in art) strives for freedom from the existing representational qualities. What may appear like abstract and futile theory from one perspective, may count as the necessary 'labour of concept' from another. Similarly, EU law needs theory that can push our thinking beyond the confines of what already exists, without losing sight of how the ideational and the material aspects of social reality always interact. This type of social-theoretic inquiry would also shed critical light on the conceptual abstractions that EU law scholarship already uses quite unapologetically.[212]

In this article, the analysis of unmasking critique showed that critical EU law scholarship cannot sail under the flag of merely exposing the negative effects of European legal integration. Instead, the methodological commitment to critique must extend to critical interventions themselves. This is so because unmasking critique is always contingent on a preceding choice between competing social rationalisations. The dialectical method of critique maintains that any attempt towards metacritical reflection remains unsuccessful insofar as it is unable to recognise its own embeddedness in social reality. While critique as a methodological commitment is not reducible to a mere substantive criticism of EU law, a more developed critical method is a prerequisite for critique's potential to contest and transform the law in substantive terms. But this quest for critical dialectics is not a 'one-size-fits-all' type of argument. Since critique is a multilayered phenomenon, each scholar will ultimately need to form their own understanding of what the commitment to critique as a method means and what level of methodological engagement is necessary for their scholarship. While this section can only provide some tentative guidelines for such critical self-reflection, it is clear that a dialectical method of critique would pay particular attention to the use of concepts in the exercise of critique.

A 'dialectic scheme' assumes 'interaction', rather than opposition, between 'paradigm dichotomies'.[213] Recourse to dialectics means that critical research cannot rely on conceptual oppositions and binary categorisations without explicating how these categorisations are pre-structured, mediated, and rationalised. This would be an important change in the study of EU law because the critical discourse often builds on such conceptual dichotomies.[214] The primacy of the object over

[212]These include, for instance, a nation, State, citizenship, democracy – to name but a few.

[213]Eg G Samuel, 'Taking Methods Seriously (Part Two)' 2(2) (2007) Journal of Comparative Law 210, 231, and 232.

[214]Neuvonen (n 188) 873–4.

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the critical subject also means that a dialectical method of critique resists any predetermined, totalising, conceptualisation of EU law as an object of critique. Acknowledging the contingency of our conceptual apparatuses has implications for how far critical claims can be generalised and, thus, for what validity claims the critical project can make. But the search for a more developed critical method is not reducible to the semantic analysis of what different meanings can be assigned to key concepts, such as a democratic polity, in the critique of EU law. The close links between practice and theory highlight that critique is rooted in 'specific sets of social relations, institutional arrangements and processes of social reproduction'.[215] Since the critic is always socialised into a certain environment and culture with a tendency to normalise the existing patterns of socialisation, the rationalisation of the critical project – and the related quest for self-critique – become ever more important.

A dialectical critique cannot repress the internal divisions of cooperative social rationality that underlies critique.[216] A dialectical critique accordingly resists essentialist references to national affective unity, solidarity, and pre-political belonging as the normative basis for critiquing EU law. Critical dialectics also goes further than, for instance, system theory, in recognising that the critical subject may also be internally differentiated.[217] The dissolution of the always-coherent subject reinforces the argument that the critic's insights are never representative of differentiated social reality as a whole. As such, the dialectical method of critique also points to the limits of non-normative descriptive approaches in the critical study of EU law. This article has shed light on the ways in which 'facticity' is currently both under- and overstated in EU law scholarship. On the one hand, the opposition between law and facticity is problematic when it fails to consider the materiality of the law itself. On the other hand, the dialectical method of critique highlights that extra-legal social reality, too, is always mediated. Arguments from facticity, whether political, economic, or social, can advance the critical study of EU law only insofar as the very idea of facticity is simultaneously subjected to critical scrutiny. This explains why empirical research cannot alone fill the gaps of critical EU law scholarship.

For critical EU law scholarship, the continuing challenge is how to conduct *normative* critique in a methodologically sound way that does not deny critique's social embeddedness. Anchoring the critical discourse to what legitimises the law has provided valuable insights into the present ambivalence of the EU legal order, that is, to the way in which its foundations may lack an extra-legal constitutive moment/power beyond the Treaties.[218] But a more developed critical method would relieve critique from the constraints of the 'role of law' debate by moving the analytical focus to the critique of law as a conflict between various models of social rationality. This brings us back to the seemingly vexed relationship between the 'explanatory-diagnostic' and the 'anticipatory-transformative' critique of EU law. While negative dialectics enables critical engagement even in the absence of any positive theory-building, a dialectical critique of EU law cannot close its eyes to the question of *what comes after critique* in EU legal studies. To that end, it is good to bear in mind that fundamental, even rejectionist, critique can also be 'redemptive' in the sense that it sheds light on the 'unrealized promises' of what is critiqued.[219]

[215]Christodoulidis (n 94) 14. See also eg Ng (n 82) above for discussion on how critique is embedded in material relations.

[216]See eg Honneth (n 14) 79 on how 'the epistemic virtue of concentrating on the object include "differentiation"'. Honneth also explicitly discusses how the cooperative rationality in critical theory differs, for instance, from communitarian visions.

[217]For more on this, see Neuvonen (n 154) 140–60. For subsequent discussion on the European subject, see also PJ Neuvonen, 'Retrieving the "subject" of European integration' 25(1) (2019) European Law Journal 6–20, and F de Witte, 'The Liminal European: Subject to the EU Legal Order' 40 (2021) Yearbook of European Law 56–81.

[218]For a recent overview of 'constituent power' in the EU context, see eg M Patberg, *Constituent Power in the European Union* (Oxford University Press 2020). For a more general discussion, see eg L Rubinelli, *Constituent Power: A History* (Cambridge University Press 2020), and different contributions in M Arvidsson et al (eds), *Constituent Power: Law, Popular Rule and Politics* (Edinburgh University Press 2020).

[219]Gordon (n 70) 198.

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6. Conclusion

Although the EU's multifaceted crises reinforce the need for critical research, the methodology of critique has received relatively little attention in critical EU law scholarship. This article made a distinct contribution to the critical study of EU law from a methodological perspective. First, it showed how both the *revisionist* and the *rejectionist* strands of critique bypass a whole set of relevant methodological questions about the critique of EU law. Second, the article explored what EU law scholars could learn from the methodological commitments of critical social theory and how the principles of metacritique, critique's immanence, contingency, and negativity can inform the critique of EU law. This analysis gained additional weight from the observation that a purely unmasking critique of EU law is vulnerable both to epistemological authoritarianism and uncritical sociological positivism. It was concluded on this basis that the turn to empirical research cannot alone fill the perceived methodological gaps in critical EU law scholarship. Since both critique and the critic are always socially embedded, the critical method becomes central to the accountability of the critical project. These findings highlighted the importance of social-theoretic approaches in the study of EU law.

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