

# HARMONIC LAW

## The Case Against Pluralism and Dialogue

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### Introduction

#### *The Problem*

If a mother orders her child to eat breakfast, the father instructs the child that she must keep an empty stomach for lunch, and the grandfather pronounces that the child is free to take her meals when it pleases, the child is bound to be confused. Even more so, if each of her family elders, having heard the others' directives, tells the child: 'you listen to *me!*'. Each directive requires the child to take an action that makes it impossible for her to comply with the rest of the directives. If the child has breakfast because the mother said so, she will be disregarding both her father's instruction not to eat before lunch and her grandfather's directive to do as she pleases in matters dietary. If she skips breakfast because the father commanded so, the child will be disregarding both her mother's instruction to the contrary and her grandfather's granting of a liberty to do as she pleases. And if she decides to reflect on whether she fancies breakfast and act accordingly, following her grandfather's pronouncement, she would be defying the authority of both her parents. What should the child do?

The situation just described seems to be far from ideal; nobody likes to be confronted with contradictory advice, let alone contradictory orders, particularly when one accepts *prima facie* the authority of each advisor or commander. The child accepts that she should do what her parents tell her to do - indeed it is in her interest to do so - but she cannot obey one parent without disobeying another; it appears that the child would be at a loss about what she should do. Call this the *problem of normative conflicts*. The problem is said to be the result of a kind of normative pluralism, and it consists in having to obey a plurality of authorities each of which claims to be superior to the other, each of which issues directives that may contradict those of others. The 27 European Union member states are often said to face a variant of this problem: national constitutional law is considered to be the supreme law of each member state, yet EU law is claimed to trump national law, the constitution included. What if European Union law requires a citizen to do X (e.g. submit his business premises to a search by

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state officials without a judicial warrant), yet national constitutional law or ECHR law entitles him not to do X? That citizen would find himself in a situation similar to the child in our story. What if, moreover, a national constitutional court reviews and sets aside an EU measure that has been upheld by the European Court of Justice? Later courts deciding whether to apply this measure would also find themselves in the situation of the child. Whom should they obey?

Many philosophers and lawyers have taken pluralism to be a genuine problem, not specific to law, and some of them have given an account of what would count as a solution to it. One of the most popular ones in the literature is the idea of judicial dialogue. In this paper I disagree with the relevant philosophers and lawyers: I believe that the problem of normative conflicts is not a genuine one and that this teaches us a great deal about European law, and fundamental rights in Europe. In particular, I am interested in challenging an argument whose structure goes like this: legal pluralism is an empirical fact, which generates problems of normative conflicts that in turn can be solved through some process of judicial dialogue. This argument should be familiar to EU lawyers as it permeates the relevant literature.<sup>1</sup> It is what I call the ‘standard picture’ of thinking about EU law. My main contention, one that contradicts views widely held by judges and theorists alike is that, as a matter of law, there are no normative conflicts of fundamental rights in Europe and no need for any judicial dialogue. My aim is not to offer a solution to the problem of constitutional pluralism, say via some harmonization or dialogue theory, nor to make conflicts disappear by mere stipulation. Rather, my aim is to debunk it by showing, in Part I of this paper, that it is premised on a positivist conception of law. In Part II, I move on to offer an alternative, non-positivist, account of law and fundamental rights in Europe that both explains why such conflicts do not exist and offers some normative guidance to how European judges should decide cases. I shall not argue directly for the merits of the alternative picture, other than highlighting its advantages over the standard picture when it comes to explaining the phenomenon of multi-layered and interacting legal orders. The alternative picture has not received proper attention in the relevant literature and its philosophical and practical merits have been obscured by the emphasis on the fuzzy notions of pluralism and dialogue. Though the discussion that follows focuses on the European Union, the trouble the paper aims to make for pluralism and dialogue is universal.

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<sup>1</sup> See e.g. Miguel Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in Walker (ed), *Sovereignty in Transition* (2003); Aida Torres Perez, *Fundamental Rights in the European Union* (2009).

## PART I: The Standard Picture

### *Legal Pluralism: A Problem for Legal Theory or a Problem for People?*

It is useful to begin by looking at the general topic of legal pluralism, outside the context of constitutional conflicts. The topic has attracted much interest in the last 40 years and has risen to prominence in the fields of socio-legal studies and legal anthropology. As with any term used to describe a diverse set of ideas, not all jurists understand it in the same way, nor do they all use it in the course of addressing the same question. On the most common understanding, legal pluralism is a descriptive term that refers to a situation in which two or more distinct legal systems exist within the same political community.<sup>2</sup> Legal pluralists use the term to describe a number of actual societies in which a state-ordained system of norms overlaps with normative orders emanating outside state institutions (such as pre-colonial law, religious law, *lex mercatoria*, transnational law, tribal law etc). Early legal pluralists were mainly interested in legal anthropology and sociology and less in legal philosophy. They were empiricists who studied societies in which various normative systems co-exist and are practiced alongside state law, often resulting in problems of social tension, conflict and confusion; problems, that is, for the people who lived under these pluralistic normative orders. What was original and innovative about this empirical work was that it studied important social phenomena that were much neglected partly because they did not fit the traditional category of a legal system.

Pluralists lamented legal philosophers' preoccupation with state law as diverting attention away from these other normative practices that are often more efficacious in guiding people's conduct and hence more worthy of being studied.<sup>3</sup> They also found the focus on state law too parochial and historically contingent, limited to the study of the emergence of nation states in the northern hemisphere during the last two centuries and ignoring much of the rest of world as well as western history before the treaty of Westphalia. It is for these reasons by and large that legal pluralists championed the importance of non-state normative systems qua *legal* systems and started pressing the claim that mainstream legal philosophy had misunderstood the concept of a legal system, unduly restricting its

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<sup>2</sup> John Griffiths, 'What is Legal Pluralism?' 24 *Journal of Legal Pluralism* (1986), 1-47; Sally Engle Merry, 'Legal Pluralism' 22 *Law and Society Review* (1988), 869-896.

<sup>3</sup> See in general Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press 2001)

scope to state law. They hoped that by pushing the conceptual boundaries of ‘law’ to accommodate non-state normative systems, they would draw attention to important but understudied social phenomena, as well as legitimize their discipline as a universal field of scholarly inquiry.

Though pluralists’ interest in how to conceptualize law was derivative from their interest in the phenomena they were seeking to describe, they gradually developed the view that the existence of legal pluralism can make trouble not only for the society that exhibits it, but also for mainstream jurisprudence. Most theories in mainstream analytic jurisprudence were developed to capture features that only state-ordained normative systems possess - such as sovereignty (Bentham and Austin), the vertical, ‘top-down’ structure of a legal system (Kelsen), the existence of secondary rules unifying all legal norms (Hart), state coercion (Dworkin) – and for pluralists these theories were ill-suited to capture these other normative practices that lack some or all of these features. Legal pluralism began to be presented as a potential problem not only for societies that experience it but also for jurisprudence: a case of a counter-example that embarrasses orthodox jurisprudential theories about the nature of law and hence calls for their modification.

The following sections explore whether legal pluralism, both in general and as it is exhibited in the EU in the form of constitutional pluralism, is a problem for mainstream jurisprudence. This might seem to some as too scholastic a concern. Why should we care about schools of thought and how they would conceptualize political events such as the European integration? After all, it is not as if these schools of thought, and the people who represent them in academic conferences, have a direct impact on legal and political practice. It might be objected in other words that it matters little whether legal pluralism in the EU is a problem for jurisprudence, while it matters hugely whether it is a problem for the people and the institutions of Europe.

While I am sympathetic to the spirit of this objection, it is important not to let it stand in the way of theoretical engagement with EU law. This is because we must allow for the possibility that something appears to be a real problem for us only because our theoretical presuppositions are flawed. Let me cite an analogy. Consider the discovery that causal determinism is true and that all human actions are determined by prior physical events. The discovery raised concerns about the very idea of free will and whether we can hold people responsible for their actions, in the absence of it. Yet such concerns are legitimate only if we are right to think that determinism is incompatible with moral responsibility and free will. If free will and moral responsibility are actually compatible with determinism, the discovery that our actions are determined causally, by prior events, is no

cause for concern. Similarly, the fact of legal pluralism may appear to be a problem for us *only* because we accept certain questionable presuppositions at the level of legal theory, namely that legal pluralism entails legal conflict. If we rethink our theoretical premises, it may turn out not to be much of a problem. At least that much should be possibility. For this reason, it is wise to start by sorting out the theory, before we ask whether some factual discovery or development, like determinism or European integration, is a problem for *us*. In later sections it will emerge that pluralism in the EU is a problem for us only if we understand it in the light of certain positivist presuppositions about the nature of law.<sup>4</sup>

### *Talking past each other*

So is legal pluralism really a problem for analytic jurisprudence? Is there really a disagreement between pluralists and analytic legal philosophers about the nature of law? At first glance, there is no reason why pluralism should embarrass theories that focus on state law, at least not while both pluralists and legal philosophers agree that state law is a species that belongs to a broader genus or family. Consider an analogy. If an ornithologist focuses on swans as an object of his study, it is no objection to point out that there are other birds that belong to the same biological family (the *Anatidae* family), such as ducks and geese. He needn't deny either the existence or the importance of these other similar yet different types of birds. Likewise, it is no objection against philosophers of law that focus on normative orders operating through state institutions to point out that there are normative orders outside the state. These philosophers needn't deny either the existence or the importance of other normative orders. And the fact that they do not purport to give an account of them does not mean that, if asked, they would have nothing to say about them.

The pluralists' claim that there is more law than state law and that legal philosophers are wrong to deny that these other normative orders are *legal* systems is ambiguous. Understood as the claim that both state-ordained and non-state normative orders are instances of the same social practice, namely that of a normative order, the claim is trivially true. Everybody accepts it, just like everybody accepts that swans and ducks are instances of the same biological family of birds, namely the *Anatidae* family. Most

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<sup>4</sup> One could object that I am here providing an alternative account of pluralism, as opposed to a case *against* pluralism. The difference is terminological and nothing hangs on it. Given how widespread the understanding of pluralism that I am attacking is, I have opted to frame the argument as one against pluralism. I have no quarrel with people who want to rescue the term pluralism.

analytic legal philosophers use the words ‘legal system’ to refer to a sub-category of normative systems, in which state institutions and officials play an important role, and to give an account of its distinctive characteristics (e.g. its institutional character, its claim to supremacy, its coercive nature etc). Pluralists should happily agree with legal philosophers that, thus defined, all legal systems are normative orders but not all normative orders are legal systems.

If on the other hand we understand the pluralists’ claim to be that all normative systems are legal systems, then their claim is manifestly false. It is analogous to saying that all birds of the *Anatidae* family, like ducks and geese, are swans. Yet ducks and geese are not swans, just like non-state normative orders (e.g. the FIFA rules) are not state-ordained. Legal pluralists who chide philosophers for focusing on state-ordained normative orders are either asserting a trivially true proposition (that not all normative systems are state-ordained) or are committing a manifest error (claiming that non-state normative orders are state-ordained). In either case, there is no substantive disagreement between legal pluralists and legal philosophers, only the appearance of a disagreement, akin to the familiar example of two people disagreeing about whether banks are beautiful, one referring to river banks and the other to financial banks.

A substantive disagreement however would arise if legal pluralists can embarrass legal philosophers about the way the latter identify that of which they *do* seek to give an account, namely *state*-ordained normative practices. The fact of legal pluralism can mean trouble for a philosophical theory about the nature of law, in the same way that black swans were trouble for the ornithologists that first visited Australia: if a theory is shown to be either over-inclusive or under-inclusive, it means that it has got the essential features of that which it aims to give an account of, wrong. If legal pluralism can show that there is either more state-ordained law (over-inclusive) or less state-ordained law (under-inclusive) than philosophical theories about the nature of law allow, then legal philosophers would have to modify their theories, just like ornithologists who first visited Australia had to abandon their view that all swans are necessarily white. Europe’s constitutional pluralism is often presented as the legal philosopher’s black swan: unlike *lex mercatoria* or religious law, it is supposed to challenge what legal philosophers take to be essential features of a *state*-ordained legal system, such as the doctrine of constitutional supremacy. It is this pluralist challenge that legal philosophers have to address, to which I now turn.

### *Europe’s Constitutional Pluralism*

What is pluralistic about the EU? Most scholars converge in treating the EU legal order as distinct from the legal order of each of the member states, the former overlapping and interacting with the latter. They present the situation as one of *constitutional* pluralism in that the EU legal order makes claims to constitutional supremacy that contradict claims to constitutional supremacy made by the national legal order. Most of these conflicting claims were initially not made in the text of the EU treaty or the text of national constitutions – the majority of the latter predating the former- but by the European Court of Justice and several national constitutional courts in the course of deciding particular cases. This fact alone should raise some doubt about how seriously these claims should be taken, given that all lawyers know that a court’s dictum may be *obiter*, bearing little or no normative significance either to the case at hand, or to future cases. Be that as it may, most EU lawyers accept that claims to constitutional supremacy made by the respective courts are to be taken seriously and that they may amount to a genuine case of normative conflict.<sup>5</sup>

The European Court of Justice has made three claims to supremacy: first, that within its area of competence, European law has supremacy over all conflicting rules of national law, including the constitution; second, that the European Court of Justice has exclusive competence to decide what counts as a matter of European law, i.e. what falls within its competence (what is called *kompetenz-kompetenz*); third, that it has ultimate authority to decide all matters of European law. On the national side of the judicial divide, both the first and second of these claims have been challenged. In a well-known exchange between the German Constitutional Court and the ECJ, the former initially questioned the supremacy of European law that violated fundamental constitutional rights, given the lack of a bill of rights in the EU, and asserted its jurisdiction to review EU law for compatibility with the rights enshrined in the Grundgesetz.<sup>6</sup> When, in response to this challenge, the ECJ developed a jurisprudence of fundamental rights drawing on principles found in the constitutional traditions of members states, the German Constitutional Court pulled back, saying that it will not review EU law for compatibility with constitutional rights ‘so long as’ the institutions of the EU provide protection of rights that is equivalent to that afforded by the German Constitution.<sup>7</sup> As to the issue of ‘kompetenz-kompetenz’, the German Constitutional Court has asserted that it has jurisdiction to review whether European Union organs have acted *ultra vires*, i.e. whether they have acted outside the competences

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<sup>5</sup> See e.g. Mattias Kumm, ‘Who is the arbiter of Constitutionality in Europe?’, 36 *Common Market Law Review* (1999), pp. 351-386.

<sup>6</sup> (1974) 37 BVerfGE 271 (‘Solange I’).

<sup>7</sup> (1986) 73 BVerfGE 339 (‘Solange II’).

conferred to them by the EU treaty, challenging the ECJ's claim to have the final say on what falls within the competence of the EU.<sup>8</sup>

Since the early stages of the development of European law, scholars took interest in the absence of higher-order criteria of hierarchy between the overlapping legal orders and the possibility of inconsistent rules or rulings between bodies, each of which claims to be non-subordinate to the other. What if a national legislature of a member state enacts a law, inconsistent with an EU norm, to which it explicitly gives primacy over EU law? What if a national constitutional court reviews and disapplies an EU norm which was previously upheld by the ECJ, or interprets constitutional rights in a way that contradicts the interpretation of the same rights by the ECJ? So far such conflicts have been restricted to hypothetical scenarios found in every other public law and EU law textbook. But the abundance and persistence of such concerns suggest that for most constitutional theorists, the lack of hierarchy and the possibility of conflicting rules of constitutional supremacy are not only constitutive of a pluralistic legal order, but also rather uncommon – perhaps even impossible – within a state-based legal system. State constitutions typically arrange the powers of legislative and judicial bodies and the relations between the various valid norms of the system in a hierarchical fashion, using ranking rules<sup>9</sup> in order to avoid conflicts and inconsistencies.

A related but distinct feature of the project of European integration that attracted constitutional scholars' attention since the early years of the ECJ's jurisprudence, is the effect of European integration on the sovereignty of member states. The project of European integration was seen as part of a wider process of chipping away at state sovereignty. Understood in a descriptive sense, as the fact of being habitually obeyed by a certain group, the transfer of legislative powers to the institutions of the EU and the subsequent efficacious enforcement of EU rules, meant that European member states no longer enjoyed exclusive sovereignty over their people. Europeans continue to obey norms enacted by the institutions of their state but now they also obey norms enacted by the supranational institutions of the EU and intended to apply to them. This fact sat uneasily with conceptions of national constitutionalism that were wedded to the idea of indivisible and illimitable sovereignty as the attribute of states and that informed much of the history and the text of the constitutional traditions of member states. For most of these traditions, the constitution not only reports the fact that nationals of the state whose constitution it is form a distinct political community that is independent from others; it also expresses the normative ideal of *popular* sovereignty, namely the claim that the people of that state, often forming a single nation, are entitled to

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<sup>8</sup> 89 BVerGE 155 ('the Maastricht decision').

<sup>9</sup> E.g. that later rules prevail over earlier rules, or that ratified international treaties prevail over ordinary legislation etc.

self-government, including not to be subjected to the power of any outside authority.<sup>10</sup> The reluctance of national constitutional courts to accept that EU law is the supreme law of the land, over and above the constitution, is the upshot of this understanding of state sovereignty, as an essential, not just fundamental, constitutional principle.

### *European Pluralism and Legal Positivism*

We are – recall – at this stage exploring whether the project of European integration is a problem for legal theory, not yet whether it is a problem for Europeans and their rights. And although European integration contradicted the way in which the constitutional traditions of member states conceptualized state sovereignty, things are very different when we move to the way in which analytic legal philosophers understand sovereignty. For within the hall of fame of analytic jurisprudence, it is only John Austin who has argued that in every society there is one body or person whose sovereignty is unique (i.e. he is the *only* sovereign on *all* matters) and whose sovereignty is united (i.e. not divided between different bodies having power over separate matters).<sup>11</sup> The Austinian sovereign is he who is habitually obeyed by the bulk of the population and who habitually obeys no-one. Austin coupled this understanding of sovereignty with the claim that all norms belonging to a legal system have a *common origin*, namely the sovereign who either enacted them or who conferred powers for their enactment to subordinate bodies. The European Union would pose a clear counterexample to Austin's theory if, plausibly, there is more than one supreme legislative authority in Europe (e.g. national Parliaments and the EU institutions) and the authority of each does not derive from the authority of the other. As we saw, supranational institutions enact European law while national institutions enact national laws, each claiming that their respective authority is neither subordinate to, nor derivative from, the authority of the other. The Austinian would be hard-pressed to explain the validity of EU laws given that their source cannot be traced back to a unique sovereign whose will is the common origin of all valid laws.

Before we turn to radically different theories of law that struggle less with the example of the EU, it should be noted that, as it happens with counterexamples, the Austinian can bite the bullet and stand up to his theory. He can first argue that there is one big sovereign body in Europe, comprised of

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<sup>10</sup> Kumm calls this view democratic statism and its counterpart in constitutional theory 'national constitutional supremacy'. See *ibid.*

<sup>11</sup> See J. Austin, *The Province of Jurisprudence Determined*, p. 246: 'In every society political and independent the sovereign is one individual or one body of individuals'. On the notion of united and unique sovereignty. See Joseph Raz, *The Concept of a Legal System*. Bentham did not think that sovereignty is united.

all the national and supranational legislative bodies, forming a single unity and having authority over all Europeans. Alternatively, he can argue that the authority of European law is ultimately derived from the authority of state constitutions. The first option would rescue the Austinian idea of a unique and united sovereignty existing in Europe, but at the cost of asserting the existence of a pan-European federal state and denying that member states are sovereign. The second option would rescue the idea of a unique *state* sovereignty at the cost of rejecting the claims to supremacy made by the European Court of Justice and upholding as true the national courts' claims to constitutional supremacy. Both maneuvers seem rather implausible. The fact however that the debate on constitutional conflicts in Europe is so often polarized between national constitutional supremacy on one hand and European federalism on the other, suggests how embedded the Austinian paradigm is amongst constitutional scholars.

Yet the Austinian picture of a unique and united sovereign as the common origin of all valid laws has been discredited within the jurisprudential school of legal positivism, of which Austin is taken to be amongst the founding fathers. H.L.A. Hart was the first to point out the many shortcomings of Austin's imperative theory but it is Joseph Raz's critique that is most pertinent to the question of sovereignty. As early as 1970, Raz explained how, given that sovereignty can be divided (i.e. split between bodies that have non-subordinate legislative power over separate subject-matters) as well as shared (i.e. enjoyed by two bodies each of which has non-subordinate legislative power over all subject matters), one cannot use the origin of laws as a criterion of identifying all the valid laws of a legal system.<sup>12</sup> If it is possible that valid laws within a legal system are made by separate bodies, each of which is a supreme legislator, then there must be some criterion *other than the identity of the lawmaker* which accounts for the unity of a legal system. Austin hoped that the notion of sovereignty, defined as a legislator who is habitually obeyed and is legally illimitable, would supply such criterion: the laws of legislative body are valid if that body is sovereign or part of a sovereign. Among the many failures of this criterion is that it is both over-inclusive and under-inclusive: not all those whom the population habitually obeys are supreme legislators (e.g. religious leaders, party leaders, public intellectuals etc) and not all that a supreme legislator commands are valid laws (e.g. commands not issued under a prescribed legislative process). Austin made the criterion of identity of a legal system dependent upon the unity of sovereignty but he had no non-circular way of identifying what unites a group of persons or bodies as one sovereign: he just assumed, in a circular argument, that these bodies are sovereign *because* they all make valid laws. Applied to the EU, Austin's theory has no non-circular way of establishing that both European legislators and national

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<sup>12</sup> Raz, *The Concept of a Legal System*, pp. 35-38.

legislators are part of one big sovereign body who is the supreme legislator (the first maneuver above available to the Austinian). Political power, defined as a social fact, is not the key to explaining the identity of a legal system. In common jurisprudential parlance, Austin conflated legal and political sovereignty.<sup>13</sup>

With Hart's and Raz's theories legal positivism moved away from seeking to explain the nature of law by reference to norm-creating institutions and towards the thesis that the key to the nature of law lies in the existence of norm-applying institutions.<sup>14</sup> According to this type of positivism, the nature of a legal system lies not in the origin of legal rules, but in the workings of law-applying institutions and in the way these institutions relate to a distinct political community or a state.<sup>15</sup> Hart argued that in every legal system there is a rule of recognition, accepted and practiced by state officials, which identifies criteria of validity for all the rules of the system. What unites all rules of the legal system is not the fact that they were made by some supreme legislator (common origin), but the fact that they are applied by courts under criteria of validity that they accept, against those that are subject to them. The rule of recognition is a secondary rule addressed to officials that "specifies features possession of which by a suggested rule is taken as conclusive affirmative indication that it a rule of the group to be supported by the social pressure it exerts".<sup>16</sup> A corollary of this view is that the origin of a valid legal rule can lie *anywhere*: custom, religious practices, foreign legislatures, supranational authorities, international bodies and so on and so forth. The source of all valid law needn't take the form of one supreme legislator, let alone the form of a sovereign *national* parliament or *constitutional* assembly. Legal pluralism, understood as the fact that non-state authorities can create legally valid rules, appears to pose no challenge to the type of legal positivism that Hart defended. The key aspect of this school of thought is the emphasis on the practice of those who apply rules, not on the practice of those who make them.

Yet the EU still poses a puzzle for certain aspects of Hart's theory. Hart suggested that in a developed legal system the different criteria of validity of a

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<sup>13</sup> On the long-lasting and distorting effect of Austinian positivism on UK public law and its doctrine of parliamentary sovereignty, see Stuart Lakin, 'Debunking the Idea Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution', 28(4) *Oxford Journal of Legal Studies* (2008), 709-734. On law and sovereignty in general see Pavlos Eleftheriadis, 'Law and Sovereignty' (2010) 29 *Law and Philosophy* 535-569.

<sup>14</sup> See Raz, *Practical Reasons and Norms*, pp. 129-131.

<sup>15</sup> On this account, the existence of law-applying institutions and of the state is not purely a legal creation but can be identified and explained independently of law. Otherwise the theory becomes circular. Raz for instance argues that every state has one legal system and criticizes Kelsen for claiming that the concept of a state can be explained only in legal terms. See Raz, 'The Identity of Legal Systems', *California Law Review* (1971), p. 812.

<sup>16</sup> Hart, *The Concept of Law*, p.94.

legal system will be multiple and that they will be ranked to prevent conflicts, making for instance custom or precedent subordinate to statute.<sup>17</sup> In this, he joined company with Kelsen, who thought that a normative system cannot ultimately make contradictory requirements.<sup>18</sup> In the *Concept of Law*, Hart presented the ranking of different criteria of validity as a likely possibility not a necessity.<sup>19</sup> He assumed moreover that each legal system has one, and no more than one, rule of recognition,<sup>20</sup> even where, like in a modern legal system, the sources of law are multiple. For Hart, the content of such complex rule of recognition is not necessarily stated anywhere, let alone contained in one authoritative text, like a constitution; its existence is manifested in the practice of officials when they identify and apply norms.

Later however, in his review of Lon Fuller's book, Hart explained that the reason why he held that developed legal systems with multiple sources of law nevertheless have one, and no more than one, rule of recognition is that criteria of legal validity are hierarchically structured.<sup>21</sup> The rule of recognition unifies all the norms of the system by containing both criteria of validity of the norms of the system and rules that arrange those criteria in a hierarchical order. Hart in other words insisted that there is only one rule of recognition because he assumed that criteria of validity in a developed legal system will necessarily be ranked. And he took the existence of ranking rules to be an element that unifies the different sources of law. If one adds the fact that ranking rules solve conflicts, it is clear that for Hart the rule of recognition is meant to bring about not only unity of the law but also the *harmony* of its norms, understood as the resolution of conflicts between rules, through their formal, content-independent, ranking.

Now this is where the difficulty lies for Hartian positivism: The pluralist character of European law challenges Hart's aspiration that the existence of a rule of recognition will secure harmony and not just unity. Member states' courts apply both EU rules and national constitutional rules but the two sets of rules are not taken to be hierarchically ordered and conflicts arise between EU rules and national constitutional rules.

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<sup>17</sup> Ibid., p. 95, 101

<sup>18</sup> Kelsen, *General Theory of Law and the State*, (Harvard University Press, 1945), pp. 407-8. H. Kelsen, *The Pure Theory of Law* (University of California Press), pp. 205-208.

<sup>19</sup> The text is clear about this. In p. 95, Hart says that provision *may* be made for possible conflicts of rules by arranging them in order of superiority and in p. 101 he says that '*in most cases*' provision is made for possible conflicts by ranking these criteria in an order of relative subordination and primacy.

<sup>20</sup> This is the standard interpretation followed in the literature. See Raz, PRN, p. 146. Some passages in the CL however do refer to 'rules of recognition' (e.g. p. 95, 102).

<sup>21</sup> H.L.A. Hart, Review of Lon Fuller's *The Morality of Law*, *Harvard Law Review* (1964), p. 1293: "The reason for still speaking of a rule at this point is that, notwithstanding their multiplicity, these distinct criteria are unified by their hierarchical arrangement".

Is there a way out for the Hartian? He, like the Austinian, could stand up to his theory by making either of the following two arguments; he could argue either that there is one complex rule of recognition in each member (or perhaps in the whole of the EU), part of which ranks EU norms in relation to national constitutional norms; alternatively, he could argue that EU rules and national constitutional rules belong to different legal systems, with separate rules of recognition, and hence no issue of conflict ever arises.

The difficulty with the first option is that there does not seem to be any agreement amongst officials that national constitutional rules trump EU rules or vice versa. It is precisely the fact of disagreement amongst officials about which of the two is supreme that is causing trouble for jurisprudential theories. The Hartian cannot stipulate that ranking rules exist where there is no agreement amongst officials to that effect. Further difficulties compound this problem, including the counter-intuitive suggestion that there is one big legal system in Europe, identified by a single rule of recognition, containing domestic legal orders its sub-systems, each of which is ranked hierarchically in relation to the others.<sup>22</sup> Even if we agree, *arguendo*, that all conflicts within the domestic and EU order respectively are solved by internal ranking rules, there does not seem to be any master rule ranking conflicts between EU rules and national constitutional rules.

The alternative suggestion that no conflicts can arise between EU norms and national constitutional rules because they belong to separate legal systems, each possessing one single rule of recognition, is worth exploring in more detail. This suggestion seeks to rescue the idea of harmony (understood as the formal ranking of rules) within each legal system. According to it, the EU forms a distinct legal system that contains its own rule of recognition. When national courts apply EU rules, they act as EU courts, following a single rule of recognition that ranks all rules of the EU legal system. And when they apply domestic rules they act as courts of the national legal system, applying that system's single rule of recognition. No conflicts arise, because at each given time courts follow one and only rule of recognition, applying rules of a distinct legal system that are ranked hierarchically. The idea here is that when national courts apply EU law, they wear a different hat, which transforms them into courts of the EU legal system. It is worth noting that this picture is familiar in the relevant academic literature.<sup>23</sup>

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<sup>22</sup> For a discussion of how many legal systems can be said to exist in Europe see Julie Dickson, 'How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and the Relations between, Legal Systems in the European Union', 2 *Problema* (2008), 9-50.

<sup>23</sup> See e.g. Paul Craig and Grainne de Burca, *EU Law* (4<sup>th</sup> edition, 2008), p. 479: "The relationship between national courts and the ECJ has been transformed by the development of precedent, acte clair, and sectoral delegation of responsibility. These developments have made national courts Community Courts in their own right". See also Imelda Maher, 'National Courts as European Community Courts', 12 *Legal Studies* 226 (1994).

The problem however with this second suggestion is that it contradicts a key element of Hartian positivism, namely that the unity of a legal system is to be found in the practice of courts, not in the origin of the rules they apply. On this view, it is not possible for the same court to belong to more than one legal system, given that courts are used as a criterion for individuating legal systems. Assuming that each Member State has its own legal system, then it follows that when domestic courts apply rules of the EU (or any other legal system for that matter) they *never* become courts of the EU. At best, they apply a domestic rule, identified by the domestic rule of recognition, directing them to apply rules of another system. And there is no guarantee that such a domestic rule will co-exist with, or contain, a further rule ranking the foreign rules vis-à-vis the domestic ones in case of conflict. For this second maneuver to work, the Hartian would have to abandon either the claim that the practice of courts unifies a legal system or the claim that all rules that a court is legally bound to apply are hierarchically ranked.

The above difficulties are the upshot of the fact that, contra Hart, the existence of one rule of recognition within a legal system (e.g. that whatever parliament enacts is law) does not necessarily entail the existence of ranking rules. For example, it is contingent whether a system contains a ranking rule to the effect that a supreme (and unique) legislator's later rules prevail over inconsistent earlier rules.<sup>24</sup> A rule identifying sources of valid legal rules may, but need not, also rank them in a hierarchical fashion.

Hart's ambition to square the unity of a legal system with the idea of harmony of its rules led to difficulties that were spotted early on by his followers. Joseph Raz was the first to argue that legal systems may have more than one rule of recognition *and* that equally valid rules belonging to the same system may conflict, without the conflict being necessarily resolved.<sup>25</sup> First, Raz distinguished between rules of recognition and criteria of validity, arguing that though all rules of recognition set criteria of validity, not all criteria of validity are set in a rule of recognition: norms legally valid according to a system's rule of recognition, such as laws conferring legislative powers, may themselves contain further criteria of validity.<sup>26</sup> It is therefore a mistake to suppose, as Hart did, that the rule of recognition contains *all* the criteria of validity of a legal system. Second, Raz argued, contra Hart, that a legal system need not contain rules ranking the criteria of validity in a hierarchical order. The existence of ranking rules is *contingent* in a legal system and it is not entailed by the existence of a rule of recognition. "There is no reason", Raz

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<sup>24</sup>Nick Barber makes the same point in 'Legal Pluralism and the European Union', *European Law Journal*, Vol 12, No. 3, May 2006.

<sup>25</sup> The *Concept of a Legal System* and *PRN*

<sup>26</sup> Joseph Raz, 'The Identity of Legal Systems', *California Law Review*, p. 809.

says, “to believe that valid norms belonging to one system cannot conflict”.<sup>27</sup> Third, and relatedly, Raz offered two arguments in support of the claim that the existence of multiple sources of law entails the existence of multiple rules of recognition. The first is negative: given that multiple sources of law within a legal system need not be ranked, contrary to what Hart thought, there is no reason to speak of a single rule of recognition; a legal system may contain multiple rules of recognition. Raz’s positive argument relates to the individuation of norms: norms regulate (prohibit, permit or empower) specific acts, such that the regulation of two different acts entails the existence of two different norms. It follows that no *one* norm can make two different things a source of law or confer legislative powers to two different bodies.<sup>28</sup> The rule of recognition that makes precedent a source of law is separate from the rule of recognition that makes statute a source of law. It is precisely because rules of recognition can be multiple that they can come into conflict.

Does European pluralism embarrass this more sophisticated type of legal positivism, as elaborated by Raz, which is committed neither to the existence of conflict rules nor to the idea that all norms stem from a common origin? Nick Barber has offered an analysis of European pluralism that purports to be compatible with this type of legal positivism.<sup>29</sup> He argues that EU law forms a distinct legal system and that there are multiple and inconsistent rules of recognition operating within each EU Member State. On this Razian account, national courts follow at least two rules of recognition: one which directs them to apply norms enacted by European institutions according to criteria of validity found in EU norms, and one which directs them to apply norms enacted by national institutions according to criteria of validity found in national laws (most importantly in the constitution). There is no reason to assume that the criteria of validity found in norms identified by these two separate rules of recognition will not conflict. With respect to conflicts between EU norms and ordinary national statutes, the two rules of recognition just happen to contain conflict rules that converge in giving priority to EU norms. There is here a case of mutual recognition and accommodation, through the convergence of conflict rules: the law of most Member States makes ordinary statutes subordinate to EU law and so does EU law. But precisely because the existence of conflict rules in each legal system, as well as their convergence, is *contingent*, it need not be found with respect to conflicts between EU norms and constitutional norms. And in fact no such convergence exists there. As we saw, the criteria of validity of EU law make EU law supreme whereas the criteria of validity of national constitutional law make the

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<sup>27</sup> PRN, p. 147.

<sup>28</sup> PRN, p. 130.

<sup>29</sup> N.W. Barber, “Legal Pluralism and the European Union”, *European Law Journal*, Vol. 12, No. 3, May 2006, pp. 306-329.

constitution supreme. And according to the criteria of validity of EU law, the ECJ has ultimate authority to decide both all matters of European law and what counts as matter of European law, whereas according to the law of some member states, national constitutional courts have ultimate authority to decide all legal questions. In case of conflict between EU law and national constitutional law, the conflict rules contained in EU law and national do not converge. It follows that no legal rule governs how this conflict is to be resolved: the matter is legally indeterminate. (I am here rehearsing, not endorsing this account).

Nor does the fact that norm-applying institutions make for the unity of a legal system necessarily entail the existence of rules ranking the criteria of validity contained in multiple rules of recognition. First, national courts<sup>30</sup> may be split, some (say lower courts) giving priority to EU law over the constitution, while others (say constitutional courts) giving priority to the constitution over EU law. As Barber notes, “if the conduct of judges, as shown in their decision and reasoning, at a given point in time, is divided between inconsistent rules of recognition, then there is no ‘true’ rule of recognition to be found”.<sup>31</sup> Second, even if all national courts converge in treating the constitution as supreme, it does not necessarily follow that their practice amounts to the creation of a ranking rule. According to the type of positivism under consideration, whether or not judicial precedent is a source of law, as well as its scope and who is bound by it, is a contingent matter which itself depends on the criteria of validity of each legal system. It is not necessary – nor is it in fact the case – that the law of Member States empowers constitutional courts to create conflict rules that are binding on the ECJ, nor that it empowers them to strike down EU measures or overturn judgments of the ECJ that violate the constitution. At best, national courts can avoid a political crisis by following a practice of giving priority to one set of rules in case of conflict, but without it being the case either that they have a legal duty to do so or that they create a legally binding rule of conflict by so doing.

So, far from being a counter-example, European pluralism seems to support the revised positivist view that a legal system may contain more than one rule of recognition and that criteria of validity within the same legal system may conflict. National courts have chosen to give priority to EU norms when they conflict with constitutional norms but in doing so they were not applying a

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<sup>30</sup> I assume that on the Razian account presented here, national courts are not part of the EU legal system, nor is the ECJ part of the Member States’ legal system. The reasons for this assumption is that the theory does not seem to allow that the same court belongs to more than one legal system, given that courts constitute a criterion of identity of a legal system. Barber, by contrast, takes national courts to be part of both the EU legal system and the national legal system and concludes that the EU legal system too, contains multiple and inconsistent rules of recognition. I do not see how this possible on a positivist account.

<sup>31</sup> Barber, p. 322.

legal rule of conflict nor did they create one. Given that both EU rules and national constitutional rules are valid and that no legal rule of conflict between them exists, national courts can choose to give priority to EU norms without it being the case either that the constitution is subordinate to EU law or that the constitution is supreme over EU law. As a matter of law, it is neither true nor false that the constitution is supreme over EU law and it will remain so until such time as national constitutions are amended, making EU law supreme in its area of competence. In the meantime, courts are legally free to choose whether to give priority to EU rules or national constitutional rules.

To sum-up, European constitutional pluralism need not make any trouble for legal positivism. Thanks to important modifications introduced first by Hart and subsequently by Raz, legal positivism can coherently account for all the features of European pluralism. This is in my view no surprise, as the theoretical presuppositions of legal pluralists are shared by legal positivists. First, pluralists assume that whether or not a state-ordained legal system is the only system of norms practised in a given society is a contingent empirical matter, not a necessary conceptual truth. They assume in other words, that there is no necessary connection between law and other normative systems. Second, pluralists assume that whether in a given society there are multiple normative systems practiced alongside state law is a matter of *social* fact, not a matter of moral evaluation. These assumptions are not only compatible with legal positivism; they also parallel some of its central tenets. Legal positivism holds that the validity of a legal rule does not depend on its moral merits but that it is exclusively a matter of social facts.<sup>32</sup> It is no surprise then that legal positivism can account for the fact of legal pluralism. And if the type of positivism I presented here cannot, then no doubt, some modified version of it can.

#### *European Constitutional Pluralism as a Problem for Courts and Dialogue as the Solution*

The preceding section surveyed mainstream theories of legal positivism with a view to assess whether Europe's constitutional pluralism challenges them in any way. I argued that the most advanced and elaborate forms of legal positivism can rise to the challenge. But it is now time to return to the question of whether the way in which positivism accounts for pluralism makes it a problem for *people* rather than for jurisprudential theories.

It seems to me that courts turn out to be the first victims of constitutional pluralism, if legal positivism holds true. For the picture of

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<sup>32</sup> These claims are (and are known to be) too coarse. For a full elaboration of which of the different versions of these tenets legal positivism is committed to see John Gardner, 'Legal Positivism: 5 ½ Myths', 46 *American Journal of Jurisprudence* (2001), 199.

European law with which legal positivism leaves us is one that puts courts in an unenviable situation. The existence of multiple rules of recognition and the absence of convergent conflict rules means that courts cannot solve conflicts by applying a legal norm. Should national constitutional courts review the ECJ's judgments about the boundaries of EU competence? Should they review EU measures that manifestly violate constitutional rights? Should the ECJ defer to national constitutional law in developing a jurisprudence of fundamental rights? Should the European Court of Human Rights review state measures that implement EU law? As a matter of law, there is no right answer to these questions; at least not in the legal positivist's eyes. Courts have to look elsewhere for normative guidance in order to carry out their judicial function. They have to balance a number of non-legal considerations: their constitutional loyalty, the likelihood of a constitutional crisis, the interests of the litigant parties, the goals of European integrations and many others. Pluralism, as understood by legal positivism, is no small challenge for courts.

It may here be objected that the existence of gaps and conflicts in the law and the idea that judges often have to exercise extra-legal discretion is not an anathema to many people, and certainly not to legal positivists.<sup>33</sup> Positivists are happy to accept that in many cases there is no law governing a particular dispute and that, when this is the case, judges should exercise good moral judgment in order to settle it. Be that as it may, surviving the challenge of constitutional pluralism has left positivism with some serious wounds. This is because the character and magnitude of normative conflicts in a pluralistic constitutional order are nothing like in the standard case of a municipal legal system that is hierarchically ordered. It is one thing to say that there may be conflicts between two rules contained in the same statute and a whole different thing to say that there are normative conflicts about which source of law is supreme and who is the ultimate guardian of constitutionality within a legal system. Such conflicts run at the deepest level of our pre-theoretical understanding of law and shake widely held intuitions about the nature of law and the role of judges. For almost everything that the highest courts have to decide is subject to potential contradiction by another court: if the ECJ interprets a fundamental right in a way that contradicts the German constitution then it risks conflict with the German Constitutional Court. If the German constitutional court polices the boundaries of the competence of the EU then it risks conflict with the ECJ. If the ECtHR reviews a state measure that implements EU law and finds a human rights violation, then it risks conflict with the ECJ. The potential of such conflicts means that there is very little law when it comes to matters that raise issues about the relationship between EU

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<sup>33</sup> See Joseph Raz, 'Legal Principles and the Limits of Law' 81 *Yale Law Review* (1972) 823. Nick Barber goes further arguing that pluralism and absence of conflict rules have normative advantages in 'Legal Pluralism and the European Union'.

law and constitutional law. If a court's judgment may be contradicted by that of an equally supreme court, it follows that neither court can authoritatively determine what legal rights and duties litigants have. It follows in other words that it is indeterminate what legal rights and duties litigants have.<sup>34</sup> Pluralism affects a large, if not the biggest, part of what the highest courts in Europe do. Whereas in the pre-pluralistic era, gaps and conflicts in law were at the periphery of judicial practice, positivism must now accept that they occupy center-stage. If we believe in legal positivism, we must accept that most of what EU judges do is politics, not law.

In the forty or so years of Europe's constitutional pluralism, courts have indeed struggled to develop doctrines that avoid a constitutional crisis without surrendering the claim to constitutional supremacy made on behalf of each legal order. The story of all the judicial sagas between the ECJ and national courts is well known and I will not repeat it here. Both the ECJ and national courts muddled through decades of institutional tension and legal uncertainty, averting a major constitutional crisis and securing the efficacious implementation of EU law within the national legal order. Despite the pluralism and all the potential for normative conflicts that it should entail according to positivism, the project of European integration has so far been a successful experiment in constitutional alchemy. Courts have opted for judicial outcomes that take into account what other courts and actors are doing, seeking to achieve harmony in the face of conflicting claims to constitutional supremacy. On the issue of fundamental rights for instance, the German Constitutional Court adopted the position that it will not review EU measures so long as there is equivalent protection of rights in the EU.<sup>35</sup> A slightly different test has been adopted by the European Court of Human Rights, which accords state measures that directly implement EU law a presumption of compatibility with the ECHR, which is however rebuttable in each case pending before it.<sup>36</sup> The ECJ on the other hand has often upheld national restrictions to EU fundamental freedoms that were imposed in the name of a constitutional principle, such as dignity.<sup>37</sup>

It is no accident that the process of developing doctrines that take into account what other courts do in the context of a pluralistic legal order, has been

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<sup>34</sup> Note that the positivist cannot argue that convergence (or agreement) between equally supreme courts entails the determinacy of the legal rights and duties that have been decided. Given that the judgments of each supreme court are not binding on the other and in the absence of a legal rule making convergent judicial outcomes legally binding, convergence cannot form a criterion of authoritativeness.

<sup>35</sup> *Solange II*.

<sup>36</sup> ECtHR, *Bosphorus v Ireland*, Appl. No. 45036/98, Judgment of 30 May 2005.

<sup>37</sup> Cf. the *Omega* case of the Court of Justice of the European Communities, Judgment of 14 October 2004, C-36/02, *Omega Spielhallen- und Automatenaufstellungs GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*.

described by many EU scholars as one of dialogue and negotiation. The former Advocate General, Miguel Maduro for instance has argued that the creation of a European legal order was possible because the ECJ entered into a dialogue with national legal actors and negotiated the various constitutional issues, thus legitimizing its role. He writes:

The relationship established between national courts and individuals on one hand and the European Court of Justice on the other thus becomes one of dialogue rather than dictation. Legal discourse concerns a two-way relationship that is established between a court on the one side, and other actors with independent jurisdictions and similar or competing interpretations of the law on the other. Sometimes, this legal discourse may be subject to a final authority but [...] it is arguable that in the European legal order there is no such hierarchy in legal discourse.<sup>38</sup>

The choice of the concept of dialogue and negotiation as the organizing idea is the direct result of the positivist assumption that what courts within a pluralistic legal order should decide is ultimately *not* governed by law. For on the positivist picture, the existence of a norm signifies the end of political deliberation and bargaining. In a parliamentary democracy, elected legislators have already debated the balance of reasons for taking a certain measure and expressed the outcome of their political bargaining in a legal norm. Courts that apply this norm are not meant to re-open arguments for and against having it, nor to engage in dialogue with relevant actors about its merits unless the norm itself directs them so to do.<sup>39</sup> It is only in the absence of a legal norm which they under a legal duty to apply, that courts may assume the role of a political negotiator who, like parliament, must engage in dialogue with other relevant actors. The standard picture of thinking about the EU's relationship with national legal orders presupposes, indeed it is premised upon, the understanding of constitutional pluralism that legal positivism offers us. It is seen as the cure to the problem of multiple and inconsistent rules of recognition and the absence of any law governing what courts should decide. Judicial dialogue stands and falls with positivism's assumptions about the nature of law. This is not only because judicial dialogue presupposes positivism, but also because it sits uncomfortably with the alternative: a non-positivist account of constitutional issues in the EU, to which I now turn.

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<sup>38</sup> Miguel Maduro, 'Contrapunctual Law', page 513.

<sup>39</sup> On the idea of norms as exclusionary reasons see Raz, PRN.

## **PART II: The Alternative**

### *Pluralism and Non-positivism*<sup>40</sup>

A helpful way to describe the history of legal positivism is as the struggle to reconcile the following four elements within a single theory of law:

- (i) Laws are man-made rules.
- (ii) Laws form a system comprised of a fixed number of rules.
- (iii) What unifies certain rules and turns them into a legal system is something other than law itself (e.g. a social fact).
- (iv) Law cannot, all things considered, contain contradictory requirements.<sup>41</sup>

Kelsen endorsed (ii) and (iv). Raz endorses (i), (ii) and (iii). Hart endorsed all four propositions. But as we saw, it is difficult to see how one can consistently hold all four of them. If both the content and the validity of laws are contingent on social facts, then there is no guarantee that valid laws will not conflict, making it possible that many or most laws conflict. If, on the other hand, valid laws cannot conflict then either their validity or their content must be independent of contingent social facts. Kelsen found the principle of non-contradiction a more appealing truth about law than the idea that certain contingent social facts about courts unify a legal system. Raz saw no great appeal in the claim that valid laws cannot conflict, and kept Hart's emphasis on the practice of courts as the social fact that unifies the norms of a legal system. Though Raz has got the most coherent view, his theory sacrifices intuitions that many positivists and non-positivists alike have found powerful. Kelsen, Hart, Fuller and Dworkin have all in different ways been attracted to the view that the principle of non-contradiction forms an essential truth about law; that it cannot ultimately be true for example both that the law prohibits the search of business premises without a warrant and that it permits it.

Legal positivists who were attracted to the principle of non-contradiction had to reconcile it with their foundational view that laws are a set of finite, man-made norms that form a system. Given that the content of man-made rules is contingent on the will of imperfect legislators who need not strive for consistency, conflicts are well possible. And the only way that they

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<sup>40</sup> Various authors, including myself, have used the term 'interpretivism' to refer to non-positivist theories of law. I here prefer the unimaginative term 'non-positivism' to avoid certain misleading connotations that interpretivism has in the relevant literature.

<sup>41</sup> I use 'requirements' broadly, to refer to duties, liabilities, rights, powers etc. The same applies to the phrase 'legal rights and duties', as used throughout the paper.

can be eliminated is by assigning priority to certain rules on the basis of structural features that rules possess, such as their mode of origin, time of creation, subject-matter etc. Since conflict rules (such as that later laws prevail over inconsistent earlier ones, or that *lex specialis derogat lex generalis*) is the only way that conflicts between valid man-made norms can be prevented, positivists like Hart and Kelsen came to see them as necessary in a legal system. But, as we saw, the existence of such conflict rules is itself dependent upon the will of imperfect legislators and hence contingent. A legal system may lack conflict rules in which case equally valid rules can contradict each other and the principle of non-contradiction comes out to be a contingent feature of law.

If one is genuinely attracted to the principle of non-contradiction as an essential truth about law, then one's best bet is to abandon the view that laws are a set of finite, man-made norms that form a system. For as long as one holds this view, he is hostage to contingencies that make it impossible to eliminate legal conflicts. Rather than trying to choose between (iii) and (iv), some legal philosophers have disputed whether (i) and (ii) are true. Ronald Dworkin was the first to question, in 1967, whether law is a system of rules.<sup>42</sup> He did so by pressing the claim that moral principles are part of the law even when there is no social fact (like legislative enactment or judicial endorsement) that validates them as legal standards. Many critics misunderstood Dworkin's argument to be that law contains moral principles *as well as* man-made rules.<sup>43</sup> Dworkin's own view, as clarified in 1972, was that law does *not* contain any fixed number of standards, let alone a set of standards that comprises both rules and principles.<sup>44</sup> On the non-positivist picture that Dworkin first introduced, law refers to a value of political morality that normatively constrains the ways in which a political community treats its members, in the sense that it can licence coercive force against them.<sup>45</sup> It is a picture in which man-made edicts, pronouncements, rules, directives, practices etc., do not by themselves amount

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<sup>42</sup> Ronald Dworkin, 'Is Law a System of Rules?', *Chicago Law Review* (1967), reprinted as chapter 2 in *Taking Rights Seriously*.

<sup>43</sup> For the history of this misunderstanding and Dworkin's response see his *Justice in Robes*, chapter 8.

<sup>44</sup> Ronald Dworkin, 'Social Rules and Legal Theory', 81 *Yale Law Journal* (1972), 855-890, Reprinted as chapter 3 (Model of Rules II) in *Taking Rights Seriously*. It is a crucial difference between Dworkin's view and legal positivism, that for the former the problem of how to individuate norms is not a genuine one. See p. 74 of *Taking Rights Seriously*.

<sup>45</sup> See Dworkin *Law's Empire* and *Justice in Robes*. The non-positivist picture that I sketch in this section also draws on the work of Nicos Stavropoulos and Mark Greenberg but I do not mean to attribute it to any author in particular. I have benefited enormously from and draw heavily on Nicos Stavropoulos's piece 'Why Principles?' (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1023758](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023758)) and Mark Greenberg's 'The Standard Picture and its Discontents', available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1103569](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103569).

to any legal standard. Rather, they constitute morally relevant facts of a practice that is governed by a moral value. This moral value determines both why these social facts (e.g. legislative enactments, judicial decisions etc) are morally relevant for identifying and enforcing legal rights and *how* they are relevant, i.e. how they affect the content of legal rights and duties. This value is not new: philosophers and constitutional lawyers have long referred to it by the names of *legality* or the *rule of law*, but the account they offered of it has, more often than not, assumed that law is made up of a fixed number of man-made norms.<sup>46</sup> This positivist assumption however makes the idea of the rule of law elusive: given that man-made enactments can be and often are morally heinous, it cannot be the case that the enforcement of law is always morally justified.

The attempt to show that law always provides a morally coherent basis for institutional action must begin by abandoning the claim that the content of the law is necessarily the content of some authoritative pronouncement. If one abandons (i) and (ii), then the principle of non-contradiction (iv) starts to get traction. For understood as a moral value, it is hardly absurd to argue that the demands of law cannot be contradictory. It is as absurd as the claim that the demands of values like justice, equality or friendship cannot be contradictory. Though philosophers debate whether moral values are commensurable and whether the demands of different moral values can conflict, it is far less controversial that the same value cannot ground contradictory moral requirements. We should presume, unless shown otherwise, that in the standard case the requirements of the same value are consistent. If 'law' refers not to man-made rules, but to a moral value that normatively controls the effect of a community's political history on collectively enforced rights, then its demands – properly understood- should cohere.

Many critics who have no difficulty accepting that the requirements of a single value cannot be contradictory, found the thesis that law is necessarily coherent absurd, only because they sought to find coherence between man-made norms enacted or practiced by different institutions. Their mistake was to seek normative coherence in all the contingent norms enacted by a competent legislature or found in a source of law. But that is the wrong place to look: the thesis that the demands of law cannot be contradictory assumes that norms enacted by legal institutions and actors may be conflicting, contradicting, arbitrary, incomplete etc. It assumes that politics, as expressed in norms made by institutions, is - from a moral point of view- patchy, messy and contradictory. What it insists on nonetheless is that there is always a right answer to whether, in virtue of the history of a political community (part of which includes relevant enactments), individuals have acquired certain moral rights or duties. Unlike legal positivism, it treats the question of what legal

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<sup>46</sup> The best example is Lon Fuller, whose positivist assumptions made his defense of the ideal of the rule of law inconsistent.

rights individuals have as a moral one from the start. Unlike legal positivism, it does not ask what moral reason is there to enforce man-made, descriptively identified, enactments. Rather, it asks whether certain enactments are morally relevant for determining the content of the moral rights individuals have against their community and, if so, whether they are relevant in the way that those who issued them intended.

Understood as the normative effect of politics on collectively enforceable entitlements, non-positivism entails a claim about law that appears at first glance counter-intuitive. It is the claim that there is a sense in which *nobody* decides what 'the law' is: not legislators, not constitutional assemblies, not judges, nobody. Such bodies merely make 'enactments' whose effect on people's actual rights is to be ultimately determined through the lens of a moral value. This claim will appear counter-intuitive so long as we still operate under the assumption that the word 'law' refers to some man-made norm. But if we allow ourselves to consider that it refers instead to a value of political morality (like justice, or equality), then the claim does not jar so much. As with any value, law's demands are mind-independent. They do not depend on what you and I, or anybody for that matter, think. Though what the law requires may often be close or even identical to what some institution (e.g. an elected legislature) has decided, this is so in virtue of moral principles (e.g. special to the value of democracy) which make it the case that the content of that institution's decision contributes the whole of the content of a legal duty. But the mere social fact that some institution (be it a court or a legislature) made a decision is not sufficient for the existence of a legal right or duty. Though legislative or other decisions are typically relevant for discovering what legal rights exist (say in virtue of democratic principles), there is never a direct entailment from the content of a decision to the content of the legal right. Knowing what some institution decided never suffices to discover what legal rights or duties individuals have.<sup>47</sup>

What does non-positivism have to say about constitutional pluralism? The first thing to note is that non-positivism is much more comfortable than positivism with the existence of conflicting claims to constitutional pluralism and the absence of conflict rules. This is because non-positivism never infers that the demands of law are contradictory from the mere existence of conflicting rules or claims and the absence of any rules ranking them. Just because there is some dictum or edict in national legal sources making the constitution supreme and another, conflicting, dictum in EU sources making it

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<sup>47</sup> It might be worth adding that on a narrow understanding of decisions as intentional actions, they are not even a necessary condition for the existence of legal rights and duties. What matters for the purposes of the value of legality (which normatively grounds these rights) is the existence of past institutional practice enforcing (or failing to enforce) claims that individuals make against each other.

subordinate, it does not mean that we are inevitably faced with a legal conflict. That is not to say of course that conflicts are never possible for the non-positivist. However, several stringent conditions would have to be jointly met in order for two provisions that impose contradictory requirements to result in a genuine legal conflict. Consider the following three:

- (i) Relevant moral principles make both provisions relevant for identifying a legal right and duty (the condition of relevance).
- (ii) Relevant moral principles assign to both provisions equal weight (the condition of weight).
- (iii) Relevant moral principles make the content of each provision conclusive of the content of the relevant legal right and duty (the condition of conclusiveness).

Take first the condition of *relevance*. There is no reason to think that each and every provision of the constitution is relevant for identifying related legal rights and duties. Take for example the question of whether an individual has a right not to be tortured or enslaved by foreign states; or whether an individual whose ship is attacked in the high seas by a foreign state has a legal right to self-defence. We do not think that the answer to such questions is exclusively controlled by whatever is written in the constitution of those states, such that if these constitutions permitted the killing or torturing of non-nationals then these individuals would *prima facie* have no such legal rights. Nor would it be correct to say that, were the constitution of a state to permit such wrongful acts, national law would conflict with international law: whether a state ought not to mistreat aliens does not depend at all on what its constitution says. Constitutions have moral relevance mainly in so far as they regulate the institutional design of a political community and the way in which its institutions exercise political power against its members. But they have little or no moral relevance to a whole set of other questions such as those regarding certain legal obligations states have towards non-nationals or other states. It follows that the claim that the constitution is the supreme law in *all* matters of law is inaccurate and that certain claims to constitutional supremacy made by national courts may be irrelevant and hence not competing with respective EU claims.

Consider next the condition of *weight*. Suppose that moral principles (to do with popular sovereignty or national self-determination) do make relevant what the constitution says on a particular issue but that the rules contained therein conflict. Suppose for instance that a constitution prohibits gender

discrimination but excludes women from the army. There is no reason to suppose that the moral weight assigned to a community's decision to maintain an army for defensive purposes is equal to its duty not to discriminate on the basis of gender. Since the latter is far more weighty than the former, it is false to say that -all things considered- women have no constitutional right to be admitted to the army. This is why constitutional lawyers often speak of certain provisions of the constitution being 'unconstitutional': they assume that these provisions receive little or no moral support by the principles that underlie the constitution as a whole.

Finally consider the criterion of *conclusiveness*. Suppose that two moral principles of equal weight assign relevance to provisions stipulating two separate fundamental rights. For example suppose for the sake of the argument that the political decision of the EU to create freedom of establishment is of equal moral weight to the national decision to grant workers the right to strike. Does it follow that when I go on strike to prevent you from hiring cheaper EU workers, your EU right necessarily clashes with my constitutional right?<sup>48</sup> One reason why it does not is that the underlying moral principles support only an *abstract* legal right to freedom of establishment or strike. The content of these abstract rights is not determined conclusively by the moral principles that justify them, but is also sensitive to further moral considerations such as the principle of proportionality, legitimate expectations, fairness, market efficiency and many others. It would for instance be unfair if a trade union could use the right to strike as a means of depriving a group of EU workers from a freedom that everybody else in the EU – including the trade union- enjoys. Even if, other things being equal, the right to strike is of equal moral weight to freedom of establishment, it need not follow that all things considered, the trade union had a right to strike. Hence it may be wrong to say that there was an irresolvable clash between national constitutional law and EU law. More than two moral principles may be pertinent to a case, qualifying and sharpening one's abstract legal rights.

The nature and stringency of the above three conditions suggest that on the non-positivist picture, it is unlikely that conflicts between provisions enacted by competent legal institutions will translate into conflicts in law, *all things considered*. In most cases, the requirements of the value of legality will be non-contradictory because the recalcitrant provisions that appear to generate conflict (wherever they may be found) will be one or more of the following three things: irrelevant, devoid of moral weight, or inconclusive. Law, on the non-positivist account, will turn out to be essentially *harmonic*.

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<sup>48</sup> Cf the cases of Viking and Laval. Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP*, judgment of 11 December 2007; Case of C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767.

### *Non-Positivism and EU Constitutional Pluralism*

It is now worth revisiting the three claims to constitutional supremacy made by the ECJ and challenged by national courts in the light of the idea of non-positivist, harmonic law. For it is difficult to see how these claims would meet all three conditions.

The first thing to highlight, under the non-positivist conception, is the normative significance of the moral principle of *fairness* or *fair-play*: when there is a joint scheme of co-operation which produces mutual benefits, then participants in the scheme have an obligation not to undermine or abuse the scheme (e.g. through free-riding).<sup>49</sup> The existence of this obligation does not depend on the personal beliefs or other commitments of the practitioners. Though their commitments can come into conflict with the scheme-based obligations of fair play, they are not really relevant in determining what practitioners owe to each other in virtue of being part to the scheme. Likewise, when states choose to engage in joint projects, like the EU common market, their resulting obligations cannot depend on states' internal constitutional commitments. National constitutions cannot have any normative relevance in controlling how each member state treats nationals of another state within a joint scheme of co-operation that is already in place.

To see this, consider the following analogy. The internal rules of my household, regarding when to clean the house and take the garbage out, have no normative significance once a joint scheme of garbage collection is in place in my neighborhood. It would be wrong to say for instance that the in-house rule not to take the garbage out at night conflicts with the neighborhood's rule to take the garbage out only in the morning. If everybody else in the neighborhood follows a practice of taking their garbage out in the morning, then it is not fair for my household to take the benefit (i.e. clean streets) of others' co-ordinated actions, without sharing any burden. Hence I am not justified to invoke the internal rules of my household as an excuse for not following the garbage collection rules of the joint neighborhood scheme. If I were to do so, I would be free-riding. It is *that* fact that makes my in-house rule irrelevant, not some alleged fact that the neighborhood rules are supreme over my in-house rules, in some Kelsenian pyramid of validity of rules. Likewise, the fact that there is in the European Union a joint scheme of co-operation regarding the free movement of goods, services, capital and persons makes national constitutional provisions irrelevant as far as this scheme is concerned. Again, it is the political fact that there is an ongoing scheme of EU common market that makes national constitutional norms legally *irrelevant*, not some

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<sup>49</sup> See the classic discussion of fair-play arguments in John Rawls, *A Theory of Justice*.

alleged fact that EU norms are – or must be presumed to be – supreme over national constitutions. The moral principle of fair-play debunks the notion of a real conflict here.

Second, it is misleading to ask who, the ECJ or national courts, has the ultimate authority to determine the competence of the EU (kompetenz-kompetenz). If the relevance and normative weight of EU norms is partly premised on the moral significance of there being an ongoing scheme of co-operation between Member States, then *nobody* is to decide what falls within the competence of the EU because this question is objectively determined by moral facts to do with principles of social co-operation. The sphere of competence is delimited objectively, by the actual scope of the joint scheme of co-operation. Courts have to try to identify the sphere correctly, by taking EU norms as relevant only when this is justified by moral principles that apply to the scheme of co-operation in play.

It might be objected here, that some institution has to have authority to decide what the area of EU competence is, otherwise different courts will assign different boundaries, jeopardizing the efficacy and harmonious application of EU law. This objection is half-right: it is right that the efficacy of the joint scheme of co-operation, and the public goods it produces for its members, is jeopardized if different courts assign different boundaries to the domain of co-operation. But that is only an argument for courts to follow the *same* boundaries, not an argument that only one court (ECJ or the national constitutional court) should have ultimate authority to set them. As far as efficacy is concerned, it is *irrelevant* which courts first set which boundary. What matters is that all courts converge in following the same boundaries, *regardless of who set them*. Once some or most courts have set a boundary, then later courts have a reason to follow it, not because the former courts had ultimate authority to set boundaries, but because moral reasons of co-ordination and efficacy require so. Non-positivism debunks the idea that only one institution must have authority to set jurisdictional or competence boundaries.

This leads me to the third question of whether the ECJ has ultimate authority to decide all matters of European law, including whether EU law violates human or fundamental rights. Like in the issue of competence, it is misleading to ask who has the ultimate authority to decide what human rights European have; but for a different reason this time. The core human rights express moral requirements that make it impermissible for any political community to make certain individual liberties or choices the subject of a collective (majoritarian) decision. Which books one chooses to read, whether to have a family or an abortion, what religion to practice, are not matters to be

decided collectively.<sup>50</sup> It begs the question against this view of human rights to ask, as Waldron does,<sup>51</sup> which institution should decide which matters should not be institutionally decided. The whole point is that it is not up to *anybody* to decide these matters, *other than the individual whose right it is*. Political morality puts these matters beyond the reach of the political process, allowing individuals to make their own choices. It is impermissible for governments to violate fundamental human rights (thus understood) and no institutional decision (be it by a legislature, a court, or a constitutional assembly) can change this moral fact. Courts have a duty to discover what political morality requires, because their role is to license state coercion only when it falls within the matters that we collectively can decide. To be sure, not all issues labeled as ‘human rights’ in the relevant legal sources, fall within the core of inviolable personal rights,<sup>52</sup> as sketched above. But most issues that courts adjudicate under substantive civil rights (such as freedom of expression, right to life, right not to be tortured, freedom of association, freedom of religion) recognized in fundamental sources of law in Europe and elsewhere, clearly belong to that category.

There is moreover a crucial difference between fundamental human rights, as defined above, and other issues arising within ordinary EU law.<sup>53</sup> Though divergent interpretations of the latter by the ECJ and national courts may jeopardize the efficacy of EU law, this is not the case with fundamental rights. Most EU measures seek to advance goals (such a common market) that work to the mutual advantage of Member States and their citizens. EU and national institutions have to co-ordinate in the choice of means (such as free movement of goods, or common currency) for pursuing those goals, otherwise the joint venture will fail. But the means employed must be morally permissible: co-ordination creates reasons only when there was, to begin with, a choice between equally *permissible* means. It is morally indifferent for example whether to drive on the left or on the right side of the road. In designing a new traffic code, either option is morally permissible. Once there is

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<sup>50</sup> I have defended a non-teleological theory of rights as underlying the ECHR in G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2009), chapter 5.

<sup>51</sup> Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ *Yale Law Journal* (2006), 115.

<sup>52</sup> For an extensive discussion of human rights as inviolable personal rights, see Thomas Nagel, ‘Personal Rights and Public Space’, 24 (2) *Philosophy & Public Affairs* (1995), pp. 83-107.

<sup>53</sup> It should be stressed that, on the non-positivist picture, the distinction between the two is not based on the formal legal source (e.g. a Treaty provision vs a directive) or the subject-matter (e.g. individual rights vs common market) of the legal dispute in question. Fundamental human rights issues may arise in the context of litigating ‘low-level’ EU legislation (e.g. Directives); and vice versa, some issues arising in the context of the interpretation of ‘fundamental rights’ provisions (e.g. the EU Charter or the Grundgesetz) may not raise any issues to do with the morality of fundamental human rights. What the distinction turns on is the moral principles that are *in fact* engaged by the case at hand.

an established practice of driving on a particular side, then drivers acquire reasons of co-ordination to drive on it. Likewise, when there is an established practice in most Member States of implementing EU measures that advance a common goal, courts deciding cases have reasons to take into account what other courts have done and to co-ordinate their action accordingly. But reasons of co-ordination do not apply when the means employed are morally impermissible, say because they violate fundamental human rights. To belabor the analogy: an established practice of running over pedestrians who step on the left side of the road, violating their right to life, would not create reasons of co-ordination for other drivers to do the same. Likewise, means of pursuing EU goals that violate human rights and are upheld by the court that first rules on their lawfulness, do not create reasons of co-ordination for other courts. Other courts are free to declare them unlawful. For example, if the ECJ has upheld an EU measure that violates human rights, this fact creates no reason for the European Court of Human Rights or national constitutional courts to do the same. Though courts in Europe should look at each other's reasoning in order to enrich their own view about what amounts to a human rights violation, each court must ultimately consider for itself whether, in the case pending before it, the litigant's human rights have been violated.<sup>54</sup> In so doing, each court aims at discovering whether state institutions have acted wrongly and that is a question whose answer does *not* depend on what other courts have said and held. When it comes to fundamental human rights issues, no court is the ultimate guardian of constitutionality in Europe because, strictly speaking, no court can decide which human rights people have.<sup>55</sup>

### *Constitutional Conflicts, Supremacy and Kumm's legal positivism*

It is now time to take stock of the non-positivist picture of European constitutional pluralism, before we turn to whether the idea of dialogue makes any sense within it. I hope it has become apparent by now that on the non-positivist account presented in the previous section, there are no dramatic constitutional conflicts between the Europe Union and its Member States. The claim of some national constitutional courts that the constitution is the ultimate law of the land is inaccurate, carrying no normative weight when it comes to identifying legal rights and duties born out of the process of European

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<sup>54</sup> This is why Strasbourg's test developed in the *Bosphorus* judgment, according to which the presumption that state-implemented EU measures is rebuttable in *each* case is the correct approach to take on a non-positivist theory. See *Bosphorus v Ireland*, Appl. No. 45036/98, Judgment of 30 May 2005.

<sup>55</sup> On the idea that fundamental rights in the EU reflect cosmopolitan moral requirements, see Pavlos Eleftheriadis, 'Cosmopolitan Law', 9(2) *European Law Journal* (2003) 241-263.

integration. It is to be taken as seriously as the claim that the German constitution is the ultimate law of the land of China or of the United Nations. The claim by both the ECJ and some national courts, that they have the ultimate authority to determine what falls within the area of competence of EU law is equally inaccurate: what falls within the competence of the EU is an objective matter, to be determined by the moral principles that apply to the morality of joint projects undertaken by states. Though courts, through their judgments, influence the scope of the joint project, they are all equal actors in a typical co-ordination problem, each acquiring reasons partly in virtue of what other courts do, *none* having the ultimate authority to decide what the scope of the obligations arising out of the project are. Finally, the claim that some court should have the ultimate authority to decide what human rights Europeans have is misleading: each court must always apply itself to the question of whether the litigant's fundamental human rights have been violated, without being bound by reasons of co-ordination to follow what other courts have said on the same issue. They are bound only by the need to develop a body of case that, as far as it is possible, expresses a coherent vision of human rights across Europe.<sup>56</sup>

The absence of constitutional conflicts under the non-positivist picture is not accidental. It is born out of the fact that questions of supremacy only make sense within a positivist framework. In that framework, the content of the law is fixed by the content of norms enacted or practiced by an institution and the issue of conflicts is inevitably the issue of *whose* norms are supreme. By contrast, on the non-positivist picture, no legal requirement is individuated by direct reference to a norm. Relevant moral principles play a role not only by determining whether and which provisions or dicta matter but also, crucially, by telling us how such provisions contribute to the content of the law, all things considered. On the non-positivist picture it need not be the case, and in fact it often is not, that the content of the law is the content of any particular enactment. Given that non-positivism is not committed to the view that law is a system of rules and given that it takes moral principles as the ultimate determinants of the content of legal rights and duties, it makes no sense to talk of constitutional supremacy either; talk of supremacy is wedded to the all-or-nothing positivist view: the content of the law is the content of a rule and, in the case of conflict, either the rule prevails or it does not.

Non-positivism debunks the problem of constitutional conflicts in Europe. It refuses to accept that the mere existence of multiple and conflicting rules and claims to supremacy amounts to a normative problem *in law*. Unlike positivism, it offers a picture of European legal practice that poses no trouble

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<sup>56</sup> For a non-positivist account of the principle of *stare decisis* see Scott Hershovitz, 'Stare Decisis' in Hershovitz (ed), *Exploring Law's Empire* (2006). It is worth noting that non-positivism offers a radically different account of how the doctrine of binding precedent works.

for courts or individuals, because it is in essence no different to the practice of a municipal legal order. It insists that the question whether national constitutional law or European law is supreme is a pseudo-dilemma, a non-issue.

Within the vast literature on European constitutional pluralism, Mattias Kumm's work<sup>57</sup> is the most elaborate defense of the view that it is unhelpful to focus on who should have the ultimate say, European or national constitutionalism. It is therefore worth addressing what the differences are between his position and the non-positivist thesis that this paper puts forward.

Starting from non-positivist premises that he borrows from Dworkin's work, Kumm advances a theory that he calls 'Constitutionalism Beyond the State'. The theory seeks to transcend the constitutional dilemma of choosing between European and national constitutional supremacy, by turning our attention to principles that best fit and justify existing legal practices. 'Constitutionalism Beyond the State' asks: 'What is the best understanding of the relationship between national and European constitutions, given the normative commitments underlying legal practice in Europe, seen as a whole?'<sup>58</sup> This question is certainly the same type of question as the one that a non-positivist, as defined above, would also want to ask about the European Union. Yet my sense is that Kumm's answer ultimately fails to escape the positivist assumptions that underlie the dilemma between European and national constitutional supremacy. To begin with, Kumm assumes throughout his work that constitutional conflicts in Europe are real and genuine. He presents his theory as a solution to a real problem caused by constitutional pluralism rather than as a debunking of the problem. But of course this might be a matter of exposition and not a deep difference between his account and the one presented here.

More important perhaps is the issue of what work principles inherent in the practice are meant to do. Although Kumm emphasizes the importance of looking at the principles that underlie national and European legal practices, he takes the role of such principles to be the ranking of positivistic norms. He writes:

'The task of national courts is to construct an adequate relationship between the national and the European legal order on the basis of the best interpretation of the principles underlying both. The right conflict rule or set of conflict rules for a national judge to adopt is the one that is best calculated to realize the ideals

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<sup>57</sup> Kumm, 'Constitutional Supremacy'

<sup>58</sup> *Ibid.*, p. 287

underlying legal practice in the European Union and its Member States<sup>59</sup>

Kumm sees principles as conflict rules, whose role is to tell us in each case *whose* norms should prevail. In the absence of a single rule of recognition that would rank criteria of validity, Kumm turns to principles as a substitute. Like Kelsen and Hart, he is attracted to the view that law's demand cannot be contradictory, yet he does not let go of the view that law is a system of *rules*. Kumm assumes that the content of legal rights and duties is the content of some enacted norm and, in the face of conflict, he uses moral principles to determine which norm should prevail. But this picture of European law is still hostage to legal positivism: it assumes that law is a system of norms that may conflict and that it is contingent whether the system contains conflict rules. When it does not, or when conflict rules contained in multiple rules of recognition do not converge, no legal norm settles how conflicts between legal norms are to be resolved, so we must look somewhere else, at morality. And the purpose of the judge doing so is to decide which of the conflicting valid rules, positively identified, to apply. As we saw, this is exactly the view that the more sophisticated version of legal positivism takes of the European constitutional pluralism. Positivists would have no quarrel with the view that, in the face of multiple and inconsistent rules of recognition, courts should turn to moral principles for deciding which norms to apply. What Kumm's view leaves no space for, is the idea that the content of legal rights and duties is not co-extensive with the content of an enacted norm; nor for the idea that some enacted norms (say domestic constitutional provisions) and judicial claims may be legally irrelevant for determining European law, hence posing no issue of normative conflict to begin with.

Perhaps Kumm has no axe to grind in the debate between positivism and non-positivism and is happy with the view that principles operate as conflict rules, ranking other rules in case of conflict. But so long as one conceives of pluralism as the problem of conflicting rules, one is still under the spell of positivism, committed to the view that nothing can be a legal right or duty unless its content is determined exclusively by the content of some enacted norm. It seems to me that the legal rights and duties that Europeans have under Kumm's theory would be very different to the ones entailed by a non-positivist account of European law, as sketched above.

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<sup>59</sup> Ibid., p. 286. The nuances of Kumm's theory are more sophisticated than I can do justice here.

### *Non-positivism and Judicial Dialogue*

When I took my driving license test, the theory exam took the form of multiple-choice diagrams of unmarked junctions in which two or more cars were portrayed approaching each other from different directions. The test would list all the pictured cars, one by one, as possible answers to the question of who should give way at the junction. As if this was not hard enough, the test would often offer an additional choice to candidates: “No car is to give way. Drivers should engage in dialogue”. In preparation for the test, my instructor gave me a useful piece of advice: “if you are in doubt about which car should give way”, he said, “never go for the dialogue option: it is always the wrong answer”.

Non-positivism extends my instructor’s advice to European law. It argues that dialogue, no matter how generously we understand it, is an ill-suited metaphor to capture the relevance that the actions of other courts has to what a particular court should decide. Here is why. EU scholars cannot use the concept of dialogue in a literal sense: it is not that the ECJ for instance adjourns a case pending before it until its judges have met, discussed and exchanged views with the judges of national constitutional courts. Nor is the request for preliminary ruling by national courts an instance of actual dialogue: the court requesting a ruling is not asking the judges of the ECJ to give their opinion on the case; it asks the ECJ to decide a question of law. Nor is the ECJ asking the requesting court what *it* thinks about the question of law that the latter is referring. Dialogue is a metaphor aimed at capturing the fact that what a court has said and done has normative significance for what another court should decide. And the reason why it fails to do so is that dialogue is a process-based method for determining outcomes whereas the determinants of legal rights and duties are substance-based. The normative ideal of dialogue implies that there is no correct decision *in advance of* a dialogue between the relevant actors and that dialogue is a necessary condition for the legitimacy of the decision. But on the non-positivist account, this is never the case in law. What legal rights and duties individuals have before a court, is independent of any process of dialogue between the deciding court and other actors. According to non-positivists, what determines the content of legal rights and duties are objective, mind-independent moral principles that calculate the normative effect of past political practice on collectively enforced legal rights and duties. Two reasons make this non-positivist claim impossible to square with the idea that the ECJ and national courts should engage in a dialogue.

First, it is not necessary that the outcome (and the reasoning) of a judgment of the ECJ have normative significance for national constitutional courts and vice versa. We saw already that in the case of fundamental rights,

each deciding court has one substantive question to answer: have state institutions acted wrongly by interfering impermissibly with individual choices that are outside the realm of collective decision-making? The answer to this question does not depend on what other courts have said and done. Though national courts should strive to give an account of fundamental rights that coheres with what the ECJ and the ECtHR have done and vice versa, any one judgment of any court may be mistaken and hence devoid of any normative weight.<sup>60</sup>

Second, even when moral principles make a past judicial outcome relevant for what a court should now decide, as is the case when co-ordination is required to secure efficacy, what is normatively relevant is not what the other court has *said* but had it has *done*. Consider the driving analogy once more: when I am fast approaching a junction thinking that you should give way, what matters in relation to what you ought to do is not what I think but what I do. If for example the only way to avoid collision, given my location and speed, is for you to accelerate and go through the junction first then you should ignore what I think or say about who should give way, and you should step on the accelerator. What you ought to take into account in other words is the normative *effect* of my actions, not my *beliefs* about what that normative effect is. Who should give way in this scenario is not something we are going to have to talk about. In normative accounts of dialogue by contrast, what matters normatively is a degree of respect for, or deference to, the normative beliefs of one's interlocutor. The justifiability of an outcome depends on there being a process in which interested parties express their beliefs and due consideration is given to them. Dialogue targets the beliefs of institutional actors; Legality, by contrast, targets the normative effect of institutional action.

In sum, no matter how far one stretches the conceptual boundaries of dialogue, it is an idea that is incompatible with the fundamental tenets of non-positivism. EU scholars who are attracted to the image of judicial dialogue must either defend its normative appeal against non-positivism<sup>61</sup> or, alternatively stop using the idea of dialogue in order to account for the fact that what some courts in Europe do may have normative significance for what another European court should decide. The idea that judicial dialogue is an inherent feature of Europe's constitutional dialogue is oversimplistic.

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<sup>60</sup> See Hershovitz, 'Stare Decisis'.

<sup>61</sup> I should stress that although the image of dialogue presupposes the account of law that legal positivism offers, legal positivism does not entail support for a dialogue model of decision-making. All dialogue theorists are positivists, but not all positivists are dialogue theorists. Some positivists may wish to offer a different account of how courts should decide cases in a 'pluralistic' legal order.

## CONCLUSION

I hope to have shown that pluralism, understood as the existence of multiple and conflicting normative orders poses no major challenge to mainstream theories of analytic jurisprudence. But the major divide in analytic jurisprudence between legal positivism and non-positivism corresponds to two radically different views about Europe's constitutional pluralism, with different practical implications.

On the positivist picture, the existence of multiple and inconsistent rules of recognition entails that the content of a large number of Europeans' rights and duties is, as a matter of law, indeterminate. Positivism argues *from* pluralism *to* constitutional conflict and legal indeterminacy. It makes pluralism a genuine problem for courts and a threat to the determinacy of Europeans' legal rights and duties. Moreover, conceptualizing what the ECJ and national constitutional courts have been doing in the last forty years or so as a process of dialogue, assumes legal positivism's picture of law. Dialogue is a solution to a problem that only exists if positivism is true of law.

Non-positivism by contrast sees no problem in the existence of multiple and overlapping normative orders, containing conflicting rules, because it rejects the thesis that law is a system of rules. It accepts that politics and the norms it generates are far from harmonious and that is why it does not seek to find harmony and coherence therein. Non-positivism posits that law refers to a value of political morality that determines what the effect of past political practice is on collectively enforceable rights and duties. That value, often called legality or the rule of law, determines not only whether someone's edicts matter but also how they matter. The dimensions of normative relevance and weight under which the value operates to identify legal rights and duties, make questions of constitutional supremacy *irrelevant*. Nobody is to have the ultimate say on the constitutional issues that divide the ECJ and national courts because nobody *can* decide these issues: they are determined by objective moral principles. Non-positivism debunks the problem of constitutional conflicts by offering us an account of European law that is no different in character to the account it gives of municipal law. Within this non-positivist framework, describing the practice of the ECJ and national courts as one of judicial dialogue makes no sense. What legal rights and duties Europeans have is not to be determined by any process of dialogue. The image of dialogue is too crude to capture the normative significance (or lack thereof) of what courts in the EU have decided, for what other courts now have to decide. And capturing this normative significance is at the heart of what courts in 'pluralistic' Europe ought to do.

I should like to end this long paper with a disclaimer and an invitation. I have not here defended the non-positivist account of European law against its

rival, nor mounted a critique against legal positivism. My aim has been to present and contrast the two schools and to show how one's views or assumptions about the nature of law makes a difference not only to how one sees European constitutional pluralism but also to how one identifies Europeans' legal rights and duties. But in my view, it is no accident that the theory of legal positivism has had to undergo constant modifications in order to account for the radical changes in the way political power is exercised in the last 60 years or so. And the picture it now offers us, although internally coherent, is one that puts conflicts at the center-stage of legal practices and presents pluralism as a real problem for both courts and citizens. The experience of European integration and its success as a constitutional experiment suggest that pluralism was a problem that never was. Non-positivism by contrast, instead of running after political changes, trying to account for the new ways in which political institutions interact, changed radically the old paradigm by rejecting altogether the view that law is a system of rules. The growing realization in Europe that issues of constitutional supremacy and conflict are pseudo-problems may provide further indication that positivism's intellectual days are counted. If this is the case, as I believe it is, it would be regrettable to see ideas of 'pluralism' and 'dialogue' replacing the tired image of law as a system of rules. For these ideas are part and parcel of the positivist picture of law. They stand and fall with it. The non-positivist's picture that puts objective principles of political morality at the heart of European law is the only real alternative to the theoretical triad of legal positivism, constitutional pluralism and dialogue. If you find the quest for ultimate rules of recognition, or rules of conflict resolution, *futile* then you are invited to give the idea of harmonic law a chance.