



The Post-Sovereign Constellation

Law and Democracy in Neil D. MacCormick's
Legal and Political Theory

*Agustín José Menéndez
John Erik Fossum (eds)*

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Cover picture: Reverend Robert Walker Skating on Duddingston Loch
(about 1795), by Sir Henry Raeburn, *National Gallery of Scotland*.

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Introduction

Agustín José Menéndez and John Erik Fossum

This report gives homage to one of the key legal and political theorists of the last fifty years, Neil D. MacCormick. The Scottish philosopher has made decisive contributions to the understanding of law, democracy and justice under conditions of social and ethical pluralism. His institutional theory of law has improved our understanding of the nature of law by stressing the importance of social legal practices at the same time that it has emphasised the essentially normative character of law's empire. In particular, MacCormick has elucidated the concept and constituent elements of law by considering legal argumentative practices, at the same time that he has put forward the first theory of European constitutional law which takes seriously the distinctive features of the process of legal and economic integration on the old continent. The Edinburgh professor has also renovated the political philosophy of the Scottish Enlightenment by means of putting forward a distinctive theory of distributive justice and very especially, a theory of liberal nationalism aimed not only at rendering nationalism attractive, but also at rooting his cosmopolitan and liberal political project.

This brief summary of the main lines of MacCormick's research and publications cannot do justice to the depth and richness of his work. We hope however to offer enough so as to make the reader aware of the sheer breadth of interests and the delightful curiosity that mark Neil MacCormick. But it is proper to add that what renders both

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MacCormick's theory and Neil himself especially inspiring and attractive is his intellectual honesty; in particular, his capacity to put his own work to question by considering very seriously alternative views, and on such a basis, of engaging in a reflexive reconsideration of his theory. One swallow no Summer makes; hence we cannot assert this as proof to the effect that practical reason drives the human spirit forward, as such. But we can take this as compelling evidence of the exceptional human and intellectual stature of Neil D. MacCormick.

In this brief introduction, we consider in some more detail the key contributions that the author of *Legal Reasoning and Legal Theory* has made to legal and political theory (Section I), and we summarise the main contents of the report (Section II).

I. THE LEGAL AND POLITICAL THEORY OF NEIL D. MACCORMICK

A legal philosopher by vocation, Neil D. MacCormick has led the development of the institutional theory of law. His characterisation of *law as an institutional fact* reveals not only the collective and user-oriented character of legal norms (radicalising some of the key intuitions of Hart's legal theory when affirming that the legal phenomenon cannot be fully understood without taking seriously the standpoint internal to legal practice), but also the inextricably dual nature of law as a functional means of social integration and as a vehicle for the reconstruction of the social order in ways conducive to the realisation of normative ideals (in brief, of justice). MacCormick keeps neatly distinct the realms of the "is" and the "ought" (here pursuing some of the key insights contained in Kelsen's first edition of the *Pure Theory of Law*), while stressing the necessary connection between law and morality, reflected both at the systemic level of law, and in the underlying claim to correctness necessarily underlying any legal norm (something which has also been emphasised, in different terms and within different traditions, by Robert Alexy and Ronald Dworkin). By highlighting that *law is an institutionalised normative order*, MacCormick claims that the systemic character of law derives not so much from the objective nature of legal norms, but rather from the social practice of making use of the law as a means of social integration; or what is the same, it is because we hypothetise that law is a system, and we do so

on the basis of a normative ideal of such a system, that law can discharge the basic social tasks that is entrusted to it in modern societies. Some of these key insights underpinned the hypothetical assumption of a “grundnorm” which would establish the validity of the whole legal order (in Kelsen’s theory) and even more explicitly, in the distinction between primary and secondary norms advocated by Hart. But MacCormick goes further than both Hart and Kelsen by taking very seriously the elucidation of the social functions of the law, assigning them a key role in the shaping both of his theoretical and his practical understanding of law (in ways not dissimilar to Habermas). Indeed, the characterisation of law as an institutional order explains, in MacCormick’s view, the unavoidable tension in modern law, its divided “soul” between its “empowering” side (providing the subjects of law with the moral knowledge necessary to be just, to know what they have to do, and enabling social cooperation to achieve complex collective goals at a large scale) and its “coercive” nature (as the necessary doses of certainty and insurance against default can only be provided by the shadow of enforced compliance). MacCormick has indeed made decisive contributions to the exploration of both the ideal element in law and legal practice, while being far from oblivious to its unavoidable “partially heteronomous” character.

MacCormick’s contributions have perhaps been especially outstanding on what concerns the theory of legal argumentation (in his *Legal Reasoning and Legal Theory* and in the more recent *Rhetoric and the Rule of Law*), and on the pluralistic character of modern legal systems, a theme which underlies his opus as a whole, but has been more explicitly pursued in the ground-breaking *Beyond the Sovereign State* and in the articles collected in *Questioning Sovereignty*.

The relevance which the Scottish philosopher assigns to the analysis of social legal practices led him to be very attentive both to the steering of societal conflicts through rules obeyed in “spontaneous” and “quasi-automatic” fashion by the subjects of law (what indeed classical positivism assumed was the core of the legal phenomenon), but also to the argumentative practices through which discrepancies in the actual normative implications of legal principles are settled. *Legal Theory and Legal Argumentation* was indeed one of the leading treatises which brought back to the forefront of legal theory the analysis of how legal cases were actually argued, and draws conclusions regarding the nature of law itself,

and very especially, the role of the said principles in modern legal orders. Indeed, *Legal Reasoning and Legal Theory* is properly characterised as an attempt to integrate some of the key insights of Dworkin's criticism of Hartian classical legal positivism with a view to rescue the brand of positivism defended by Hart. But the more that MacCormick explored his original contributions, the more he came to distance himself from the author of the *Concept of Law*, although this does not necessarily imply that he has come to converge with Dworkin's position. As Massimo La Torre claims in this report, it may perhaps be fairer to say that MacCormick has indeed pursued to its logical and normative conclusion some of the key insights of Hart's theory, and in doing so he has integrated insights from other angles and theoretical traditions; his keen interest in legal topics and his very fruitful collaboration with Ota Weinberger may have rendered possible a genuine and promising third way.

His life-long preoccupation with legal pluralism, concurrently fuelled by his understanding of the nature of law and his sympathies towards the cause of Scottish nationalism led Neil MacCormick to develop what may be fairly said to be the first theory of European constitutional law which takes seriously the specific features of the European Union as a process of legal, economic and political integration. In particular, the Scottish philosopher has aimed at showing that European law is grounded on an overlapping set of legal social practices which presuppose different understandings of the validity basis of Community law. Instead of arbitrating over which of the two alternatives is right (the national constitutional practice which claims that the European legal order rests upon the twenty seven national constitutions or the supranational constitutional practice which affirms that integration has led to a mutation of national legal orders, now absorbed into a single European constitutional order framed by the constitutional law of the Union), legal theory should concern itself with determining why and how the European legal order does indeed keep on discharging its basic social tasks despite the co-existence of such practices. The intriguing question is not which of the two standpoints is right (both of them *are* from their own perspective) but why a legal order can be pluralistic without descending into chaotic diversity.

But as was already said, the work of Neil D. MacCormick reaches beyond legal theory and firmly enters the terrain of the larger province of political

philosophy. His keen interest on the theoretical aspects of constitutional theory (reflected in his theory of Community law and on his reflections on the British constitutional order) reflect a thorough consideration of the theory of the state, and very especially, of the normative dimensions of the *Rechtsstaat*, closely intertwined with the basic assumptions of his institutional theory of law. In addition, his life-long interest in the political philosophy of the Scottish Enlightenment is reflected in his contributions to the theory of distributive justice (contained in his *Legal Right and Social Democracy* and in many articles in diverse journals) and very especially, to the theory of nationalism. Although it is beyond doubt that his interest in the latter is not only academic, but also reflects a personal commitment, MacCormick has made a major contribution to the rethinking and repositioning, so to say, of nationalism as part of a liberal and cosmopolitan political project. In particular, his reflections have cast light on the role that “liberal” nationalism could play in rooting and grounding what in most cases remain the abstract and detached political philosophy of cosmopolitanism.

II. THE CONTENTS OF THE REPORT

This report collects the edited versions of the papers presented at the workshop “The Post-Sovereign Constellation”, held in Bergen in November 2007. All contributors engage in a critical reconstruction of MacCormick’s work, aimed at revealing the connections between the different sides of his *opus* and at furthering his insights in each specific field.

The first section contains a piece by **Neil D. MacCormick** himself, in which he reflects on the seven big themes of his legal and political theory: the normative character of legal order, the institutional character of legal order, the central but far from exclusive role played by state law in social integration, the relationship between law and morality, the synthetic and systemic aspects of law, and the relationship between reasons and emotions in practical reasoning. In reviewing these themes, MacCormick both provides an overarching (albeit of course sketchy) picture of his theory, which serves as an introduction to it, but also reveals the connections and links between the different parts.

The second section deals with MacCormick's concept and conception of law. **Lars Blichner** notes that MacCormick's theory is of special interest to social scientists because he is one of the rare legal scholars who is keenly interested in exploring the limits of law as a means of social integration, and the relationships in which it stands with other normative orders. Indeed, Blichner's contributions to the theory of the process of juridification and de-juridification are apt to reconstruct and complete some of the basic insights of MacCormick on what concerns the relationship between normative orders, institutional normative orders and legal orders. Processes of juridification and dejuridification should no longer be regarded as "borderline", "marginal" questions which legal theory can blissfully ignore; instead they should be analysed as determining factors of the social tasks that law can perform effectively. **Massimo La Torre** considers the unfolding of Neil D. MacCormick's legal theory by reference to the concept of law which underlies his work. La Torre claims that the legal theory of the Scottish philosopher is the true heir to the normative project underlying Hart's legal theory, in the precise sense that it has pushed to its logical and normative conclusion the quest for a non-decisionistic understanding of law, which stresses the key role played by social legal practices, the centrality of the standpoint *internal* to law as a normative order to understand legal phenomena, and consequently, calls for a theory which focuses on the addressees, not the authors of the law. **Marina Lalatta** explores the systemic nature of MacCormick's legal theory by focusing on the underlying tension between his claim to uphold a "moderate" relativism in moral questions, and his late acceptance of the existence of a systemic connection between law and morality, which comes close to the "claim to correctness" theory of Robert Alexy. While she acknowledges that MacCormick's reluctance to abandon a moderately relativistic position is not without good reasons (recently highlighted by the enthusiastic endorsement of non-relativistic theorists and political actors of blatant violations of fundamental rights in the so-called war on terror), Lalatta claims that MacCormick should endorse a non-relativistic position without having to endorse the less attractive aspects of cognitivism. **Stefano Berteau** covers what seems to us rather similar ground from a very different perspective. His paper analyses the most recent developments of MacCormick's theory of legal reasoning (contrasting *Legal Reasoning and*

Legal Theory with Rhetorics and the Rule of Law), and considers the implications they have for the understanding of the concept and the nature of law. Berteau claims that MacCormick has not only moved beyond positivism (as the Scottish philosopher likes to put it himself, becoming a post-positivist) but in doing so he has set a “middle ground” between the concept and theory of law which underlies Hart’s and Dworkin’s research programs). **Flavia Carbonell** reconstructs in a critical fashion MacCormick’s concept of coherence in legal reasoning, and places it in the context of his theory of legal pluralism. The salience of the theory is determined by analysing the extent to which MacCormick’s theory underlines the jurisprudence of the Court of Justice of the European Union; and the extent to which argumentation from coherence may ground the claim of MacCormick to it being the best possible theory of European Community law. Carbonell finds that the resort to the argument of coherence by the ECJ as a means of increasing the breadth and scope of Community law does not foster a legally pluralistic reconstruction of Community law, but is indeed an instrument of its monistic reconstruction. Indeed, it turns the Court into the final decision-maker in charge of solving conflicting interpretations or collisions of norms. This casts some doubt not only on the *affinity* between legal pluralism and coherence, but also on the extent to which the European legal order is a pluralist one.

The third section considers MacCormick’s theory of legal pluralism, and very especially, its application to the constitutional theory of the European Union. **Tanja Hitzel-Cassagnes** considers the extent to which MacCormick succeeds in constructing a synthetic theory of law and politics capable of accounting for the various transformations of law as a means of social integration in a “pluralistic” context without renouncing the key normative categories of political philosophy inherited from the Enlightenment. MacCormick claims that there has always been a pluralistic potential cloaked behind the apparently monistic political and legal language of modernity; and that what concealed such potential was the historical, political and legal preeminence of state law, its characterisation as the unique form of institutional normative order. But while the “pragmatic” concern of MacCormick cannot but be shared, and while there is much to be learnt from his actual theory, Hitzel-Cassagnes rightly points out that it is simply not the case that the universalistic drive of law is a side-effect of

the predominance of the “nation-state” paradigm, but is actually a constitutive character of law as a means of social integration; this implies not only a “structural” universalistic proclivity of law, but a “normative” universalistic proclivity. As a consequence, norms governing the relationships between legal orders should also be legal norms underpinned by a universalistic drive. **Martin Borowski** finds that MacCormick’s theory of post-sovereignty represents the most sophisticated attempt to date to explain the ‘pluralistic’ nature of Community law, overcoming the simple confrontation of the ‘European view’ and the ‘national view’ of the European Union which has characterised legal and political scholarship for decades. Still, he finds that legal pluralism is not convincing, either as a general theory or as the basis of the reconstruction of Community law. This is basically so because it fails to reconstruct the derivative nature of Community law and cannot provide an adequate framework for the decision of conflicts between EC law and national constitutional law. However, MacCormick’s contribution to tackle the difficult and complex problem of the reconstruction of Community law is taken by Borowski as the point of departure for what amounts to a sophisticated and revised version of the national theory of constitutional law, namely Borowski’s derived and nearly unconditional supremacy of Community law. This entails the view that the actual breadth and scope of the supremacy of Community law is subject to potential exceptions, to be determined by means of weighing and balancing the normative reasons underpinning the claim to supremacy (in concrete, the very aim of European integration) with weighty countervailing reasons which may justify the opposite result in a handful of cases. **Agustín José Menéndez** considers the same topic from a different perspective, and indeed offers an opposing alternative. His paper aims at both contextualising MacCormick’s theory of European legal pluralism in the history of the development of theories of European constitutional law, and to provide an assessment of its capacity to serve as the theoretical support for European constitutional practice. While he finds that MacCormick’s theory is capable of capturing key aspects of the social practice of European law, and in doing so illuminates the key role played by non-legal factors in ensuring the stability of the Community legal order, he finds the theory less promising in guiding actual legal reasoning; especially when it comes to solving European constitutional conflicts, i.e. conflicts between national constitutional norms and Community norms.

Menéndez puts forward an alternative theory (the synthetic theory of European constitutional law) which aims at integrating the key insights of MacCormick's theory (and very especially the limited institutionalisation of pluralism in European constitutional law) with those provided by the national and the European theories of Community law. This results in a European theory of Community law that is sensitive to the pluralistic character of the European institutional setup but which also still affirms the necessarily monistic character of law, very much in line with Hitzel-Cassagnes' paper.

The fourth section considers the political theory of liberal nationalism put forward by Neil MacCormick. **Joxerramón Bengoetxea** focuses on MacCormick's contribution to the understanding of national law and state in contemporary Europe, and in particular, his concept of "internal enlargement", or what is the same, the possibility that Member States divide or split into new Member States so as to realise the aspirations to self-government of region-states. He reflects on the correlation between MacCormick's institutional theory of law, with the emphasis on non-state institutional normative orders, and his defence of "liberal nationalism", as a differentiated and characteristic form of liberal political philosophy. Bengoetxea considers in detail the key role that such a form of nationalism could play in rooting and providing support for the cosmopolitan telos which characterises the European integration project.



Part I

MacCormick on MacCormick

1

MacCormick on MacCormick

Neil D. MacCormick

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Some colleagues, I think, specialize more in the critical-dialectical method, than in the constructive-collaborative one. My dear friend and admired senior colleague, Ronald Dworkin, is an interesting example of somebody who always surveys the world from a single position: his own. Dworkin, although giving very interesting valuable critiques of other people's work, always does so by restating them in his own terms, and seeing if he can give what he regards as an improved version of it. His recent writings about legal positivism are an example of that style. This is a very strong and powerful way to do the business. I think my own style has tended to the other side. I enjoy a good argument as much as anybody else. I like the dialectical-critical bit of the work. But I notice when I review a book for example, I always tend to start by trying to see it from the author's point of view. It takes me a long time to discover if I agree with a book, because if you try to understand it, you should read it sympathetically, with willing suspension of disbelief. Once you master the ideas, you think hmmm, that is rather persuasive, even if it says what you do not think; or what you didn't use to think. The upshot of that is of course that people that have this attitude tend to shift their position. If you read with sympathy and interest a thing (there is something in that, better take that on board), you will be willing from time to time to acknowledge a change, a shift of position because you have felt that some other argument you had not thought about, was a strong one, and you needed to acknowledge and

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adapt or adopt. This must make it difficult, I realize, reading some of the papers of this workshop, for people reading things that I wrote twenty or thirty years ago, to figure out MacCormick's position. The answer is that he is a moving target. This creates the risk of inconsistency and perhaps worst of all, of what we could call mere eclecticism. You have an idea from here and an idea from there, and you have a certain collage of nice ideas, but may be not something that makes complete sense. I hope that is not the case. But there are difficulties about both styles. They need to combine somehow, the critical-dialectical and the constructive-collaborative must be taken altogether. These are difficult things to do, and we must all try. I very much appreciate the spirit of this gathering, which is exactly that kind of collaborative but also mutually critical exercise.

It seems to me that what I have done over the years is to address several tasks. I really regard *Institutions of Law* as the centre of what I have really tried to do, or the underpinning of everything else. I do believe that there are important epistemological and ontological issues with which the philosophy of law does have to deal. I remember reading an article by Richard Tur, now in Oxford, then in Glasgow, in which he said many years ago that to understand Kelsen you must realize that what he was doing was writing a theory of knowledge for legal science. In what sense is there knowledge, in what sense can we know things if we are studying law? Law is not just a matter of either naked will, or ideology or interest wrapped up in an attempt at objective theories of justice or something like this. Kelsen's *problematique* was all along, and Tur is right about this, trying to get clear in which sense can we get genuine knowledge in a genuinely normative realm. I think it is important for us in law schools to take issues of legal theory seriously, because to some extent our claims to be genuine members of the academy, genuine scientists, or scholars, depends upon having some reasonably thought through views about these matters.

Institutions of Law tries to tackle the question, is there really law, and what sort of thing is it? The answer, you know, rather trivially, is that law is institutional normative order. The method I try to use, I call explanatory definition. The method is in part one of analysis, not in the rather elaborate one of conceptual analysis developed by Oxford philosophers in the aftermath of the Second World War. What I mean is analysis in the older sense. We are dealing here with a large complex object and the best way to understand large complex objects is to understand them in terms of what their elements are, what their parts are. *To understand the whole by*

understanding the parts. Of course that also requires a moment of synthesis, as well. Because the parts are what they are only as parts of a whole. You have to have a sense of the parts, as parts, and of the whole, as a whole. A kind of hermeneutic circle, I suppose.

The simplest part of a normative order is norms. We have to think about what norms are, and about the various kinds of norms that there are, and of the various kinds of relationships between persons you can have. And indeed also about the constitution of persons, as persons from the point of view of normative order, as well as the relations they have. All these things have to be clarified, and can be so clarified.

In addition to normative order, one has to think about institutionalization, institutional normative order. And these are all questions with which I deal, which we will be discussing in some of the papers that are coming, so I do not want to get in detail in advance. But just to sketch the main elements of the things we are dealing with.

As was mentioned already, one of the things I find important it to get straight that state law, the law of the state like Norway or Germany is only one kind of law; one of the merits of using the concept of institutional normative order is that one doesn't automatically, from square one, so to say, privilege the state as the locus of law. The state is in fact for most of us the most important locus of law, and it is so for two very important reasons. First of all, the state is territorial; and second, the state is a coercive organization. It can allocate opportunities to occupy space, and it can endorse such allocations. So that its normative order tackles for all of us issues which are vital to us and cuts into the interests and concerns of other normative orders which there may also be.

Still, many more of my fellow citizens are aware of the laws of associated football and the proceedings of the FIFA than of the proceedings of the European Union or even the law of Scotland. But of course when it comes to the bit, if somebody commits fierce assault during a football game, the courts of the state will have the first shot at dealing with the issue. But still FIFA law will have its effect in terms of the movement of points from a team, or the exclusion from competition. But it is not the case that the only dissuasive forms of coercion are those operated by the state. Still, only the state can legitimately back coercion up with physical force. This is true also from the standpoint of great transnational confederations like the European Union, although we will have discussions in the course of the next days concerning how to conceive of the relationship of the European Union as a legal order and the Member States as legal orders, and the

members of the European Economic Area as connected states. We all know well that in the last resort, if it comes to the question of physical enforcement, European law will be enforced through the organs of one of the states, not for the time being any specifically EU coercive organ.

There are very important reasons why we have to take, and in fact do take, state law very seriously. As teaching institutions, law schools are mainly engaged in assisting people to learn the law of their own jurisdiction, there is money to be made practicing that kind of law because of the serious effects it has on organisation of the economy and on the society. When we discuss notions like legal pluralism, it is helpful to start with the conception of law which allows us to say why state law is so important, but makes it obvious it is not the only kind of law that there is. And it is not law in some radical different sense, or some weaker sense. I will not call canon law in any sense weaker law than Norwegian law. To excommunicate is certainly a different thing than to put somebody in jail. But some people fear excommunication more than they fear jail. There are people who think it differently. I am of the latter. Excommunicate me as much as you will, but I don't want to go to jail.

I guess there is the other question of the relationship of legal order so understood and moral order, legal norms and moral norms. Just putting it crudely and simply, it looks that state law, and law more generally, is institutional and it thus puts the agent in the situation of heteronomousness. When subjected to the law, one is potentially subjected to the will of others. It is not necessarily the case that I agree with the law of my state, even in fundamental and important things. You only have to contemplate the issues like euthanasia and abortion which whatever solutions state law reaches in matters of that kind, there will be conscientious citizens that will be outraged by what their state does or fails to do. By contrast, morality in the conception I defend of it, is neither institutional, nor coercive; indeed it is autonomous, it presupposes the actual exercise of moral choice. It leaves the agent in a position of autonomy. Each of us is his/her final judge in matters of morality. Whether each of us is her own final legislator is another and interesting question which I will catch on briefly at the end. That I think marks the contrast between the legal, as I understand it, and morality, as I understand it. I remark from time to time that a lot of the discussions about law and morality assume that we know perfectly well what morality is. But the problem is indeed how to characterise morality and how to characterise

law. The relationship between two objects can only be clear when you establish what the two objects are. It seems to me that if you take that conception of morality and that conception of law, it is obvious that the one is not identical with the other; that is an important fact. In fact some people will say that makes you a positivist, if you hold to a clearly demarcated line between law and morality. I am not sure about that.

The next thing which is worth thinking about once we get a clear conception of law, of morality and of institutional normative order, is the practicality of law. Law is not just an inert body of norms. Indeed norms are not inert things; norms are guides to action. This entails that a reflection on the character of legal reasoning is of great importance and interest to us. How is the institutional normative order operationalised? And particularly how it is operationalised in judicial decision-making, and in legal practice more generally. I have always been interested since the very earliest time in theories of legal reasoning, and the attempt to construct a theory of legal reasoning which is compatible with what I originally took to be a legal positivistic view, perhaps the same view as that of my teacher H L A Hart.

My point of view is fairly straightforward. When we connect the theoretical study of legal reasoning with the ontological issues studied in *Institutions of law* (norms, third rules, principles and guidelines), it is useful to work out definitions of the differences between rules, principles, guidelines and so forth. And I think that I have offered some hopeful suggestions about that in the said book.

Thinking in terms of the Rule of Law, the *Rechtsstaat*, obviously one of the tasks of legal reasoning is to show that where we do have rules, they are being applied accurately and faithfully. And although there have been a great deal of discussion about whether deductive logic has any part to play in the work of legal systems and legal institutions, I have never been able to be persuaded other than that in a very straightforward way there is a kind of simple legal syllogism, which is involved in the application of rules to cases. Of course to call it a simple legal syllogism can be rather deceiving, because as Joxerramón Bengoetxea discovered one time when he was thinking about it in Edinburgh, you may find complex chains of simple syllogistic reasoning. Take complex tax problems: we say these are easy cases, but only in the sense that they do not necessarily give rise to any problems of interpretation. But they are frantically complex. It involves a

great deal of patience and intelligence to work them to an end. So don't underestimate the importance of syllogistic reasoning in law.

But also do not underestimate that for good reasons, the scope of syllogistic reasoning is restricted, because we get problems of interpretation, problems of qualification, problems of evaluation and issues about relative values, different consequences of pursuing one course over another, what I call a problem of relevancy, and problems of proofs. We can look to the styles and kinds of reasoning that can be brought to those tasks. One thing is clear: there have to be reasons beyond the rules. And this means that there is a porousness between law's activity, law's practice and general moral reasoning, because both of them engage in practical reasoning and relate to questions of practical reasonableness. In general terms, the duty of courts is to reach the most reasonable and plausible solution consistent with the rule of law; and that in itself is a kind of loaded dice on the issue of how to unpack that. On *Legal reasoning and Legal theory*, I thought that at the end of the day one simply has to reach a subjective decision. And in someone's sense that is true; if you are a judge, and only limited rules apply, you must reach a decision. This can leave us with the thought that there is really no right answer at all, which is where I was to begin with. But my colleague Ronald Dworkin has over the years cumulatively persuaded me that this is a mistake, and also has Robert Alexy. There is no reason to suppose that there is not in the last resort a more reasonable answer to any given problem, and a less reasonable one, even if both of them are pretty reasonable, and even if you take full account of the law. I am now an acceptor of a version of the right answer thesis, which has been a topical dispute among lawyers since Ronald Dworkin first posed the question in his book *Taking Rights Seriously* in 1977.

Anyway, we wonder if on the other hand we have to try to figure out the kinds of arguments (for example arguments about coherence, consistency, consequences), and how they fit together, and in some way, the issue of reasonableness lies there. Another question, which I think is a unifying point between legal and moral reasoning, a unifying aspect of practical reasoning, that I noticed in some of the papers we will discuss, is the issue of universalisability, Kantian universalibility, i.e. the topic of the universalisable, of generalisation when deciding issues. I have worried about that a lot. It is true that one only decides particular cases, and indeed one only takes particular decisions. And you always have particular reasons for doing so. Yet would these reasons be reasons, rationally acceptable

reasons, if we did not think they were in some way universalisable? In my view not, but this has been a considerably discussed subject. And again I think we may have a further iteration of that in the coming chapters.

Then all that said about the analytical and the rational aspects of legal theory, we must come to terms with its synthetic aspect. We need to look at how legal orders come together in different bits and how this connects with other questions of importance to us. Some of my colleagues, particularly my English colleagues, are inclined to say that differences between for example public and private law, or public and criminal law, are rather arbitrary, there is no clear line of demarcation. And perhaps in a certain way the particular structure of the English court system makes that seem credible. Yet it is surely not accidental that all legal thinking in modern states tries to separate issues of public law, issues of criminal law and issues of private law. This seems to be logical. Public law represents the interface between law and the state, the state both centrally and locally, and we see that in the modern world public law is engaged in their efforts by the state motivated by political argument to inject a degree of distributive justice into an economic system which in so far as it is a market order can have sometimes momentary results which seem unsatisfactory from the standpoint of justice. So that for example the provision of public education, public health services, equalisation devices of one kind or another, are done under the aegis of public law. The other interesting thing about public law if you look at it from the standpoint of legal relationships; powers exercised under public law tend to be unilaterally exercisable. If you are taking a decision on behalf of an agency of the state, we may consult the public beforehand, you may have duties to consult and the obligation to state reasons for your decisions; the decision binds regardless of the consent of the other party. This stands in sharp contrast with most of the powers which are exercisable in private law. However great the economic disparity between the parties, it remains the case that generally speaking a private power cannot be exercised except with the consent or agreement of the person towards whom it is exercised. So private law powers are bilateral, although they often operate in very sharply distinct power relationships, economic power relationships; while public relations are unilateral in the referred sense. Still, it may be that the state sometimes finds that its power of a legal kind is technically speaking unilateral, but that *de facto* it is countervailed by the economic influence which a private

corporation can exercise in public affairs (as is the case, for example, when the state tries to regulate Microsoft).

If we think of the state and civil society the civility of civil society depends above all on the criminal law. It used not to depend on criminal law, and it is not only criminal law. But when we talk of civil society, what do we mean? Seems to me that civil society, to take it right from Adam Ferguson's (who is not the man portrayed skating on the ice in the cover of this report, but was indeed a friend of his) *Essay on Civil Society*. The question is all human beings live in societies, but not all societies are civil, some societies are war-like. My Viking ancestors when they arrived into Scotland ventured into rape and pillage were not unsocial beings; Aristotle would have recognised them as perfectly social people; but civil people? And they met pretty fierce guys there. My other ancestors called them off. It ought to be surprising; it isn't surprising that I can walk down Princess Street in Edinburgh thinking that nobody is about to draw a sword and cut me. By and large we trust total strangers to treat us amiably and with civility. Along the reasons for this is the state and the coercive power, you can create a sufficient body of competence that there is voluntary cooperation in coercive systems, to use Hart's phrase; people are able to deal in an impersonally trusting way. I passed through London a week ago and went on to the tube's station platform at Oxford Circus at quarter to six. It was heaving with people. I realised again why I never wanted to live in London. But even then, everybody was going about their business. In these days of heightened fears of terrorism, it was so obvious being there that this state of affairs is far from obvious. Still, we do not really think it a terrorist act is going to happen. And we are right. It does not happen. People get through these huge crowds with safety and security. That is a remarkable procedure. The civility of civil society is secured by law, and particularly guaranteed by the criminal law.

The economic system is surely wholly dependent on private law; first of all you require secure private property. You will never divide what you can take. Economic relationships depend upon pretty much security supplied by private law. When you put it altogether you can see; well, you will be able to make sense of Niklas Luhmann. The legal system, the political system, the economic system and civil society, all are aspects of the same thing, or alternatively, there are different moments of the great social whole. And as he very brilliant says, each of these is a system of communication which imperfectly understands the others. And that is also true. What we have to realise is that they are not completely opaque to

each other; they are interactive and develop structural cuttings between them. I think this view of getting some kind of synthetic as well as analytical view of the elements of legal order helps to build up a sense of what we are talking about: the overall coherence of law and society and political order.

The last problem which I have still outstanding is the following. This is a trilogy but there is a missing green book which I am trying to write at the moment. I think some of you have noticed that there is a perpetual oscillation between ideas of universalisability, ideas of Adam Smith, which are surely correct. People who had no sense of fellow-feeling with others will be totally incapable of becoming moral agents. The horizon of otherness of other people; yet the sameness of their capacity for suffering as one's own is the beginning of enlightenment in moral questions.

I suppose to this day, psychopaths, people with various forms of social and personality disorder, are simply people who cannot see the world as others see it, who can't imagine themselves in the shoes of somebody else sympathetically. I think this is correct. This insight from Hume and Adam Smith, the capacity for empathy and fellow-feeling, is foundational for the existence and functioning of moral creatures; that has to be acknowledged. And yet it clearly won't do just to say what is right is a matter of what feels good. One of the most famous XVIIIth century critics of David Hume asks "Why do we call judges judges? If Mr Hume will be right we will call them feelers". It is not true. Feelings may matter, but at the end of the day moral judgment is judgment, as legal judgment is judgment. We think of moral reasoning and legal reasoning as somehow mutually parallel. We go back to the problem of trying to reconcile something out of Kant, and the school of natural law thinking of which he is a combination, and the sentimentalism of some parts of the Scottish enlightenment thought.

I am quite satisfied that I do not yet know the answer to this, what I know is the question: how to reconcile the need to procure a sensible rational theory of moral judgment, which nevertheless takes account of the fact that the matters of which moral judgment judge are the most fundamental feelings and emotions of human beings? That is all I can say about that at the moment, but I am still working on it.

Some people have noted that I have effectively changed camps. I started out as a positivist, and I am now called the muse that only natural lawyers can own. But I am entitled to call myself a post-positivist. Why? The

answer is given very well in Massimo's paper. I certainly started out my legal thinking very much under the spell of H L A Hart, and I do think that one very fundamental insight of Hart stays with me, and ought to stay with all of us, that is that we are most fundamentally norm-users than norm-givers. To understand law and legal order you have to understand it from the user's point of view, not from the manufacturer's. And that is partly because part of our most important normative capabilities relate to norms that nobody ever made. I refer to speech. No natural language was ever deliberately created, all natural languages are normative codes which tell you right and wrong ways of expressing. We all speak. If we could not speak we would not think human thoughts anyway. So the roots of our capacity for specific human action is a normative order which we all use but nobody has made. This I think is a significant point. I am not saying that made norms are not important. They are very important, and for the reason I started out with. The law of the state dominates much of practical activity. And of course states have legislatures, judiciaries and precedents and so on. But of course it is true that most of the most important practical norms that we confront are made ones, or partially made ones; but bear in mind the capacity to make them depends on a constitutional framework, and the constitutional framework itself depends upon its customary observation by members of the community. You can always find a constitution as you like, but if Mr Musharraf can tear it up and people acquiesce, then it stops being a Constitution. The issue is what is functioning as a constitution and that depends again on the user's perspective, not the giver's perspective. From that point of view I remain a faithful disciple of H L A Hart. I think that on a number of important points his theory turns out to be wrong or still insufficient. I am not entitled to call myself a natural lawyer given all that I inherited from Hart and Kelsen but I am no longer a positivist, but a post-positivist.



Part II

Legal Reasoning and the Concept of Law



Changes and Continuities in Neil D. MacCormick's Concept of Law

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Speaking about Professor MacCormick's concept of law and its evolution in time means to me somehow an exercise of recollection and it brings about a sort of autobiographical backlash. The academic year 1984-1985 I spent in Graz at the Institute of Philosophy of Law of the local university whose director at that time was Professor Ota Weinberger. As you know, a first seminal book presenting a contemporary version of institutional legal theory has been *An Institutional Theory of Law* by Neil MacCormick and Ota Weinberger which was published in 1986. Being in Graz in 1985 I could see— so to say— the cooking of that book which collected a number of papers of the two scholars. I remember very well how much Professor Weinberger was excited about that book and the affinity of views with his Scottish colleague.

During that year I attended Weinberger's seminars and lectures and had daily discussions with him about the new theory that was slowly taking shape. I found his views and all the process fascinating and was attracted (and finally seduced) by an approach which being solidly anchored in the analytical philosophical tradition nevertheless had a few subversive traits. I was thus encouraged to read Neil MacCormick's papers and books and

such intense reading together with the frequent exchange of views with professor Weinberger deeply influenced my ideas about law and legal theory.

I had been unhappy with the analytical philosophy of law for a number of reasons. On the one hand, its ontological reductionism whereby the only relevant dimension of the being was an empiricist and physicalist one seemed to me hostile to a serious consideration of law as a domain where arguments do really matter and are decisive for decisions. I had problems to accept the view that legal reasoning is just ideology or a variable of a stimulus/response mode of human conduct. I could hardly cope with the neo-positivistic idea that “all propositions are of equal value”— to use Wittgenstein's wording (*Tractatus logico-philosophicus*, § 6.4), given that a value— to quote again Wittgenstein's phrasing— “must lie outside the world” (§ 6.41)¹ and hence it cannot be either known or else approached in a rational way. On the other hand, I could not see how language might be the central existential category of law, putting aside or downgrading extra-linguistic reality as a mere content for linguistic propositions, therefore ending up defining law as just another sort of language function. Finally I believed to see lurking behind analytical jurisprudence and legal realism the old and somewhat terrible figure of law as force and violence. The “fact” celebrated by legal realism indeed was a *fait accompli* and the facticity of the hold of the stronger over the weaker. Decisionism— it seemed to me— in the end was the final outcome of legal positivism, whatever its philosophical foundation but especially under the crude light of neo-positivism and physicalism.

Now, the bunch of all these unhappy features of legal theory under positivistic and analytical conditions seemed to be avoidable through the new legal institutionalism proposed by MacCormick and Weinberger. They raised a number of claims that I found to be sound, especially once one moves from the angle of legal argumentation and constitutionalism. They were sound indeed and would deserve that one keeps them.

¹ Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, trans. by D. F. Pears and B.F. McGuinness, London: Routledge and Kegan Paul, 1966, p. 145.

H.L. A. Hart's impact on the contemporary jurisprudential debate on the concept of law can hardly be overestimated. Although his work is often seen as a fine restatement and re-elaboration of the legal positivist *Weltanschauung*, Hart's legal theory is a first, fundamental step out of the revised legal positivism as it has been shaped by scholars such as Hans Kelsen and Alf Ross. Hart's criticism, though in the first place addressed against John Austin's topical expression of analytical jurisprudence, does not indeed spare the "pure doctrine of law". Nor is Hart too condescending towards Scandinavian realists. What actually is attempted by the British jurist is to reassess and reorganize the core of positivist views by reforming their philosophical and methodological postulates.

In this enterprise the central, though non-explicated philosophical background is Wittgenstein's late program and its imaginative change of paradigm within analytical philosophy, at least as long as this is looked upon by Oxford ordinary language philosophy. Hart's views are hardly to be fully understood without such source. The same holds—I would say—as far as Neil MacCormick's theses are concerned, since their starting point is a critical reassessment of Hart's revision of the analytical jurisprudential background. This is why I believe we cannot today do without having a good look at this which is a foundational moment.

Let me, please, summarize what I assume are the four fundamental tenets of Hart's philosophy of law.

(1) There is a preliminary, general rejection of *per genus et differentiam* definitions.² Words, names, concepts to be defined should be referred to the multiple uses that are made of them. Necessary and sufficient conditions for the application of a concept are not to be found predetermined in the concept's semantic content. Likewise what is law is not just a matter of definition, but it is to be found in the practice of the law itself.

(2) The second tenet of Hart's legal philosophy accordingly is that the law to be defined is to be approached as a practice, and not just as a pure

² See H.L.A. Hart, 'Definition and Theory in Jurisprudence', now in Id., *Essays in Jurisprudence and Philosophy*, Oxford: Oxford University Press, 1983, chapter one.

linguistic phenomenon. The point of view to be adopted for this purpose cannot be a purely theoretical perspective. A pragmatist stance should be taken, that is the relevant point of view is the one of the *practice* of law. Said in a slightly different way, the definition of law cannot be carried on without taking into account its practice.

(3) But the law is not just a practice whatsoever; it is a *social* practice. It is not a matter of individual prescriptions or commitments; it presupposes a community where general conducts are taken following common rules. The meaning of a (legal) rule is related to its use, and such use is not a private or idiosyncratic habit. There is a community, a tradition — if you like — backing such use. The law — Hart points out — is a practice which consists in following different and multiple sorts of rules that are not all imperative or restrictive. Nor are they all to be reduced to one kind format of rule. This is shown through the variety of types of rules that lawyers apply. Rules are something to use, and their purport can only be ascertained and classified from the user's point of view. “Power conferring rules are thought of, spoken of, and used in social life differently from rules which impose duties, and they are valued for different reasons. What other tests for difference in character could there be?”³ In the experience we make of the law we of course face first of all imperative rules, rules that impose obligations and constrains and narrow down our scope of action. But we also face other and perhaps even more important kinds of rules: rules that ascribe powers, rules that offer facilities, rules that serve as a sort of signposts, as references for recognizing further rules and attribute them legal existence, rules that are canons or criteria of sound judgment and of legal reasoning at large. A primitive legal system might consist only of commands or prescriptions. This however is not the case of modern developed legal orders that are actually structured along multiple layers of different kinds of rules.

(4) A further consequence of this approach is that the practice of law to be known, to be understood and conceptualized, needs to be considered from a privileged and special perspective which is not the one adopted by an external observer as it happens in a purely descriptive enterprise. This special and privileged perspective here is the one taken from the internal point of view, that is *from the point of view of those that are taking part in*

³ H. L. A. Hart, *The Concept of Law*, Oxford: Oxford University Press, 1961, p. 41.

the practice and follow its rules, in short from the angle of the practice main actors: in the law advocates and judges. The language *about the law* (which comprises the *concept* of law) bases on the ordinary language *of the law*. A mere observer's point of view will not do. It will not be sufficient to render the sense and purport of what law consists of. For instance, as we have just seen, the important difference between power conferring rules and obligation imposing rules, that is between what Hart calls secondary and primary rules, could only be perceived from the user's angle, that is from the internal point of view. In a more general sense it is normativity itself which is "internal", and not just "external", though according to Hart this does not imply that normativity be equivalent to feeling obliged. One can be obliged, have an obligation, without necessarily *feeling* obliged.

Now, if this is in a nutshell Hart's research program and I think there is no reason to doubt that it is, at least until his posthumous *Postscript* to the *Concept of Law*, the wide range of implications that we can draw from that program has not yet been fully taken into account or investigated to its farther borders. For instance, if we have to take seriously Hart's rejection of *per genus et differentiam* definitions and his recommendations of the rule user's perspective, it might well be that his philosophy be not affected by the "semantic sting", the positivist and conventionalist obsession for legal validity according necessary and sufficient conditions intrinsic to the rule semantic contents.

Of the three prominent scholars whom we may attach the label and the honour of Hart's disciples, I mean professors Dworkin, MacCormick and Raz, the first (Dworkin) has made his fortune by stressing his distance from and launching a formidable attack against the old master's views, while the last (Raz) has for a while hoisted the school's flag and has looked after the continuity of Oxford jurisprudence in the wake of the master's teachings. Raz nevertheless more recently leaves the law user's perspective out of the scope of legal philosophy and makes of it something irrelevant for the concept of law. Whether by doing so he has in fact been the most faithful of disciples could however be doubted.

So that — this is a central contention of mine in this paper— only the second of the three disciples above mentioned (Professor MacCormick) might perhaps be seen as the closest to the original inspiration of Hartian

legal philosophy. I contend that it is indeed Professor MacCormick that makes his own all four main tenets of Hart's research program and that he tries to keep up the promises the old master could not or would not fulfill to the end.

Two promises or claims are more or less explicitly made or raised through the all argument of Hart's *Concept of Law*.

(1) The first claim is that law— as we have already seen— to be understood and conceptualized should be dealt with from an “internal point of view”. Here we find the promise of a *hermeneutical* theory. Reporting and understanding, explanations by causal laws or by meaning and intention are judged to be distinct cognitive enterprise.

(2) Hart's second claim is that law is much more than a matter of commands and imperatives, of decision and sanctions. Here we have the promise of an *antiauthoritarian* conception. Within Hart's theoretical horizon there is more or less openly declared a commitment for a liberal view of law, where prescriptions and coercion are no longer the fundamental materials which legal experience is made of. Now, these two promises have remained unfulfilled. They are not kept to the end; they are given up by the English jurist. Eventually in his posthumous *Postscript* we find more than hints of a “change of heart”,⁴ especially as far as the centrality of the internal point of view is concerned.

As matter of fact in the inner development of Hart's theory— and much before that *Postscript*— the internal point of view gets on the one side moralized, so that it is converted into the perspective of those that approve of the legal order considered and feel more or less morally obliged to abide by its rules. In fact, the internal point of view is seen by Hart as sharing the values of the legal system in question. On the other side, such perspective is reserved to only a class of people within the legal order: legal officers and judges. Ordinary citizens, but also somehow lawyers in their capacity of advocates, are sent back to the external side of the law — where it is a matter of regularities, expectations of probabilities, and brute facts.

⁴ R. Dworkin, 'Hart and the Concepts of Law', 119 (2006) *Harvard Law Review Forum*, pp. 95-104, at p. 102.

The second, the anti-authoritarian promise too is not maintained to the end. It is true that Hart introduces into the system a kind of rules which are different from commands or sanctions imposing norms; it is true that he successfully repeals and confutes Hans Kelsen's idea of the sanction as a defining element of the legal provision. Indeed, a sanction is such if it is so defined through the indication of being a reaction to a previous rule violation. The rule is prior to the sanction and some evil or damage cannot become and qualify as sanction without a previous normative ascription. All this is sharply pointed out by Hart and afterwards backed and reinforced by MacCormick – who even argues that coercion is not a logical or necessary feature of law.⁵

However, when dealing with judicial deliberation, Hart has to concede that beyond the semantic core of rules legal reasoning ends up shifting into a fully discretionary decision. Decisionism somehow is Hart's answer to the question of rule following and application in hard cases. Once we enter — he says — the penumbral area of legal rules, and there is always a more or less wide one, there is very little to reason or to deliberate. Judicial decisionism thus is the last word for the practice of law.

This conclusion of course cannot but result unsatisfactory for a domain where actors are in search and struggle for one right answer. Against Hart's decisionism his three disciples react each in a different way. Dworkin tries to fill in the gap of discretion that Hart kept open through his "rights thesis" and by recourse to the notion of principles. In the law — he says — rights are claims to be right and there are not only rules to apply, but also principles. The latter by their logic are expansive and do not allow for empty spaces.

Joseph Raz acknowledges that legal reasoning is driven through principles and therefore is close to a moral practice. But then he insists on defending the legal positivistic view of a strict conceptual separation between law and morality. So that in the end he has to expel legal reasoning (which is irremediably morally tinged) from the "nature" of law. His thesis will be the following: it is true that legal reasoning is involved in

⁵ See N. MacCormick, *Legal Right and Social Democracy*, Oxford: Oxford University Press, 1982, chapter twelve.

moral deliberation, but legal reasoning is not relevant as far as the the definition of law is concerned. The legal philosopher in conceptualizing law and legal concepts is not at all bound or referred back to the lawyers' use of those notions. By doing so however such legal philosopher has to abandon Hart's central assumption according to which to define the concept of law one should consider how the law is used and practiced, that is, first of all, *legal reasoning*. It seems that a legal philosopher of the kind suggested by Raz would be, rather than following Hart's research program, a pre-Hartian scholar.

It is only professor MacCormick — this is my central thesis — that remains faithful to Hart's original methodology. In his first book *Legal Theory and Legal Reasoning*⁶ the Scottish scholar programmatically declares that “a theory of legal reasoning is required by a theory of law”.⁷ Here Hart's idea that the study of lawyers' use of the term “law” is central to the philosophical enterprise dealing with the concept of law is openly vindicated. Accordingly Professor MacCormick develops a theory of legal reasoning that is compatible with the Hartian research program. This book— writes MacCormick — “is something of a companion volume to H. L. A. Hart's classic *The Concept of Law*. The account it gives of legal reasoning is represented as being essentially Hartian, grounded in or at least fully compatible with Hart's legal-positivistic analysis of the concept of law”.⁸

In his important first monograph Professor MacCormick on the one hand defends the possibility and even the necessity of using deductive reasoning against sceptics and decisionists. “Despite recurrent denials by learned persons that law allows scope for deductive reasoning, or even for logic at all, this book — so writes MacCormick in a new foreword to his monograph — stands four-square for the idea that a form of of deductive reasoning is central to legal reasoning”.⁹ The relevance given to deductive structure of reasoning in MacCormick's reconstruction of legal reasoning corresponds to Hart's focusing to rules when discussing the concept of law. This is explicitly recognized by the Scots scholar himself: “The

⁶ Oxford: Oxford University Press, 1978.

⁷ N. MacCormick, *Legal Theory and Legal Reasoning*, Oxford: Oxford University Press, 2003 (revised edition), p. 229.

⁸ *Foreword*, in *ibidem*, p. xiv.

⁹ *Ibid.*, p. ix.

centrality of rule-based reasoning in this book matched the centrality of the 'union of primary and secondary rules' in Hart's jurisprudence".¹⁰ If there is a non-deductive part of lawyers reasoning, this in the end— it is said— will focus on the deductive part and will be intelligible by virtue of its relation to such part. On the other hand, nonetheless, he tries to integrate Dworkin's criticism of Hart's positivism within a theory of second order justification of judicial reasoning and a conception of external validation of legal reasoning sources.

So that it is to Neil MacCormick that we owe a serious attempt to keep Hart's unfulfilled promise of a non-decisionist concept of law without however giving up either the positivist separation between law and morality or the internal point of view. In fact, the centrality he gives to deductive reasoning allows seeing principles as not focal and overarching in the structure of legal reasoning, thereby limiting or controlling the entering of moral considerations into judicial deliberation.

In this respect I would also like to mention his thesis of the "imperative fallacy", outlined in an article of the early Seventies¹¹. Here his contention is that we not only have a descriptive or "naturalistic" fallacy (derivation of an "ought" from an "is"); we could also have an imperative fallacy, that is a logically unjustified jump we are confronted with whenever from a "shall" ("you shall shut the door", for instance) we believe to be able to infer a "ought" ("I ought to shut the door"). A command is a fact and a fact statement (that is, a statement that there is a command that so-and-so) cannot be the major premise for an "ought" or normative statement. I would like to stress that such thesis might contradict the "source thesis" or— in Dworkin's terminology— the "plain fact view", according to which the existence of a law (or of a legal obligation) could be fully justified in cognitive terms, through the reference to a particular "source" of law (a piece of legislation, for instance, or a concrete, specific judicial decision) without further specification or normative premises. On the other hand, the "plain fact view" which Dworkin ascribes to Hart is hardly consistent

¹⁰ *Ibid.*, p. xv.

¹¹ D. N. MacCormick, 'Legal Obligation and the Imperative Fallacy', in A W B Simpson (ed.), *Oxford Essays in Jurisprudence, Second Series*, Oxford: Oxford University Press, 1973, pp. 171-201.

with Hart's rejection of the *per genus et differentiam* definitions. By means of stressing of the possibility of an "imperative fallacy", MacCormick points out to a justificatory scheme which is indeed at variance with the positivistic obsession about "sources". Indeed, sources are thought of as something open to description — which is the argument the positivistic jurisprudent employs to reassess the distinction between law and morality as an ontological or logical incommensurability between the two.

Furthermore, Professor MacCormick picks up and develops also Hart's first promise: his legal epistemology centered around the "internal point of view". MacCormick first tries to avoid Hart's moralizing move by distinguishing a "volitional" from a "comprehending" internal point of view. "It will be noted — he writes — that what determines the 'internality' of a statement is the *understanding*, not the *will* of the speaker".¹² Here we face an ambiguity in Hart's explanation of the internal point of view. When considering the distinction between "internal" and "external" statements we cannot avoid the following question: "Is it a distinction between levels of understanding, or a distinction between degrees of volitional commitment"?¹³

Towards a concrete, historical legal system— MacCormick says— we could indeed assume an internal point of view and accordingly issue "internal statements" concerning the "internal point of view", without however taking a volitional commitment with regard to the considered system and law, that is, without having morally to identify ourselves with that system and law. There is actually an internal stance which is detached, merely cognitive. Being obliged by the system or accepting to be so is a different perspective: it is the normative point of view. However, this— says MacCormick— is the crucial attitude to assume in order to have "internal statements": without a normative internal point of view we could not have a cognitive internal perspective. The latter "is parasitic on— because it presupposes— the 'volitionally internal' point of view: the point of view of an agent, who in some degree and for reasons which seem good to him has a volitional commitment to observance of a given pattern of conduct as a standard for himself or for other people or for both: his

¹² Appendix, in MacCormick, *supra*, fn 7, p. 291.

¹³ Ibid.

attitude includes, but it is not included by, the 'cognitively internal' attitudes".¹⁴ This implies — I believe — that a sort of moral attitude is logically prior to the legally cognitive one: in a sense by affirming the priority of the "volitional" perspective MacCormick seems to establish a conceptual bridge between morality and law. His thesis here seems to amount to the following: (a) we could not have law without some group ascribing to it moral force; (b) we could not have a legal (detached) point of view without presupposing a much stronger normative commitment towards those very rules that we are going to understand and report. In short, it would seem that the thesis here is that law that "is" somehow depends on the law that "ought to be" — which might be considered a violation of the legal positivist neutrality principle. In a sense, what MacCormick is proposing by his distinction of a "volitional" and an "understanding" internal perspective and the additional view that "understanding" is parasitic on "volitional" is something which could be seen as closer to Dworkin's "rights thesis" — whereby stating a right implies a claim "to be right".

It might therefore be doubted that by his distinction MacCormick were able to overcome Hart's moralizing of the internal point of view. A way-out perhaps would be to reassess the volitional stance as a normative one (taking off its psychological and mentalistic undertones), to root it into a concrete practice (that for instance of giving and asking for reasons) switching into a pragmatist mood, and then to try to discriminate between a strong normative point of view (*grosso modo* equivalent to a strong volitional, moral perspective) and a weak normative attitude — which, though it implies a commitment to the relevant rules, would not moralize them, since they were here conceived as a part of an ontological and/or epistemological dimension, well distinguished from the ideality of the moral sphere and of the volitional upholding that such sphere demands. MacCormick seems to point out in this very direction when he makes a decisive move in his concept of law. He tries to reinterpret Hart's internal point of view in terms of a thesis about the facts of the law. He emphasizes that the internal point of view is possible within a specific area of experience, that is, when dealing with a special type of *facts*. So what we

¹⁴ *Ibid.*, p. 292.

need is an ontology of law considered as a special sort of fact which requires to be understood an appropriate perspective. Law is made of facts which are dealt with by internal statements. These special facts in the world are *institutional facts*. “If law exists at all, it exists not on the level of brute creation along with shoes and ships and sealing wax or for that matter cabbages, but rather along with kings and other paid officers of State on the plane of institutional facts”;¹⁵ this actually a statement not very far from the following, recently written down by Dworkin: “Legal systems are not natural kinds, like bismuth and centipedes, that have essences. They are social kinds”.¹⁶

In MacCormick’s words we find a clear reference to John Searle’s theory of “institutional facts” as distinct from “brute” ones, and as being so because of particular rules which some constitute or “institute” these fact. This represents a development of views held by J. L. Austin, the Oxford philosopher and a friend of Hart’s, who added to language and statements beyond the usual reality mirroring function more creative properties. Language is performative; it does not only mirrors, but also and mainly shapes and produces new states of affairs. Baptizing a ship, giving her a name in a ceremony, is not an ostensive operation, or a descriptive enterprise; it entails producing something new: an identity which was not there before. Now, Searle in a sense makes performatives impersonal, not too bound to a pragmatic context between an addresser and an addressee in a concrete specific individualized context. Performatives are thus reinterpreted as rules, but rules that not prescribe something which is independent from the rule, but rather rules that constitute objects and states of affairs that are not logically independent from the rules themselves. These are “constitutive rules” (as opposed to prescriptive or “regulative” ones). And constitutive rules introduce or produce “institutional facts”.

MacCormick prefers to use the notion of “institutive rules”. But by doing so — avoiding the idea of “constitutive rules” and introducing a tripartition of “institutive”, “consequential”, and “terminative” rules, — the Scottish

¹⁵ N. MacCormick, *Law as Institutional Fact*, Edinburgh: University of Edinburgh, 1973, p. 2.

¹⁶ Dworkin, *supra*, fn 4, p. 98.

scholar seems to narrow down the scope of institutional facts to legal concepts such as contracts, wills, trusts etc. Law is seen as an institution or as an institutional fact — this is step forward from Hart's yet undeveloped ontology of rules and hermeneutics of points of views. However, what an institution amounts to remains a trifle too underdetermined.

MacCormick's first use of institution as a notion for legal theory is to point out a special existential dimension of law that cannot be fully referred to the empirical world. There are more things in human experience and in law than just inert objects or merely empirical states of affairs. (i) In this sense "institution" is used as an equivalent to institutional fact. But immediately after having introduced this notion MacCormick refers it mainly to *legal concepts*.

Institutional facts would be an appropriate description for a concept like contract, so that in the end the former are reshaped in terms of (ii) a device to render rule application easier and more efficient: a technique of presentation, a presentational tool of materials which on principle could be manipulated under a different description, one by one, rule by rule, provision by provision. They are more less what the German doctrine would call *Rechtsinstitute*. But — and I refer here just to the argumentative line taken in MacCormick's seminal inaugural lecture *Law as Institutional Fact* — (iii) an institution is also said to be a social collective entity, a social group, a contextual community. Here MacCormick seems to use "institution" in a sense closer to the one adopted by traditional legal institutionalism, by scholars such as Maurice Hauriou and Santi Romano. We are then confronted with a further turn in his use of that notion; (iv) Institution is said to be something which has to do with the "institutionalized" or the "organized".¹⁷ "Institutional" here is opposed to "informal",¹⁸ and it is a dimension where there are different layers of norms and people or officials are appointed to make the rules be followed and to check their correct application. In this further sense an "institution" *grosso modo* is equivalent to the developed normative system singled out by Hart: a system where there are rules and meta-rules; and where meta-rules

¹⁷ See for instance N. MacCormick, *Questioning Sovereignty*, Oxford: Oxford University Press, 1999, p. 7.

¹⁸ See N. MacCormick, *Rhetoric and the Rule of Law*, Oxford: Oxford University Press, 2005, p. 4.

are not *prima facie* prescribing patterns of conduct but are meant to ascribe powers about the first order, “primary” provisions. In this sense, we could not have an institution without people charged or “officers” appointed to ascertain when and what is the rule to be applied to a certain case and to redress deviant behavior.¹⁹ Adjudication in short would be the “threshold” beyond which we shall find law as a proper “institution”.

All these four declinations of the notion of “institution” can be found in the manifesto of MacCormick’s institutionalism: his inaugural lecture held in Edinburgh in 1973. What is a little disconcerting for a reflection whose title is *Law as Institutional Fact* is that in its conclusion the philosophical declination of “institution” (that is, Searle’s proposal of an “institutional fact”) is dismissed and only its sociological use is fully admitted. Institutional facts are seen as too narrowly defined to allow for standards other than rules to be operative within the scope they would be called to cover in law. MacCormick is sympathetic with Dworkin’s vindication of rights and principles as important bricks, or better pillars, in the walls of law. The law has a purposive side that rules cannot fully express and implement: principles are inescapable in legal practice and in the definition of law. MacCormick in this respect is much less sceptical than Raz and than Hart himself, at least as the latter’s views are expressed in his posthumous *Postscript to the Concept of Law*.²⁰

Rules do not fully govern their own application. This is said by Wittgenstein, argued by Hart, and reinterpreted by MacCormick—who however does not extract from such statement a skeptic conclusion in Hart’s vein. “We cannot — says the Scottish scholar — be sure that the conditions of validity which we state as necessary are unquestionably necessary in every case, so we cannot be certain that for every case they are sufficient”.²¹ To complement the open texture of rules’ semantic contents we could/should recur to principles. If this is so, the conclusion will be that “institutive rules of institutions should be taken only as setting the conditions which are ordinarily necessary and presumptively sufficient to

¹⁹ See N. MacCormick, *Institutions of Law*, Oxford: Oxford University Press, 2007, chapter one.

²⁰ See H. L. A. Hart, *The Concept of Law*, Second edition, with a Postscript edited by P. A. Bullock and J. Raz, Clarendon, Oxford: Oxford University Press, 1994, pp. 238 ff.

²¹ See MacCormick, *supra*, fn 15, p. 24.

the existence or valid creation of a specific instance of the institution".²² Such flexibility (or defeasibility) of law and legal concepts depends upon among other reasons the elaboration of arguments of principles and policy. Legal rules' meaning is not to be exhausted in their semantic content: they have a "point"—which is to be recognized and traced back to make sense of their application. Rights for instance rest upon interests (MacCormick is a notorious opponent of the will theory)²³ and these are external to the rules semantics, but should nevertheless be taken into account to assess the rights' purport and justification. But if this is so, if the rules' semantics does not offer a full paradigm of their application, then — this is MacCormick's conclusion — "the concept of law cannot be tied down to being simply an institutional concept in the philosophical sense, covering simply the criteria of validity and the rules valid in terms of them".²⁴

This is a very important conclusion and one which opens up to further possible development for the concept of law. On the one hand one could try to give to the philosophical notion of institution, Searle's "institutional fact", a clearer pragmatic turn. Institutional facts would then be defined not through their constitutive rules only, but also and mainly through the concrete actions made possible through those rules. An institution would thus be a practice, a series of conducts, not just an ideal object or state of affairs produced by fiat through special semantic contents. Or, following Searle's suggestion, the object would be "just the continuous possibility of the activity".²⁵ A better definition of an institution might thus be the following: an institution is a scope of action made possible through constitutive rules, whenever this scope of action is actually "exploited" through actual conducts. In this way it would also be possible to avoid the usual vicious circle that afflicts many definitions of "institutions" whereby an "institution" is said to be at the same time a system of rules and the product of these very rules.

MacCormick's conclusion about the open texture of institutions and "institutional facts" make also possible a further move. Rules and

²² *Ibid.*, p. 28.

²³ MacCormick, *supra*, fn 5, chapter eight.

²⁴ *Ibid.*

²⁵ J. R. Searle, *The Construction of Social Reality*, Harmondsworth: Penguin, 1996, p. 36.

institutions need a practice to precise their range and sense of application. But what kind of practice is this? It is clearly a *meaningful* and *judgmental* practice, a series of conducts driven through the contents of rules, but also through their “point” and the underlying “interests” and values. “Norms—Professor MacCormick reminds us—involve judgments”.²⁶ And “normative judgments and deliberations do not relate to or presuppose or derive from single isolated norms. Rather they depend on some larger conception of normative order”.²⁷ The “institution” is not just a norm, or just a “habit”, Wittgenstein’s *Gepflogenheit*. This being a normative situation, a space where conducts are taken because they are opened up by rules, we cannot do without posing the question of justification.

The problem is seen by Wittgenstein, which refers to the “form of life” within the institution that is valid and “exploited” as a justificatory background. However, this not yet the bedrock; a “form of life” is not blind to the game of giving and asking for reasons. True, there are institutional theories which stop here, and recommend us a closed communitarian narrative. This may perhaps be the case of traditional legal institutionalism. This cannot however be the case of a legal theory that follows Wittgenstein’s steps and is open to the question of the “point” of the law. Wittgenstein goes beyond the *Lebensform* and adds to the rule its *Witz*, its “point” (see for instance *Philosophische Untersuchungen*, 564 and 567), so that there might be room for an underlying principled discourse. Something similar does MacCormick, when he stresses that to issue a normative judgment “some larger conception of normative order” is needed. He then adds that a normative order first is something which “ought to be”—a paradigm “about the way things ought to be and ought to go on”—and only afterwards it is facticity, as a matter of the world as it is. But here—I would say—we take a path well beyond any “plain fact view” or any “source theory”, and we are given a chance to refer (and reassess) institutional facts (and law) against a justification background.



²⁶ MacCormick, *supra*, fn 17, p. 7.

²⁷ *Ibid.*, p. 3.



Juridification from Below: The Dynamics of MacCormick's Institutional Theory of Law

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Law is institutional normative order
Neil MacCormick, (IoL¹, p. 1)

Human beings are norm-users, whose interactions with each other depend on mutually recognizable patterns that can be articulated in terms of right versus wrong conduct, or what one ought to do in a certain setting. Understanding this use of norms presides understanding any possibility of deliberately creating relevant norms that are to become patterns of behaviour. Yet deliberate creation of norms occurs. Norm usage can acquire a more formal character, indeed can become institutionalized. To understand this is to understand the transition into institutional normative order, and thus law.

Neil MacCormick, (IoL, p. 20)

Law as institutional normative order thus come to be a complex and systematic whole.
Neil MacCormick, (IoL, p. 304)

Any theory of law should ideally include some kind of idea about juridification, although not necessarily using that name. The question I will ask is if and in what way Neil MacCormick's institutional theory of law

¹ IoL refers to Neil D. MacCormick, *Institutions of Law, An Essay on Legal Theory*, Oxford: Oxford University Press, 2007.

includes an idea about juridification. In order to answer this I will proceed as follows: First, a concept of juridification is needed, second a basic idea about MacCormick's institutional theory of law, and third a more detailed account of juridification relative to MacCormick's theory. I will concentrate on MacCormick's concept of law in order to answer questions like: what makes juridification possible in the first place? (presuppositions, human ontology); what drives processes of juridification? (dynamics); and possibly why juridification is accepted? (legitimacy, justification). These are big questions of course and we cannot expect to give justice to MacCormick's entire lifelong work. I will concentrate on his book, "Institutions of Law" (IoL), that is his latest and most comprehensive version of his institutional theory of law. Even more specifically I will focus on the transition from normative order to institutional normative order (IoL, Chapter 1 and 2). This will be my main reference in what follows. The strategy will be one of comparing MacCormick's concept of law with an account of juridification developed elsewhere². In the process I hope to identify mechanisms³ through which juridification can be understood; and maybe indicate an answer to the difficult of questions; what are the limits to juridification?

I. THE CONCEPT OF JURIDIFICATION

The concept of juridification proposed here, originally developed in collaboration with Anders Molander, takes as its point of departure what may be considered five basic elements of law.⁴ First, law involve authoritative institutions. This means identifiable institutions made up of

² Lars C. Blichner and Anders. Molander, 'Mapping Juridification', 14 (2008) *European Law Journal*, pp. 36-54.

³ See Jon Elster, 'A Plea for Mechanisms', in Peter Hedström and Richard Swedberg (eds.), *Social Mechanisms: An Analytical Approach to Social Theory*, Cambridge: Cambridge University Press, 1998, pp. 43-75; and *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences*, Cambridge: Cambridge University Press, 2007, especially at p. 32.

⁴ These again loosely build on four more basic criteria of law: 1. Law should be able to guide human conduct. 2. A claim to correctness in the weak sense that every decision made by the legal system should be backed by reason. 3. The fulfillment of the basic rule of law criteria. 4. Law should be backed by morally acceptable reasons, meaning reasons that people in general may accept as moral even though they may not agree that these reasons should have any bearing on a given actionable conclusion.

identifiable people with a limited competence to make decisions on behalf of those that the law concerns. Institutional procedures concerning decision-making and the limitations on what an authoritative institution may do are governed by rules and principles and the same goes for changes in the authority's competence. Second, law involves norms. These norms should be such that they can guide human conduct. In order to do this they have to conform to the most basic rule of law criteria, meaning that norms have to be general and relatively clear, promulgated, non retroactive, relatively stable, possible to follow and not contradictory⁵. Third, law involves an equal opportunity for all subjects under law, to appeal to law, and law also involves deciding who is right and who is wrong whenever someone believes the law has been violated and makes an appeal to law. Fourth, law involves interpretation. Part of the limited competence of the institutionalized authority is competence to interpret the law. This gives the institutionalized authority power. This power is limited in that interpretation is itself governed by rules and principles. Sometimes that involves interpreting or changing, or even inventing new rules and principles governing interpretation.⁶ Fifth, law involves a tendency among strangers to understand self and others, and the relationship between self and others, in view of a common legal order.

All these five elements may be seen as preconditions for any legal system. Our contention in developing a concept of juridification, however, is that we need a way, not only to establish the presence or absence of these elements, but also their relative degree of dominance. According to one formulation the term juridification may be seen as capturing the process "whereby areas of social and economic life become subject to systematic control through legislation, the application of legislation by state agencies and the adjudication of outcomes through the judicial process and the

⁵ See Lon L. Fuller, *The Morality of Law*, New Haven and London: Yale University Press, 1964.

⁶ Basically, the more radical the interpretation the stricter the demand that the rule of law situation should be improved, meaning that after the interpretation there should be less room for criticism based on the rule of law than before. Based on the premises that the rule of law is an essentially contested concept and that it is never fully satisfied, all we can ask is that the interpretation be reasonably defended with reference to the rule of law. Thus the rule of law serves as a weak critical standard in the sense that some interpretations are excluded, but more than one may be acceptable.

courts”.⁷ What we have proposed is five dimensions of juridification that may capture this development in more detail:

First, constitutive juridification (A) is a process where norms constitutive of a political order are established or changed to the effect of adding to the competencies of the legal system. Second, juridification (B) is a process through which law come to regulate an increasing number of different activities or regulate these in greater detail. Third, juridification (C) is a process whereby conflicts increasingly are being solved with reference to law. Fourth, juridification (D) is a process by which the legal system and the legal profession get more power (as contrasted with formal authority), due to indeterminacy and lack of transparency in law. Finally, juridification as legal framing (E) is the process by which people increasingly tend to think of themselves and others as subjects under law, sometimes at the expense of other identities. Juridification, as we understand it, takes place within a legal order or a legal order in the making, be it at a national, international or supranational level. It is a process in the sense that something increases over time. If the process is reversed we speak of dejuridification.

We have made two propositions on the relationship between the different dimensions of juridification: First, the different dimensions of juridification are not necessarily linked, meaning that a link has to be substantiated empirically. We argue that, although it is almost inconceivable to imagine a society based on law where some juridification have not taken place on all five dimensions, they are distinct in the sense that one type of juridification may gather speed, halt or be turned around without a parallel effect on the others. Second, the relationships between the different dimensions of juridification may be linked in any which way, positively or negatively, meaning that any model has to be substantiated empirically. The problem with this of course, if even only loosely accurate, is that we may come up

⁷ Cf S. Wilks, ‘Markets and law: Competition policy and the juridification of the economic sphere’, Paper presented at the Society for the Advancement of Socio-Economics (SASE) Conference, George Washington University, Washington DC, 8 July 2004, on file with the author.

with hundreds of models that all give different accounts of the process of juridification.

In normative terms the conclusion was that even if a level of juridification on all five dimensions seems warranted for any system of law, juridification carried too far may move the very same political order towards total legal domination: “At a certain level juridification may in deed turn ugly as Günter Teubner claims. Saying that too little is as bad as too much, is not exactly a ground-breaking statement, but we may at least postulate a breaking point, or maybe rather a breaking zone, that a society enters at a certain level of juridification. Such a zone may be seen as delimited by a point beyond which the benefits of further juridification is questionable and a further point where juridification is carried so far that the effects are clearly detrimental from the point of view of the rule of law, democracy or civil society..

At the same time it is difficult, based on our conceptualization, to establish an ideal model of juridification. The closest we can get at this stage is to argue that the dimensions of juridification defined here will have to balance each other off. We can establish some rules of thumb, some “stop and think” signs of the type; if juridification B without juridification C something is wrong; or if juridification D without juridification A+B something is dead wrong; or juridification ABCD without juridification E, of which the EU legal system may be seen as an example, something has to change or something is going to break, to use but a few possible examples.

We argue then that different dimensions of juridification will have to develop hand in hand, but this alone is not sufficient. There is not only a tension between the different dimensions of juridification, but also an inner tension within each. The logical endpoint of juridification A for example, is a society run by the judiciary. At some point in moving towards such circumstances, the existing self understanding and legitimacy base of the legal system would be undermined. In the same way juridification B carried to far would undermine the very freedoms law is supposed to protect. Juridification C may in the end internalize moral, ethical and instrumental concerns to a degree where the responsibility for solving political disputes becomes indistinguishable from the application of law. With juridification D, the legal system is dependent on a the continued construction of a relatively coherent working legal order, a coherence that

will be increasingly difficult to sustain as the scope of interpretation and the degree of complexity increases, not least with the development of international law. Finally, juridification E may proceed at the expense of or subsuming other conceptions of self and others, conceptions which the status as a legal person presupposes and is meant to protect.”

A note on this account of juridification is in order. It was originally meant to cover what MacCormick would refer to as the legal order of the constitutional democratic state and different legal orders developed in cooperation between these states, like for example the EU legal order. That opens up for questions relating to the status of this concept of juridification relative to the pluralism of normative- and institutional normative orders that MacCormick’s legal theory presupposes. So one question that this essay may help to answer is if this concept of juridification may find more general use even relating to the most minimal normative and institutional normative orders. Before going into that in more detail I would like to start by giving an all too brief outline of some of what I take to be the relevant building blocks of MacCormick’s institutional theory of law necessary to understand the following discussion.

II. MACCORMICK’S LEGAL THEORY, LEGAL PLURALISM AND THE LIMITS OF LAW: SOME PRELIMINARY REMARKS.

It may seem unfair in a way to evaluate MacCormick’s concept of law relative to a concept of juridification that MacCormick, has not used himself. My defence is that MacCormick’s concept of law is intimately linked to his institutional theory of law, and that an account of juridification ideally should be included in any comprehensive theory of law. To examine law in terms of processes of juridification and dejuridification as understood here, points to questions relating to the limits of law as well as to the dynamic development of law.

MacCormick defines law as institutional normative order. The institutional normative order that he concentrates on throughout his book (IoL) is the constitutional democratic state. He starts out however by explaining

(laying out) how this constitutional legal order can exist and how it is institutionalised. With a fair amount of simplification the explanatory exercise has three identifiable levels. First, normative order; second, institutional normative order; and third, the modern constitutional state or “law-state” (IoL: 35) that is the most comprehensive institutional normative order currently existing. One may loosely say that these are three levels of juridification.

Different orders, at each level of juridification, according to MacCormick, may exist and develop in parallel. The first level is made up of pre legal normative orders, the second, any, even the most minimal “legal” order, and the third the specific legal orders of the modern constitutional state, marked most importantly, relative to the second level, by a fully realized separation of powers doctrine. The first two levels are the most basic and the ones I will concentrate on. According to MacCormick it is the institutionalization of “norm-usage” that is essential in understanding the transition from normative order “into institutional normative order, and thus law” (IoL: 20). This transition is exemplified by the practice of queuing.⁸ If our concept of juridification is compatible with MacCormick’s concept of law it should be possible to reconstruct at least parts of MacCormick’s argument concerning these levels by way of our five dimensions of juridification.

MacCormick’s point of departure then, is a pre legal social order, a normative order. It may be called pre legal because of its importance to MacCormick’s concept of law. It is something that precedes an institutional normative order. Without pre-legal social order a legal order would not be possible. I interpret this in two ways:

⁸ Queuing as normative order is without any institutional guidance except from the norms of queuing past on from one individual to the next and that is activated whenever a particular individual encounter an other individual in a situation that, according to the norms, calls for queuing up. Roughly speaking this normative order becomes institutionalized when someone else than the queuing individuals impose some form of order on the queue, that be in the form of a manager of the queue, the putting up of a fence or a machine giving out numbers. This institutional normative order can develop into a fairly complex set of rules and the need for interpretation of these rules. I will return to this in more detail.

First, that MacCormick argues that normative order serves as confirmation that human beings are capable of guiding their conduct by way of norms and moreover that this is an inherent part of being human. This ontological point of departure is essential for the establishment of any legal order and for juridification. “Humans are by nature norm-users.” (IoL, 245)⁹, meaning that they are capable of differentiating between what ought not and what may be done. The question is if this human potential may be filled with whatever substantial content.

Thus, second, it may be argued that it is not only this human quality that matters, but that legal orders in addition build directly on already developed normative orders in a more substantial way, as the queuing example seems to indicate. The legal order, on this reading, is an institutionalized continuation of a normative order (or normative orders) that is/are already present in any society. This, in a broad sense cultural quality (as in everything from queuing cultures to human rights cultures), whether driven by instrumental, ethical or moral concerns, is essential for any legal order and for juridification; “in the final analysis the formal rests on informal, customary foundation.” (IoL, p. 304).

These two ideas are of course compatible; we can hold both views without contradiction.¹⁰ The real question is if it is possible to build legal order without the substantial support of existing normative order. Or in more relative terms, how much substance is needed for law to properly fulfil its function, be it civility, social peace, justice or the common good, or all of these (See IoL, 216, 221,304)?

According to MacCormick law is institutional normative order as opposed to normative order. To say that it is institutional merely refers to one

⁹ This is close to Lon Fullers view that: “To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.” See Fuller, *supra*, fn 5, p.162.

¹⁰ It is even possible to see it as continuum, where “norm-user” skill may be filled with ever more specified substantial content.

particular type of institutionalization¹¹; institutionalization that establish legal order or refine this legal order. In the limited vocabulary of this essay that would mean juridification. At a given time, in a given society, if I have understood MacCormick right, there are always different existing normative orders and different institutional normative orders, and these may interact in different ways. MacCormick's concept of law, then, seems at first sight almost limitless as "legal orders" (institutional normative orders) may pop up anywhere and exist independent of any state authority. On closer inspection however this pluralism certainly has its limits.

First, laws ubiquity points to a particularistic or contextual quality of law. Law may be used to create order in a host of different and possibly unrelated social circumstances. Still, it is but one of many ways to create social order (the alternatives count everything from pure force to uncontroversial everyday social norms). The question then is when law may or should be used and when it may not or should not be used. The answer points towards some external normative criteria like effective social integration, democracy, justice or quite simply order as a quality in it self. From the norm-user perspective this means that the norm-users have to accept these criteria.

Second, if the concept of law may be used in widely different circumstances and still be called law it means there is a universal quality to law. What are the elements that have to be present in any social circumstance in order to call something law? The answer points towards some particular internal institutional qualities of law like for example consistency, non-contradiction or clarity. From the norm-users perspective these are qualities that any norm-user would have to accept while still being a norm-user.

Third, there is a dynamic quality to law as legal orders may develop in response to different demands to social integration. Legal orders differ in their sophistication from the most simple local to the most complex modern state law. Thus there is a limit to law as any stability is only

¹¹ This is one particular type of institutionalization relative to the many different concepts of institutionalization currently existing in the social science literature.

temporary. Law may always be challenged and if it can not be challenged, it is not law. From the norm-user perspective norms are always up for grabs; an institutional normative order is never perfect.

Fourth, there is an argumentative quality to law linked to reason giving, what MacCormick calls “the intrinsic arguability of law” (IoL, 260). Any decision have to be given with reference to reason even if this reason is not always perfect “even from the perspective of the engaged legal reasoner” (IoL 260). This relates to Alexy’s “claim to correctness” argument. Thus there is a limit to law as for example “extreme injustice is incompatible with law” (cf note 22, IoL 260). From the norm-users perspective law that can not be reasonably defended in public is not law.

Finally, there is a placid quality to law. If different legal orders exist side by side and these sometimes overlap or infringe on each other one may ask in what way do, can or should one legal order limit an other legal order? This means that questions linked to the contextual-, the universal-, the dynamic-, and the argumentative quality of law; has to be restated at the level of a plurality of legal orders. There is however a lower limit as only institutional normative order is legal order, and an upper limit as the total domination by one legal order effectively undermines any plurality, be it of normative or institutional normative order. Law is limited in the sense that when met by another institutional normative order it has to reason to the satisfaction of norm-users.

All in all MacCormick’s legal theory points towards a democratic quality of law through his emphasis on the norm-users. This does not mean that wherever there is law there is also democracy. Law is democratic in the minimal sense that if a legal order is not generally accepted by the norm-users it can not properly be called law, (but has to be called something else like for example a coercive order).¹² Law is limited in the sense that if norm-users do not freely accept and internalise a particular legal order, law

¹² In a democracy most would contend that law is accepted because it is democratically made, but in this case the democratic element is not an intrinsic part of law only what makes law democratic. This in contrast to MacCormick’s norm-user perspective that can be seen to give law an intrinsic democratic quality, although a limited one.

will not prevail. If the majority of norm-users are would be criminals there is no law.

III. NORMATIVE ORDER AND JURIDIFICATION

Is it at all possible to identify the different dimensions of juridification in MacCormick's work and can it help us understand the dynamics involved and possibly the limits of juridification? The first test is if the five dimensions of juridification proposed may also in some way capture what MacCormick calls "informal normative practices" or "normative order", the starting point or background for any form of juridification. If MacCormick is right in claiming that any legal order has its roots in the pre legal idea of human beings as norm-users, and that the development of a legal order, from normative order to institutional normative order, may be called juridification, then it might be possible to identify the presence or the lack thereof of the five dimensions of juridification even at the pre-legal level.

As indicated, in order to clarify what he means by normative order MacCormick use the practice of queuing as an example. What we need in order to understand something, like queuing as a normative order, is how people come to act in roughly similar ways. At least three "positive" mechanisms seem to be working in combination, and one "negative". First, an "underlying guiding idea" (IoL: 18), a kind of constituting principle like for example "first come, first served", as in the case of queuing. People interpret this underlying idea in roughly similar fashion although with variations depending on context and other more particular considerations (IoL: 15,17). The interpretations are potentially contestable and no uniquely right answer exist (IoL: 16,18). Second, mimicking behaviour, as when "we all try to pick up local nuances when we move around" (IoL:17). When in doubt people do what others do. Third, a normative belief that acting in this or that way is the right thing to do for various reasons. This is the idea of overlapping consensus (IoL:18), people may have different reasons for acting the way they do, but these are all strong reasons, be it justice, fairness, respect for a particular culture, even efficiency in the "what is most efficient for all" sense, and so on. Fourth, an idea of choice,

that people may break with the normative order at their own free will, jump the queue, with no justifiable reason (IoL:14), and without more serious repercussions than the contempt of others. The normative order is a voluntary practise. Is there a parallel between the dimensions of juridification and such a normative order?

First, no doubt an important part of a normative order are norms. These may be more or less specified, as in juridification B, and one may even draw the parallel that sometimes a particular normative order conquers new terrain as when the practise of queuing spread across different sectors of society, or new normative orders emerge. One way to measure the different cultural queuing codes would be to measure the specification of the queuing rules and how far throughout society it has spread, or more generally to what extent a particular society is guided by normative orders. That the norms are specific, however, would not necessarily mean that they are common to all although MacCormick seems to believe, as indicated, that a common base norm is a necessary focus point for any normative order.¹³ How does this interpretation square with one of MacCormick's main points that "there can be normative order without explicitly formulated norms" (IoL:18). Well, on the other hand he argues that this "does not mean we cannot reflect on how to make explicit an implicit norm of conduct" (IoL: 15). Thus it seems reasonable to conclude that norms may be made more or less explicit, while still holding on to the idea of a normative order.

Second, neither can there be any doubt that references to the normative order are used in an effort to solve conflicts, as in juridification C. Even this may vary across time and between different cultures. In some circumstances it is quite normal to complain when someone is jumping the queue while in others less so.

Third, human beings may to a greater or lesser extent believe in a particular normative order like queuing. They may identify with, value, and

¹³ This is similar to Dworkin's distinction between concept and conception. People may have a common concept of queuing, for example "first come first served", but different conceptions of it. Ronald Dworkin, *Law's Empire*, London: Fontana, 1986, at p. 71.

see themselves as subjects under the normative order, as in juridification E, not only as benefiting something by adapting or risking something by not adapting.

What then about the competency to decide what the normative order is in case of conflict (A), or the interpretive power that follows from ambiguous, confusing or simply too many and complex norms (D). Following MacCormick, these elements of juridification, that in a legal order are formally institutionalized, are in a normative order distributed equally among individuals. When MacCormick speaks of a normative order he seems to speak of this as a flat structure where every human being has the same right and presumably the same power to interpret the normative order and act on their own understanding of it. There is a pressure to adapt by way of social sanctions, but everyone has the same right to interpret what these sanctions are and how to apply them. Still, staying within MacCormick's frame of reference, one may speculate that even within a normative order some would have a greater say on what the proper conduct in a particular situation should be and when the relevant norms should be activated. Newcomers would for example look to the more experienced for guidance, or there might exist some cultural codes regulating who to look to for guidance, without this amounting to anything like a formally institutionalised structure. This means that it may be possible to identify some minimum level of juridification A and D in a normative order, in the sense that there may be some general norms guiding where to look for guidance when in doubt (A), and some people with more clout than others when interpreting what the norms are (D).

So this seems to be MacCormick's main point in focusing on normative order: That human beings are capable of ordering their life in order to avoid or solve conflict (C) based on (more or less) implicit norms (B), anchored in beliefs that abiding by the normative order is right (E), and without the guidance of any other formal deciding or interpreting authority than their own, but possibly inspired or influenced by some form of informal authorities (A, D). The main emphasis, however, is on juridification C and E. This is what makes a normative order normative and in a double sense. The normative order guide people to do certain things and avoid others in practical instrumental terms because it helps to avoid or solve conflicts (C) and at the same time because it is the right

thing to do so that people identify with the normative order (E). Juridification C and E can then be seen as the normative dimension of juridification in terms of MacCormick's concept of law, "law as institutional normative order", in the sense that only these two dimensions of juridification may be developed to their fullest potential while still staying within a normative order. As indicated this may also amount to what would by some be considered excessive juridification C and E. From the point of view of law one may for example consider queuing up for the sake of queuing up (in the sense that queuing up has minimal or no effects on normative standards such as efficiency or justice) excessive juridification E. The reason why people queue up then would be because it is a cultural practise that people cherish, not because it has any practical significance other than avoiding conflict that might arise as a result of conceived disrespect for this cultural code.

Some normative orders work better than others and a normative order may disappear all together. Thus we may at least presume that there are processes of "juridification" and "dejuridification" going on even at this level. It is difficult, however, to understand what drives these processes. Normative order seems to have a practical instrumental side (serves a function) to it as well as an ethical or moral and both are needed in order for something to be counted as a normative order. The last man standing when a queue dissolves may be ridiculed because his action have no practical effect, but he will be the hero of all those that believe queuing up is the right thing to do, maybe even among those that have given up their ideals for pragmatic reasons. Still one man is not a queue. What we have is normative, but not order. Likewise those that queue up, not because it is the right thing to do, but rather to get at what they want or avoid an embarrassment, do not really form a queue in the sense of a normative order. It is order, but not normative order.

What we have then in terms of juridification are people who try to solve some practical problems with reference to a normative order (C), a normative order that they attach value to and subject themselves to (E), because they believe it to be the solution that is equally best for all considered equal. Juridification C and E mutually reinforce each other. The importance of the normative order seems to be this: People act in an orderly fashion based on an idea of what is the right thing to do, in order

to fulfil some function, even in the absence of explicit norms, authority or coercion.

Why then would a normative order need institutionalization as indicated in the queuing example or alternatively why can we not solve all our social problems by way of normative orders? Why do institutional normative orders develop? Why further juridification? To begin with two reasons may be indicated. First, we fail to solve conflicts because there is disagreement over interpretation of norms. Juridification B has not developed very far. Second, there is disagreement over who should be in charge and who should interpret the norms. Juridification A and D have not developed very far.

IV. INSTITUTIONAL NORMATIVE ORDER AND JURIDIFICATION

When moving from a normative order to an institutional¹⁴ normative order MacCormick emphasizes two institutional traits, the formulation of common and explicit norms, and the establishment of some form of limited institutionalized authority to keep track of and uphold these norms and to interpret them in case of conflict. The first of these is linked to juridification B, the second to juridification A and D. Thus the elements of juridification that in a normative order are weak or left out, in an institutional normative order, play centre stage; it is what makes the institutional normative order institutional. We now have all the elements

¹⁴ Maccormick concept of institution contains both a normative and a practical element, in that it refers to a practice that is in some way “infused with value”, to paraphrase Philip Selznick (the phrase was coined in his *Leadership in Administration*, Evanston: Row, Peterson 1957). A distinction is also made between formal and informal institutions, based on the presence or not of stable explicit authoritative norms. Normative order is informal institutions and institutional normative orders are formal institutions. Finally, a distinction between institutions as organizations or not, is made. A court is an institution and an organization governed by explicit norms. A contract on the other hand is not an organization, but it is still an institution because it is governed by explicit and authoritative norms.

we need in order to build a legal system. But how does this happen? What is it that triggers this process and what keeps it going?

MacCormick provides a strait forward answer to at least the first part of this question:

“The defining characteristic of this kind of normative order is the possibility it opens to avoid exclusive reliance on somewhat vague implicit norms. Problems of a kind apparently endemic in informal orders can be avoided by resorting to issuance of expressly articulated norms, making explicit what is to be done or decided in expressly foreseen circumstances, the very effect of the explicitness being to diminish vagueness.” (IoL:24)

So the defining characteristic is the issuance of explicit norms, that is juridification B, the specification of first tier norms. Still, someone have to issue these norms and interpret what they mean in concrete situations. We have seen that even in a normative order there are room for some specification of norms. What is principally new in the institutional normative order is an authority, an authority that is itself limited by norms; that is second tier norms. The hallmark of an institutional normative order then is an established authority. It is an authority in the sense that it may construct the norms, interpret the norms, administer and punish disobedience. Moreover, and more importantly, it has a right to do all this. Now, what is it that makes it possible to establish this authority? Where do the second tier norms come from? What is it that drives the process of juridification A. Why do people generally queue up when told to queue up by someone in charge? Why do people let themselves be ordered around? In order to possibly understand the dynamics involved in the transformation from normative order to institutional normative order one place to start may be to ask why the new system is accepted if it is to be based on something else than coercion.

There does not seem to be any obvious answer to this question if we presume, as I will for the sake of argument, that there is not already a higher or stronger institutional normative order, so to speak, that provide this authority for the weak institutional normative orders (for example a managed queue based on legally enforced property rights).

1. The point of view of authorities

The first answer would be that authority stems from the quality of the institutional setup identified as authoritative (juridification A). The basic point about juridification A is that an institution is given a limited amount of competence, thus there has to be norms guiding where authority begins and where it stops. How does MacCormick account for that? The authority seems to be taken more or less for granted. It comes into being equipped with at least some second tier norms to guide its decision-making activity. The authority applies and lay down norms in order to make norms more explicit “for a certain bounded sphere of activity” (IoL:25). Even though queuing norms are now “explicitly laid down by those in charge of providing the service on offer” (IoL:21), the institutional composition of this authority is not described in much detail. We have to rely on formulations like this:

“The position held by marshal or manager is almost certainly itself an expressly created job, perhaps with a formal job description set up within an organization with a quite elaborate structure of interrelated roles or jobs and with employees appointed to carry them out. In such context there is clearly what we may call “institutional normative order”, not merely informal normative order, with informal institutions.”

Thus the authority does not seem to get its authority from any external source. It presumably has the right to manage a queue whenever this right has been activated. Thus, even though it seems that juridification A is presupposed, or leads to juridification B, it is not easy to figure out where juridification A comes from.

2. The norm-formulator point of view

A second alternative then is that the authority is based on juridification B, meaning that the authority in charge gets its authority from the quality of the first tier norms, a quality that again depends on the second tier norms. This seems more promising since most of MacCormick’s second chapter deals with the explicitness of norms. In this interpretation it is the

specification of first tier norms that first leads to the establishment of an authority and to the further development of this authority by the development of second tier norms to limit or expand its competence. That is $B \rightarrow A$. The creation of order in many circumstances depends on explicit first tier norms; somebody have to see to it that norms are made explicit; this somebody needs authority, so authority is given to somebody that by definition follow some basic second tier norms. If this is so, how can the quality of first and second tier norms be assessed?

One test would be to see if the norms set out conform to the norms of the preceding normative order or have a similar source, like efficiency concerns or concerns of justice. Then we have to interpret MacCormick to the effect that norm-users relate to the substance of this preceding normative order. Since there are more than one interpretations of the preceding normative order, we have to presume that people would be content with a range of different possible interpretations as long as it may be understood to belong to the category of, lets say queuing. The norms will then be acceptable to the degree that they do not break with the informal institution of queuing. The authority would for example get in trouble if it moves people in and out of the queue based on how much money they are willing to pay. Still, this does not seem to be MacCormick's position. In commenting on various formalized queuing practises he argues; "attitudes to queuing may be far removed from those of mutual voluntary cooperation" even though he adds "though perhaps never quite excluding every trace of this" (IoL:22). In order to get at this position a more promising start would be to try to understand what is meant by the explicitness of norms. Three candidates will be considered:

1. *Explicitness as specification of norms.* What happens in an institutional normative order is that an authority is set up or takes charge in order to "render precise what in the informal setting is vague". The authority's task is to make decisions according to norms. When these norms do not give a satisfactory answer, an answer is given either by pure discretion or it is solved by way of specification of norms, that makes it possible to reach a conclusion in that particular situation, a conclusion that may serve to solve similar problems in the future. The task is then to make the norms more explicit and less vague. If we read MacCormick's example of queuing

carefully, however, we see that what he describes as an effort to create explicitness and lack of vagueness (IoL:24) in fact may be seen as the opposite. Juridification B, as specification of norms, (as MacCormick is fully aware of) does not necessarily make the norms more explicit or less vague. The clear and simple “institutionalized” rule that the person to be served first is the one that can present the right piece of paper, with the right number, at the right time, at the right counter, risks becoming more vague with each new specification that is added, as when the rule involves making “further calls in a clear and loud voice” and to “check if there are any apparently deaf people” around. (IoL: 24). The specification of rules does not have to lead to more complexity and indeterminacy, but it certainly may and sometimes does, the reason often being that what is at stake and the reason for specification, is not explicitness in itself, but for example justice. Thus here we seem to have a kind of internal dynamic. Vagueness leads to the formulation of more specific norms that again leads to even more vagueness and the need for even more specified norms and so on. Juridification B, (as specification) seems to feed on itself. The downside to this is that explicitness as specification does not in itself seem to give the institutional normative order authority. If anything it would be the authority’s effort to render precise what was formerly vague. The effort to specify the norms may also lead to an expansion of the authority’s competence (juridification A). The question is if the manager of a queue has the authority to make specifications for example of how to handle, let’s say, mentally handicapped people. If not, the manager can take on the responsibility to do so or be given this authority by a superior authority. In either case it is the need for specification that drives juridification (or dejuridification) A, increased or more limited competence. This means that $B \rightarrow A$. In sum then juridification B presupposes juridification A ($A \rightarrow B$). As MacCormick writes “The existence of the second tier of the practice leads to” ($A \rightarrow B$) “or is accompanied by” (AB) an increasingly explicit articulation of the first tier.”. But it is also the case that the specification of norms (B) leads to more specification of norms (B), and this again may give the authority more competence (A). $A \rightarrow (B \leftarrow \rightarrow B) \rightarrow A$.

2. *Explicitness as adherence to basic rule of law criteria.* Explicitness may mean that in order to function rules must be “intelligible and within the capacity of most to obey”.¹⁵ One way of putting this is that norms have to conform to the most basic rule of law criteria as laid out for example by Lon Fuller.¹⁶ MacCormick does not refer explicitly to the rule of law while discussing informal normative order (Chap. 2), still there are frequent more or less explicit references to at least some of the basic internal rule of law criteria, like for example the generality of norms, the precision of norms, the promulgation of norms, the relative stability of norms, non-contradictory norms and elements of due process. Even though MacCormick goes a long way in indicating that the aim of juridification B is to get ever closer to this ideal or try to get closer to this ideal, as when he refers to the explicitness of norms, and various specifications without contradiction, this does not seem to have the status of a comprehensive “basic rule of law test”. Still we have found a second internal dynamic element; juridification B is driven by a desire on part of the authority to make it possible for people to follow the rules and this involves an effort to conform to the basic rule of law criteria, whenever earlier implicit or explicit norms breaks with these criteria. More bluntly put; specification is sometimes driven by the desire for basic rule of law improvements.

3. *Explicitness as formal structure of norms.* Yet another test would be if the norms adhere to the “whenever OF then NC” formula of a norm. For this to be the case we would have to presume that this structure has to be relatively recognizable, meaning that anyone should be able to recognize it as a proper norm. The rule “Jeans will not always be accepted” posted on the wall outside a bar in Bergen, Norway, would for example not count as a norm, even if the gate-keeper know exactly what it means in terms of the ideal formula. If it did it would not be the explicitness of the norm that gave authority to the gatekeeper, but something else.

¹⁵ H.L.A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 1961, p. 202.

¹⁶ Lon Fuller that argued that in order to call something law it at least have to conform to these criteria, what he called the inner morality of law, because it would be immoral to ask people to follow rules that would in effect be impossible to observe, whether these rules could themselves be considered moral or not. It is interesting to compare with Lon Fuller here since even he saw law as including a whole range of activities that normally is not called law, like the rules of a sports organization.

But is it really what MacCormick means? I have already argued that under a normative order norms may be more or less explicit, so what is new when we move to an institutional normative order? Possibly that the norms are now explicitly formulated in the sense that they fulfil the criterion “Whenever OF then NC”. But this does not seem to mean that anyone may easily be able to formulate the norm in such terms. On the contrary, MacCormick seems to suggest that it is the authority’s task to figure out this whenever it is unclear. So the formula seems to give structure to the authority’s reasoning in interpretation, but not to demand that the norms in themselves should be formulated in such a way that anyone may understand them as such. As with the rule of law criteria then it seems to be the belief in the authority’s ability to interpret the norm in accordance with the formula that gives authority. People in general believe in the formula but realize that a perfect and determinate fit for all kinds of situations are difficult to formulate, and thus are comfortable with leaving this task to a specialized authority. Juridification B, in the sense that all norms when applied should be specified in order to conform to the general formula, leads to juridification A in the sense that the authority is given the competence to interpret any norm in order to make it fit with the formula. (B→A)

3. The point of view of the norm-user

A third answer would be that the authority rests with the norm-users, most basically whether they use, want to use and are able to use, the norms laid down by the authority or not. The authority’s authority is depended on the degree to which people solve conflicts by reference to norms. It is already established that people are norm users by nature, but that cannot possibly mean that people will use whatever norms that are handed to them. As in the normative order people still have a choice; law is always up for grabs. Furthermore if it is difficult or maybe even impossible to use the norms, they will not be used. Is there an increased tendency to solve conflicts with reference to the norms or not, that is juridification and dejuridification C and what is the role of this in the process of juridification generally?

Even though people are free to choose whether to abide by the norms or not, that is to solve conflicts by way of reference to norms or not, in an institutional normative order there are presumably more at stake than in the normative order. In the queuing example people are “*required* to follow the norms laid down by the service-provider” (IoL:21) and the lined-up people “*have to* orient themselves” (IoL:21) to norms. But why would this be so? People may just turn around, say because the queue is too long, unfairly managed, in total disorder, or for whatever reason. Because they need the service provided one may argue, but even then people may sabotage the queue, protest, start a fight, organize some kind of resistance to the queuing order and so on. Yes, but then the authority always has the possibility of arranging the queue in ways that make it more difficult to sabotage the queue or coerce people in more direct ways. Yes they probably can, but the more such measures are used the less people orient themselves to the norms and more to the actual or expected coercion. Juridification C apparently plays a more important role in MacCormick’s scheme than what appears at first glance. What is this role?

The authority according to MacCormick “has or assumes authority to determine how to settle disputes”. It is this need for dispute resolution that apparently triggers a process of specification of norms. It is a matter of making a decision when “some doubt arises about the priority in a queue” (IoL:22). Conflicts then are solved by the authority, but by reference to norms, norms that people in general accept in order to solve conflict. If it is not possible to solve conflicts with reference to these norms as they stand, the norms are specified. The need for juridification C then triggers juridification B, and as we have seen juridification B triggers juridification A and vice versa. We then have: $C \rightarrow (B \leftrightarrow A)$.

But MacCormick goes further than this. Not only do the need for dispute resolution trigger juridification (and dejuridification) A and B, the quality of dispute resolution, that is the quality both of first tier and second tier norms also positively affect the tendency people have for solving conflict by reference to norms. We see this in the example where inconsistency “could be bad for customers relations” (IoL:22) or difficulties of interpretation “are (for example) causing annoyance among the customers, who might take their business elsewhere.” (IoL:23) So juridification C does not only lead to juridification B, but juridification A

and B also positively affect juridification C. When norms become more specified there will be an increased tendency to settle disputes with reference to norms ($B \rightarrow C$). Thus we have $C \rightarrow (B \leftarrow A) \rightarrow C$. This however also depends on the degree of juridification or dejuridification A. In the beginning the authority has the right to settle disputes only limited by an area of operation and some implicit ideas about what such an authority has the right to do. Through practical dispute resolution second tier norms develop that may either give the authority more or less competence, that is dejuridification or juridification A. This would again positively affect juridification C and the quality of juridification B.

4. The norm-interpretation point of view

So far so good; what then about juridification D, the increase in judicial power? “Judicial power” (in our interpretation) has two sources; indeterminacy and lack of transparency in a system of norms. Clearly in the beginning there is a fair amount of indeterminacy; the norms are unclear and vague. With juridification A and B we would expect dejuridification D. As the norms become more specified and the area of application becomes settled, and when the second tier norms are in place, there should be less room for doubt. As we have already seen this is not necessarily the case.

First, the sheer number of norms and specifications of norms, makes it ever more difficult for the norm-users to have a clear view of what the norms are. It falls on the authority to keep track of this complexity, even in a fairly simple norm system as that of ordering a queue. The lack of transparency alone would give the authority increased “judicial power” ($B \rightarrow D$).

Second, as argued, specification does not necessarily mean less room for interpretation. On the contrary it may often enough mean that the norms become harder to interpret ($B \rightarrow D$). Similarly, second tier norms, that may limit as well as increase the authorities competence, may sometimes make interpretations more difficult ($A \rightarrow D$). According to MacCormick implicit rules in an institutional normative order are norms that may be derived from a previous ruling (covered by the doctrine of precedence). If the

authority has the competence to both solve cases by “establishing” new implicit rules and by reference to existing implicit rules it will almost surely lead to more complexity and thus less transparency, but it may also give more room for interpretation. The dilemma from the point of view of an authority that has to make a decision is easy to see. Too strict limitations on competence (dejuridification A) gives less room for interpretation (dejuridification D) and may hurt “customer relations” (dejuridification C) since there may not be possible to make a reasoned decision and moreover that factors that the norm-users see as relevant may not be taken into consideration. If the authority is given more competence (juridification A) it gives more room for interpretation (juridification D), but the norm-user may still not be satisfied if the interpretation made are too difficult to understand or is considered incorrect (dejuridification C).

A partial answer to this dilemma is given in the form of second tier norms that govern the degree of competence the authority has when applying different rules. It is presumed then that in some issue areas more discretionary power is warranted in order to reach a conclusion. Other issue areas may be considered too important in some sense to be left to the authority to decide. Juridification D may then vary across issue areas, but if we ask how this variation is decided we are again left with “customer satisfaction” as the best indicator. The authority will establish second tier rules that as far as possible make sure that people will continue to use reference to norms to solve conflict.

In addition there is, in MacCormick’s work a more comprehensive answer to the question of interpretation. The formula “whenever OF the NC” gives direction and structure to legal arguments, but cannot in itself solve disputes over interpretation. This is left to the rhetoric of law, that is the reasoned deliberation over how to arrive at OF and NC and the relationship between the two.

5. The norm-accepting point of view

All in all then MacCormick’s institutional theory of law the institutional dimension of juridification may be captured by juridification A, B and D. The relationship between these dimensions of juridification is, as we have

seen complex, with different mechanisms working to balance the three dimensions through processes of juridification and dejuridification. The quality of these processes is however in the final analysis decided by the norm-users. It is the need for an institutional system in order to solve conflicts with reference to law that sets off the process and decides its further development. If the institutional normative order is not actually used (dejuridification C) for whatever reason (inefficiency, injustice and so on), the order will slowly dissolve. In addition, the last issue to be dealt with relates to the tendency among norm-users to frame issues in light of existing institutional normative order, that is law, a tendency that indicates the degree to which people identify with the institutional normative order (juridification E). One thing is that people actually use norms to solve conflicts, another that they believe this is something they ought to do, that they subject themselves to norms because it is right. Where does this sentiment come from? . We have already discussed this in relation to a normative order where we concluded that juridification C and E mutually reinforce each other, but does it also relate to juridification A,B and D?

If we presume, like MacCormick that some values are good, be it linked to efficiency, fairness or reasonableness or some other value, and further that the observance of such values positively affects juridification E, we should look for how MacCormick accounts for this. When it comes to juridification or dejuridification A the answer is clear enough. Some “general principles” are established in order for the authority to systematically evaluate how and to what degree different values should be considered when making a decision, and there can also be direct reference to such values or norms indicating when these should be taken into consideration. This in turn, whether juridification or dejuridification A is involved, would generally speaking most certainly make interpretation more complex and difficult as different values have to be balanced against each other.

When it comes to juridification B , values, as indicated may be built into rules as discussed by MacCormick (IoL:30). One may, for example, specify a rule by including the word reasonable in order to indicate that when making a decision this standard should be applied according to common sense, this in order to avoid that the norm be used in situations where it would be obviously unreasonable. The word reasonable is entered

because more concrete specifications would be difficult to make, or as it often is in a partly unpredictable world, impossible to provide. This again is related to juridification D. The authority in question has the right to interpret and this gives power, but there is a limit to this power as clearly unreasonable interpretations will be rejected by the norm-users through processes of dejuridification E and C.

V. THE NORM-USER PERSPECTIVE ON JURIDIFICATION

If this interpretation of MacCormick's institutional theory of law relative to processes of juridification and dejuridification is roughly right it points towards a rather interesting model of juridification. This is what I will call a democratic theory of juridification, or juridification from below. The model, with a fair amount of simplification, has two basic dimensions:

The model has a "normative" dimension linked to juridification and dejuridification C and E. It is normative in the sense that it is juridification C and E that in the final analysis determines whether an institutional order is to be accepted by norm-users as law. The acceptance has two sides to it; one practical (juridification C) and one linked to identity (juridification E). Law is dependent on norm-users actually using the law in the sense of using appeal to law to solve conflicts (C), meaning that law has to be useful in this practical sense, it serves a purpose. Law is also dependent on legitimacy in the sense that norms not only serve a practical purpose, but does this in a way that norm-users may identify with as right (E). Both is needed in order for law properly to become law, that is institutional *normative* order.

This acceptance however is dependent on a second institutional dimension, institutions that makes acceptance possible. The model then also has an "institutional" dimension linked to juridification A, B and D. First, the functioning of institutions will have to be guided by some basic rules that norm users find useful and legitimate (A). Second, the first tier norms have to have form and content that norm-users find useful and legitimate (B). Third, interpretation of both basic norms and first tier rules has to be

conducted according to principles (most basically according to a logic of argumentative reasoning) that norm-users find useful and legitimate.

With these two dimensions we may tentatively construct five ideal type orders and at least indicate the limits of law. The basic premises are these: First, juridification, in order for an institutional normative order to emerge has to reach a certain level on all dimensions of juridification. Second, if carried to far, juridification may reach levels where it is not possible any longer to speak of an institutional normative order. Finally, in any institutional normative order, whatever the level of juridification, the different dimensions of juridification are balanced off against each other.

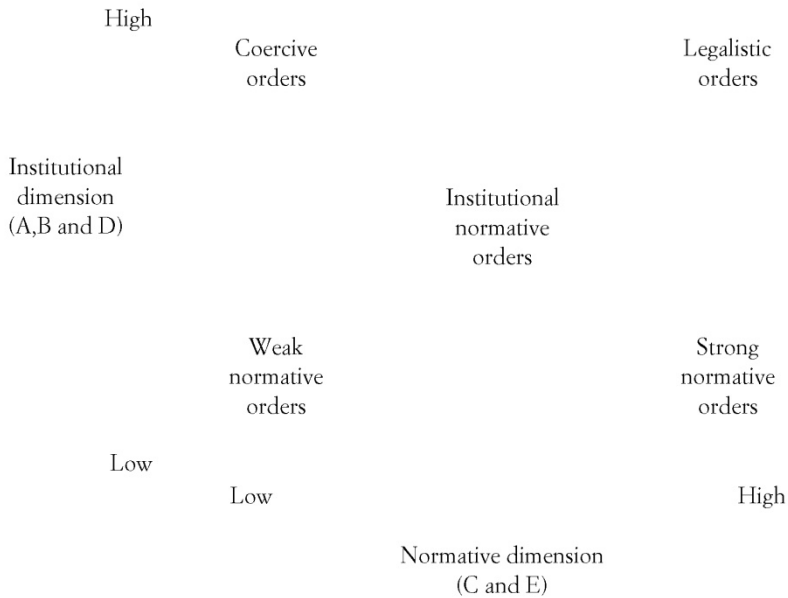


Figure 1

Normative order as described by MacCormick is found at the bottom of the figure. There is a certain level of juridification A, B and D as described earlier, but too low for an institutional normative order to develop. The normative orders may however have different levels of juridification C and E. Weak normative orders are orders that are not generally accepted by potential norm-users. One example may be special privileges for a

particular group of people, lets say based on gender or societal position. To the degree that such orders are of any importance to norm-users they would be unstable without normative acceptance or institutionalization. Still one may imagine such orders even in a modern democratic society. As long as these practises are not seen as infringing in any serious ways on basic rights they may be tolerated and even respected even if most people in general see them as useless to themselves and on principle inappropriate. An example may be an internet network restricted to a particular class of people that gives the people who are members privileged access to particular markets. One may however think of situations where privileges are accepted by everybody as something natural as when women allegedly accept their inferior positions in some societies, or as when inherited positions or wealth are sources of both respect and privileges. This would be situations where privileges are backed by a strong normative order. Weaker or stronger normative orders are however not law since juridification A, B and D has not developed very far. What happens when these extreme cases of juridification C and E are coupled with institutionalization, that is juridification A, B and D?

In the case of the weakest normative orders where special privileges are involved, institutionalization may amount to what one may call a coercive order (upper left corner). Take slavery as an example. It is highly institutionalised as the slave-owner has the right to establish proper rules and refine these as he sees fit (juridification A, B and D). Why is this not institutional normative order, that is law? Because the normative dimension is missing. Most of potential norm-users would not find it useful, nor accept it as legitimate. Moreover there are no mechanisms to assure dejuridification A, B and D, mechanisms that possibly would bring the order within the realm of an institutional normative order, that is away from slavery.

In the case of the strongest normative orders where special privileges are involved and norm-users accept the situation, it seems more difficult to reject institutionalization as amounting to institutionalized normative order, that is law (upper right corner). That excessive juridification A, B and D without juridification C and E is not law, according to MacCormick seems compelling, but that excessive juridification A, B and D combined with excessive juridification C and E is not law, but "legalism", something

that would follow from the conceptualisation of juridification presented here, seems less self-evident according to MacCormick's theory. In order to explain why I believe this nevertheless is the case I will go back to the five limiting qualities of law introduced earlier.

First, the contextual quality of law claims that law may be useful in a host of different situations and for a host of different reasons (efficiency, justice, self-interest, the common good, order in itself ect), but not everywhere. There are contextual limits as to the use of law. The usefulness, however, are for the norm-users to decide. If norm-users do not use something as law or accept it as law, it is not law. In the case of a legalistic order, however the norm users accept the order, and this means that we cannot use this contextual limitations as indicating that something is not law. From an external point of view we can of course claim that the norm-users are not autonomous, that they are indoctrinated or pressured in some way, and go on to argue that law is dependent on democracy to some degree or in some form. But this does not seem to be MacCormick's position. Institutional normative order may exist without democracy as the queuing example indicate. What I will argue in the following is rather that MacCormick's concept of law presuppose some democratic elements that not in themselves amount to democracy, but points in the direction of democracy.

Second, the universal quality of law, suggests that wherever you go law is marked by the same quality; that it is able to guide human conduct. In order to do this it has to adhere to certain rule of law criteria most famously proposed by Fuller in "Law and Morality"; law should be clear enough to be understood, relatively stable, not contradictory, not retroactive, not impossible to follow and so on. This clearly limits law as means to subjection, as juridification A, B and D will have to be limited. Still we may think of laws that fulfil these criteria to an acceptable degree and that still privileges certain groups, as when Saudi-Arabic women are not aloud to drive. If this is accepted by the norm-users why should we not call it law?

Third, and a more promising candidate is linked to the dynamic quality of law. It suggests that law may develop in order to adjust to the norm-user perspective. That juridification A, B and D for example are adjusted so as to achieve juridification C and E. But if there are no one left to challenge

the system the dynamic quality is gone. From perceived perfection there is no escape. An intrinsic part of law is that it can always be challenged. Fourth, then, without law being challenged there cannot possibly be any argumentative quality to law and finally, even though other orders may exist whether legal or not, these will have no relevance relative to the “legalistic” order as this order cannot be challenged. A religious sect of fanatics for example follow their own rules without regard to state law, international law or whatever other reasonably relevant normative- or institutional normative order.

So it seems that MacCormick’s theory even involves an idea of excessive institutionalisation, be it with or without the acceptance of norm-users. One possible way to interpret the Guantanamo Bay detention camp, is to look at it as a particular order in its own right. It is heavily institutionalized in the sense that excessive juridification A and D has taken place, and whenever a new norm is needed it is added to the order (juridification B). It is limited to certain activities, but what these activities are may be redefined as seen fit by the authority, and the authority ostensibly has authority over each and ever living human being on earth. It started out as an order closer to the legalistic end of the continuum, accepted by at least parts of the American people. Through consecutive challenges brought on by dejuridification C and E, the order has moved towards the coercive end of the continuum. At the same time a process of dejuridification A, B and D has taken place, as the system has been challenged from legal orders proper like international law and American constitutional law. Perceived as a purely coercive order by norm-users, it will have little chance of surviving if it loses executive backing.

Institutional normative orders then are democratic in the sense that they are dependent on acceptance from the norm-users in order to be called legal orders, and have to be accepted both as useful and right. It is not however necessarily democratic in the sense that law-making is necessarily democratic (e.g. backed by democratically accountable lawmaking institutions). There is still a conceptual difference between law and democracy. Law without democracy is possible. Still, if this interpretation of MacCormick has anything to offer it may help understand why in most models of democracy, democracy is seen to presuppose law. In

MacCormick's terms this would mean that modern liberal democracy presupposes institutional normative order.

The basic question we have tried to at least start to answer is this; what drives the process from normative order into ever more elaborate institutional normative order? What drives the process of juridification according to MacCormick? Tentatively we will suggest a combination of three features: First, processes of juridification, second processes of dejuridification, and third a commonality between people in general, politicians, lawmakers, bureaucrats, lawyers, legal scholars and judges.

1. Processes of juridification

There is something intriguingly simple and comprehensible with MacCormick's explication of normative order and institutional normative order, and the relationship between the two. As have been argued it might not be all that simple after all as there are more dynamics at work than first anticipated, if we consider the clearly expressed as well as the more implicit or implied dynamics. Is it possible to combine all these (and others that a more comprehensive examination might reveal) in a single model? It probably is, but I will settle for a simplification that I believe can capture the essence of the dynamics of juridification. It begins with norm-users that want to solve conflicts by reference to norms, and it ends with the realization by norm-users that this ought to be done, something that encourage further juridification. The system, then, is driven by norm-users that try to solve conflicts by reference to norms (C). We do not need to have any other source of this beginning than the premise that people are by nature norm-users, they tend naturally to try to solve conflicts with reference to norms.

What I propose then is that juridification C, an increased tendency to use norms to solve conflict, at one point depends on the establishment of some sort of authority with a limited competence to make decisions. This is juridification A. The authority in turn specifies and adds to the norms as new and unprecedented cases demand. This is juridification B. Sometimes this means inventing new principles, doctrines, ect, that further expands the authority's competence (juridification A). All this does not,

however, lead to less room for interpretation. On the contrary, as the world's complexity presents itself there is no end to interpretation and this in turn is reflected in the complexity of the institutional normative order. This is juridification D. The authority's expertise at interpretation and knowledge of the meandering path to rightfulness, becomes ever more indispensable. In general most people appreciate this. They will start to see themselves as subjects under the institutional normative order. This is juridification E. But this is not the end of the story. It starts all over again. As people (including those in authority) experience that the institutional normative order works they start to identify themselves with the established order, they become more inclined to make references to institutionalized norms to solve conflicts (C), the authority's competence increase (A), and so on. Thus $C \rightarrow ((A \rightarrow \leftarrow B) \rightarrow D) \rightarrow E \rightarrow C \rightarrow (A \dots)$.

2. Processes of dejuridification

Is there no end to this process of juridification? There certainly is. Such a system, dominated by juridification, will in the end collapse under the share burden of complexity and incoherence. We will get dejuridification E and C as it becomes ever more difficult to understand what the norms mean,. People can no longer orient themselves according to norms and the rules limiting and guiding decision makers become incomprehensible. The remedy is dejuridification A, B and D. As the process of juridification moves on there are a parallel process of dejuridification. The authority takes on new competencies only to give them away (sometimes only partially) if they turn out to be too difficult or complex to handle. Norms are specified but sometimes the process is turned around and more general principles are established to simplify norm-use. Sometimes principles are established and norms specified in such a way as to make interpretation easier and simplify the system. Sometimes cases are rejected because the interpretations needed are too far removed from the norms that are to be interpreted, and so on. Over all juridification continues, but is continuously patched up by parallel processes of dejuridification, all in order to achieve a level of coherence, simplicity and thus predictability.

These mutually adjusting processes of juridification and dejuridification may go relatively unnoticed, but are sometimes shaken by larger changes,

as when an institutionalised authority suddenly loses big fractions of competence by a massive process of dejuridification A, when for example the principle of separation of powers is introduced. What would trigger such events according to the ideas laid out here are dejuridification E followed by dejuridification C, processes that can not be turned around by relatively minor adjustments in the form of dejuridification A, B and D.

The most basic change when moving from simple institutional normative orders to more comprehensive ones like the modern constitutional state is first overall juridification and second dejuridification A. Dejuridification A happens when the authority is split up into different institutional agencies, “charged with legislative functions, with adjudicative functions, with executive administrative functions and with law-enforcing functions” (IoL:35). Since juridification as defined here is linked to the adjudicative function, it will lose much of its competence to the other three, but keeps a level of competence to control the other institutions. In this new situation however, we can get juridification or further dejuridification A. The same goes for juridification B that may be met by revolutionary processes of dejuridification B, the scraping of whole segments of law by the stroke of a pen, as when the freedom of religion is confirmed by law, or laws regulating intimacy is replaced by new laws regulating intimacy. Juridification D also has its limits, and when piecemeal adjustments fail, larger doctrinal change, for example in order to limit judicial review of administrative action, may be the result. Radical dejuridification D is brought on by dejuridification A.

3. Towards commonality?

So we have an idea of overall juridification, an idea of dejuridification as an adjusting mechanism and dejuridification as more radical change, punctuated equilibriums;¹⁷ big revolutions and smaller revolutions. The different dimensions of juridification balance off against each other and this gives the overall process, whether dominated by juridification or

¹⁷ See Stephen D. Krasner, ‘Approaches to the State: Alternative Conceptions and Historical Dynamics’ 16 (1984) *Comparative Politics*, pp. 223-246; and ‘Sovereignty. An Institutional Perspective’, 21 (1988) *Comparative Political Studies*, pp. 66-94.

dejuridification, direction. Can this alone keep the system going; secure continued juridification without total collapse; three steps forward and one back? Clearly there are some rules guiding the formulation and interpretation of norms, and rules limiting in one way or another the authority in question and regulating the decision-making process. In addition there are a general requirement linked to the deliberative quality of debate. The question is if we need something more, something more substantial, like a more comprehensive rule of law, democracy or the integrity of civil society, specific principles necessary for an institutional normative order as complexity increases, standards external to the process of juridification that may direct the process and curb excessive juridification? Not necessarily if I have understood MacCormick correctly.

The alternative is linked to juridification C and E, the basic elements of a normative order. This is what everyone supposedly has in common. We are all norm-users by nature. We tend to solve conflicts, if possible, with reference to norms. This goes for people in general, as well as politicians, bureaucrats, lawyers, legal scholars or judges. They all ask the same question; how is it possible to solve this or that dispute with reference to law? At the same time everyone tend to frame issues in light of an institutional normative order, an order that they voluntarily subject themselves to. The institutional part of MacCormick's argument, linked to juridification and dejuridification A, B and D, may be seen as the core elements of a modern constitutional order. Overall juridification of the institutional normative order, however, is also dependent on juridification C and E. These dimensions of juridification is what keeps the system together as it is what everyone, inside as well as outside the system, is competent to assess. If juridification A, B and D "fail", it will lead to dejuridification C and E, and this effect will be picked up by everyone concerned, and lead to adjustments; parallel processes of juridification and dejuridification A, B and D. The system, if left alone may naturally develop towards something like a modern constitutional "rule of law" state, that would be an empirical question, but this process may take many twists and turns, and the end-product of different processes may be quite diverse, as exemplified by the many different, but advanced institutional normative orders currently existing. As the current events in Pakistan makes abundantly clear institutional normative order may be brought down by external events, but even in such a situation representatives of civil society,

as reported by the BBC, are set on testing the limits of the new system, their arrest being proof of their dedication. Massive dejuridification C and E is the expected immediate result of massive dejuridification A, B and D, the legal void being filled by coercion, violence and civil protest. For the system to regain its balance, processes of juridification and dejuridification A, B and D will follow.



4

On Law and Morality Reflections on Neil D. MacCormick's Philosophy of Law

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I. ON LABELS: DISTINGUISHING NATURAL LAW FROM POSITIVIST THEORIES

I will start with a general, trivial premise: labels are only labels. And it is necessary “to identify the real meaning of concepts- as Antonio Gramsci wrote in his *Quaderni del carcere*– because under the same hat different heads can be hidden” (Gramsci 1975, 1411).

In the paper “*Natural*” *Law Revisited* (1982) Ronald Dworkin underlines the irrelevance of labels and in particular the controversial and notorious label of “Natural Lawyer”. The *incipit* of the paper is clear: “Everyone likes categories, and legal philosophers like them very much. So we spend a good deal of time, not all of it profitably, labelling ourselves and the theories of law we defend. One label, however, is particularly dreaded: no one wants to be called a natural lawyer”. But Dworkin goes on: “If the crude description of natural law I just gave is correct, that any theory which makes the content of law sometimes depending on the correct answer to some moral questions is a natural law theory, then I am guilty of natural law”. My thesis is that the same statement can in a certain sense

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describe MacCormick's philosophy of law. Provided, of course, we do not assume that what defines iusnaturalism is the claim that a true law exists and is accessible to human knowledge, and that it expresses transcendent and objective values: values independent of human will and interest (MacCormick and Weinberger, 1990, 7). But if we agree with Dworkin's general definition of iusnaturalism, it is possible, in my opinion, to see a convergence of the two philosophers in this respect. But this is a generic assumption which needs more explanation, if only because the boundary between iusnaturalism and legal positivism has, through time, become more and more difficult to draw (MacCormick and Weinberger 1990, 178).

With this in mind, my paper will focus on the relationship between law and morality from Neil MacCormick's point of view. I will summarize some aspects of his theory of law with specific regard to this topic. Then I will concentrate on some elements which in this respect seem to me problematic. Later I will deal with the concept of *reasonableness* in order to show the relevance and non-relativistic character of the conceptual connection between law and morality in Neil MacCormick's thought. His self-definition as «post-positivist» is perhaps compatible with the above mentioned weak definition of "natural lawyer", and this not only because it rejects too austere a version of "legal positivism": a legalistic idea of "legal positivism". My thesis is that MacCormick accepts the idea of a conceptual connection between law and morality. But he considers morality in a relativistic way and at the same time maintains the principle of reasonableness as a principle of correctness for the law. These two statements about morality, however, cannot go together. Either one, or the other. And I'm convinced that morality implies a claim of universalizability, otherwise it is not morality at all. Furthermore, "brutal relativism"- to borrow Bernard Williams' expression- must be rejected. In this light, if morality also means reasonableness (as MacCormick himself seems to suggest), the connection between law and morality is necessary and has a normative force: it is not true any more that it is legitimate to identify every sort of ethical or ideological content with the demands of morality as such.

These initial considerations on labels are in part an *excusatio non petita*, but perhaps they are also helpful indications about the content of my paper and do not necessarily mean that one is looking at labels rather than

theories. On the one hand, it is true: we must be careful, reflection on labels can be a great waste of time. On the other hand, such reflection can tell us something which is not so irrelevant. The debate on the distinction between natural lawyers and legal positivists is a debate on the concept of law and on its relationship with morality. If labels are an outcome and not merely the main object of reflection, they can be a way of clearing up ideas and positions.

MacCormick tells us something in this perspective. Every label always has vague applications, that is, we have first of all to define the concept and only then can we apply it to different cases. This is true for the labels “natural law theory” and “legal positivism” (MacCormick and Weinberger 1990, 159). For this reason one may argue that these two theories can be interpreted as convergent, even if differences still remain (*ibidem*, 178). On this revisional perspective MacCormick defines the “law’s ‘positive’ character as nothing other than this very characteristic that is laid down through intentional human acts aimed at regulating human conduct. For *jus positivum* means ‘law laid down’, and ‘positive law’ is *jus positivum* translated into English” (MacCormick 2007, 243). And also: “The school of thought known as ‘legal positivism’, at any rate in its more austere and rigorous forms, absolutely excludes the possibility that there is any moral minimum that is necessary to the existence of law as such. The positive character of law is all there is to it. Conversely, the question of the moral value of obedience to law is always an open one. According to that conception of legal positivism, the present version of institutional theory is non-positivist, or, if you wish, ‘post-positivist’. Conversely, if the universe of human thought is necessarily divided into two mutually exclusive camps, such that anyone who admits any moral minimum to be essential to the existence of law belongs outside the positivist camp and in that of its rival, this theory belongs in that rival camp. Believers in this two-way-divided universe of jurisprudence assign to the category ‘natural law’ any theory that fails their austere test for positivism. Such believers will therefore characterize the present work [MacCormick’s work] as a form of ‘natural law’» (MacCormick 2007, 278). “It is perhaps most sensible to say that (...) it is post-positivist, if not anti-positivist” (MacCormick 2007, 279).

I will try to defend this conclusion, but not in the same sense. I mean, the reason for defining MacCormick’s concept of law as a form of natural law theory consists *not only* in the assumption that it is not an austere version

of legal positivism. This sort of definition is not so decisive by itself, but can be significant if it indicates a deeper comprehension of the relationship between law and morality, and above all of the idea of morality as such. I have the impression, in other words, that there is a more relevant reason—not only a negative reason, but a conceptual one too—for saying that this theory of law is a particular and very interesting form of natural law theory. My idea is that if we try to discover what lies under the fight for (about?) labels, we will find that MacCormick is a *iusnaturalist*, and not only a post-positivist. He rejects a trivial form of positivism, of course, but in his theory it is also possible, I think, to find some points which make him not so relativist as he declares he is. He argues for a particular concept of correctness, a conceptual connection between law and morals, and a principle of reasonableness (II), which corresponds to a principle of rationality that is necessary if we don't want to abandon the attempt to pursue freedom as an end (III). But I think that he does not seem so close to Finnis with regard to the question of the priority of the good over the right (as MacCormick himself underlines in his review of Finnis' masterpiece) (IV).

These three points go in the direction of *iusnaturalism* rather than moderate positivism or post-positivism. And above all, in this perspective MacCormick's view of the connection of law and morality seems to me necessary and critical, because it tells us something crucial for defining the concept of law. Nevertheless, with regard to the relationship between law and morality MacCormick's work does present some ambiguities; and that is what I am going on to elucidate.

II. LAW AND MORALITY

I think that it is true that, debates on labels and discussions grounded on rigorous dichotomies “are rarely revealing of any important truth” (MacCormick 2007, 278). But in this case I suspect that one important truth is at issue. The relationship between law and morality, the problem that is at the bottom of all that discussion, is a central one, or even *the* central one, when one is talking about law and the concept thereof. This is the theoretical question hidden underneath the labels. Law and morality have important characteristics in common. First of all, both concern obligations, they are normative orders. Their nature, however, is conceptually different. Morality has a non-institutional structure, while law

is an institutional fact. The normative order of morality has to do with individual autonomy, with choices and sets of principles elaborated by self-governing individuals. The normative order of law is sustained by political authority, that is, the state and its coercive power (2007, 4). In this respect, we can underline that, while morality is autonomous, law is heteronomous: "It confronts each moral agent with categorical requirements in the form of duties, obligations, and prohibitions that purport to bind the agent regardless of the agent's own rational will as an autonomous moral being. The law's demands of the autonomous agent purport to bind the agent in a heteronomous way. Law is (in this sense) heteronomous, as well as authoritative and institutional; it thus stands in clear conceptual contrast to morality, which is autonomous, discursive, and controversial" (MacCormick 2007, 255. See also MacCormick 1996, 170-1). This conceptual divergence is also related to a simple circumstance. Authoritative texts play a key role in legal argumentation, given that they are a fixed starting-point for interpretation, adjudication, deliberation and so on. Morality as autonomy recognizes no authoritative texts at all (MacCormick 2007, 259). But this does not mean that the two spheres (law and morality) do not overlap at a significant point. The point is the reasoning, the practical reasoning, that is, their common source of correctness. As we read in *Institutions of Law* (on this point very close to Alexy's *Theorie der juristischen Argumentation*; see MacCormick 1978, 304; 1990, 234; 2005, 99; 2007, 260): "That legal reasoning is a sub-species of practical reasoning, and hence either strongly analogous to, or even a specialized form of, moral reasoning, is true (...) To produce justifying reasons for one's decision, although these include legal norms and precedents, requires one to interpret the norms and precedents in the light of background principles and values, hence the interpretative reasoning is also in part moral reasoning. (...) All this is highly important, and a necessary corrective to a merely narrow legalism. (...) The more we take legal decision-making to be a public matter drawing on public sources, the less we force agents into the position of having to knuckle under the moral decisions of particular judges and other legal officials. (...) Law, by virtue of the way in which it addresses the moral agent *ab extra* is always at least relatively heteronomous. That is why law and morality are conceptually distinct" (MacCormick 2007, 260-1). This is a very important point for my argument. The fundamental idea is that law implies a claim of moral correctness that has a procedural and contingent nature: it depends, according to certain standards of equality, on the community and its

principles. Here, the idea of an objective morality is rejected and the idea of a discursive and interpersonal morality is defended. Moreover, this sort of morality has a necessary connection with law in itself. Against moral realism, on the one hand, and legalism, on the other, the two domains go together if we define morality as critical morality and think that law implies a claim of not only methodological correctness. The basis of the claim to correctness of the law is, ultimately, practical reason, with its limits and its capabilities. In this sense, MacCormick defends a mid-way and partial relativistic position between the two extremes of Dworkin and Alf Ross. In MacCormick's perspective Dworkin is ultra-rationalist because of his "one-answer" thesis, whereas Ross is anti-rationalist, because he thinks that justice is not a normative question, but a question of force. According to Ross, making laws or justice is like beating upon the table; it is only a question of efficiency (Ross 1965, 297). The "space" between Dworkin and Ross is what interests MacCormick more, since there we find the law and the possibility of its *correctness based on the idea of practical reasoning*.

MacCormick (with Alexy) points out that law implies a claim to correctness and therefore it involves a performative self-contradiction if it implements an unjust conduct of agency/implements unjust conduct. "The idea of legislation passed without even a pretension to correctness is a kind of absurdity" (MacCormick 1992, 112). But what does correctness mean in this case?

These considerations on morality are not as univocal as they seem to be, because according to MacCormick they are consistent with other (and I think, very different) statements. I am referring to his essay on *Natural Law and the Separation of Law and Morals*, in which MacCormick underlines that this "necessary connection between law and morality (...) does not protect us from very much" (MacCormick 1992, 113), and adds that "the fact that there are certain moral aspirations which are conceptually intrinsic to law (though not conditions of its validity) *could never stop perverted opinions about relevant values being transformed into perverted laws*. A stark warning is provided by the fact that some of the leading jurisprudential ideologues of Nazism in Germany were denouncers of positivism, and some even took themselves to be propounding a purified version of natural law doctrine (involving, *inter alia*, such obscenities as assertion of the natural human and moral superiority of the Aryan race and other such nonsense). The mistake they made was not that of thinking morality relevant to law-making; it was that of identifying their hideous

views about the healthy sentiments of the people with the demands of justice and morality” (ibidem, 114, my italics).

This is a crucial point, but it is only true- indeed- if we take away the core meaning of the idea of correctness and morality, only if we think that a claim to morality can imply whatever values, for example, even racist values. But is that correct? What does morality mean? What is consistent with the concept of practical reasonableness which is essential in the moral discourse?

MacCormick himself tells us that morality goes together with universality or universalizability, that it has to do with the concept of impartiality as used by Adam Smith: “Smith perhaps has the most complete and almost convincing view, because his device of the ideal impartial spectator supplies for us a common inter-subjective yardstick against which to adjust and objectify our particular passionate responses to cases” (MacCormick 2005, 87; see also MacCormick 1990, 277). But if that is so, how can we say at the same time that everything is going well? “Everything” is not going well anymore. If morality is reduced to emotions or personal and arbitrary preferences, it is true that the connection between law and morality is a totally open question, and theoretically open to the worst injustice. Here, it is clear that morality has no chance of being universalized. But is a morality that is far away from the possibility of being conceptually universalized- i.e., a morality that it is not rational to universalize is still a morality? I do not think so. As MacCormick also seems to be convinced, morality means universalizability, so the claim to correctness implicit in law is incompatible with evident injustice. MacCormick talks about reasonableness, and if reasonableness means something, it means universalizability; more, public and discursive universalizability. The claim to correctness is the point of connection between law and morality. Correctness means first of all practical reasonableness.

III. THE PRINCIPLE OF PRACTICAL REASONABLENESS AND THE CLAIM TO CORRECTNESS IN THE LAW

The concept to reasonableness is a central one in MacCormick’s work. It is its main normative principle. MacCormick gives us an articulated definition of “reasonableness” in *Reasonableness and Objectivity* (MacCormick 2003) and in chapter 9, “Being Reasonable”, of his recent

Rhetoric and the Rule of Law (MacCormick 2005). The starting-point of the definition is an empirical observation. This concept is used in very different contexts (MacCormick 2003, 532-3; MacCormick 2005, 162): “Reasonable doubt is not the same as reasonable decision-making nor is either the same as reasonable care in driving” (2003, 533). Anyway there is a common character. “That common thread (...) lies in the style of deliberation a person would ideally engage in, and the impartial attention he would give to competing values and evidences in the given concrete setting” (MacCormick 2003, 533). In general, and not only in the limited field of law and institutional matters, the reasonable choice is not derived from our reasoning faculty as such, it is the outcome of a process, the application of a procedure: “It is not a job for the computer” (MacCormick 1981, 100). The search for reasons for action, that is, for what would make an action rational, is a complex procedure. “Reason is inevitably involved in any attempt to constitute momentary ends into some coherent system or order, enduring through time and availing in common among persons. Reason is involved in the universalization and checking of particular projects, and weighing them in the setting of an aspirationally coherent way of life” (MacCormick 1992, 119). Reasonableness in general deals with *prudentia* in the classical sense of the term. “It is a virtue that is incompatible with fanaticism or apathy” (MacCormick 2003, 531). It implies moderation and responsibility towards risks and consequences of actions. It takes interests, different points of views, relevant positions and principles involved in action seriously. It tries to find reconciliation among divergent perspectives and opinions. It is a form of impartiality in a Smithian sense: “reasonable persons resemble Adam Smith’s ‘impartial spectator’ (...) For they seek to abstract from their own position to see and feel the situation as it looks and feels to others involved, and they weigh impartially their own interests and commitments in comparison with those of others”. I will continue the quotation, because this passage is very clear and crucial, and reveals an interesting continuity with regard to the Scottish enlightenment tradition and a still relevant influence in particular of Hume and Smith’s work. “They are aware that there are different ways in which things, activities, and relationships can have value to people, and that all values ought to be given some attention, even though it is not possible to bring all to realization in any one life, or project, or context of action. Hence they seek to strike a balance that takes account of this apparently irreducible plurality of values” (MacCormick 2003, 531-2). In short, “universalization [is] essential to justification within practical

reasoning” (MacCormick 2005, 78) and legal reasoning is a special case of practical reasoning. In the context of this argument, reasonableness means the ability to find relevant interests and values involved in action; these have to prevail and to direct actions which we want to be reasonable and universalizable. Reasonableness in deliberation has three ground features. It is “public” (MacCormick 2005, 100), “procedural” and is “a matter of degree”, because it corresponds to a public and argumentative process of evaluation of the relevancy of different risks, consequences, interests, values, and so on, involved as the case may be. So, we may summarize, with MacCormick: “the final judgment is one attained by ‘weighing’ and ‘balancing’ to decide whether, all things considered, they constitute not merely good and relevant reasons in themselves for what was done, but adequate or sufficient reasons for so doing even in the presence of the identified adverse factors. (...) At best we ascribe greater or less weight to some reasons or factors than others, and the question is what are the grounds of such ascription” (MacCormick. 2003, 554. On legal reasoning the conclusion of chapter XI in MacCormick and Weinberger 1990 is very important).

IV. THE SUPREMACY OF THE GOOD UPON THE RIGHT (ON FINNIS’ NATURAL LAW THEORY)?

At this point, MacCormick’s reflections on Finnis’ Natural Law Theory take on relevance. In this context I will only concentrate on the notion of *the good* and its relationship with the notion of *the right*. In the background Rawls’ dichotomy between teleological and deontological theories of justice may be useful. The first presuppose the priority of the good over the right, the second the contrary. The idea is that in the first group we find theories which are perfectionist and assume that we need a true and substantive concept of the good, in order to be able to understand what is the right thing to do at every level, the institutional and the deliberative level. Here the concept of the right is subordinate to the concept of the good. In the second group, on the contrary, the starting-point is the right in its formal and weak – and for this reason universalizable – nature. The good is a plural concept (it is always plural). Here it is impossible to find any convergence, because different people have different ideas of the good (and of what are “goods”); moreover, it is contradictory to pretend otherwise, because in such case the right (and the

related principle of autonomy) would collapse. MacCormick declares he is sympathetic towards Finnis' conception of the good, that is, to the first group (leaving aside all judgment on the ontological assumptions of Finnis) (MacCormick 2007, 116). "If we had- MacCormick writes in paragraph 5 'The good and the right' of 'Natural Law and the Separation of Law and Morals'- no sense of the good, we should have no sense of direction for the pursuit of any steady ends or aims; equally, no sense of what to shun or avoid as bad. Thus we should have no sense of right and wrong, for the wrong is precisely that which ought to be shunned; the right, that which may, or in some cases must, be done" (MacCormick 1992, 125). I think that the contrary is true, and when MacCormick talks about the "good", he seems to have in mind the "right". The pattern, the legitimate (respectful) structure of agency is delimited by the right, our different courses of action following these formal guidelines are in a *radical* manner personal expressions of the good. This is confirmed, from my point of view, by the fact that MacCormick is sceptical about the determinate list of goods proposed by Finnis and thinks he can find a better solution in Habermas' and Alexy's theories. He says: "I remain uneasy with the ipsedixitism of [Finnis'] claim of self-evidence tied to a bald listing of seven basic goods" (MacCormick 1992, 128). And "the ideas of Jürgen Habermas and Robert Alexy on rational practical discourse here seem to me helpful, in suggesting how we might abstract out of concrete aims and wishes general categories of the good in terms of ends whose adoption would satisfy felt needs and interests in a potentially universalizable way" (*ibidem*). My impression is that Habermas and Alexy are talking about the right, and not about the good; they take sides with Rawls' second group of justice theorists, not with the first one. This is moreover confirmed by the fact that the normative principle is, in MacCormick's perspective, procedural and corresponds to the principle of reasonableness (rightness), and not to a set of substantial values.

In this sense, in MacCormick's interpretation the distinction between the good and the right fades away. If we grant MacCormick the priority of the good, how can we talk about universalizability starting from a controversial and substantive (partial and determined in its content) idea of the good? My idea is that we have, with MacCormick, to take as fixed the principle of universalizability and that, at the same time, we should reject the perfectionist (above all Finnis') interpretation of the "hierarchical" relationship between the good and the right. On this point, MacCormick

does not contrast so much with Dworkin and in general with authors who may be defined as procedural natural lawyers. This is even more significant if we do not forget the implications of the Finnisian priority of the good over the right from a specific political point of view; in other words, if we do not underestimate the practical consequences of Finnis' theory of political authority.

This is my first observation, but for the moment I will leave it aside, because I have briefly to focus on two other aspects of MacCormick's theory, before reaching a provisional conclusion.

V. TWO FURTHER OBSERVATIONS

1. Reasonableness and freedom

The idea of reasonableness and the connected idea of rationality is not a choice but a necessity because of the conceptual connection between rationality and freedom. This question is, for example, well explained by Amartya Sen in his introduction to *Rationality and Freedom* (Sen 2002) As I have said, for MacCormick "reason is inevitably involved in any attempt to constitute momentary ends into some coherent system or order, enduring through time and availing in common among persons. Reason is involved in the universalization and checking of particular projects, and weighing them in the setting of an aspirationally coherent way of life" (MacCormick 1992, 119; see also MacCormick 1990, ch. XI). But if it is so, how can he defend the thesis that the rational discourse and the effort to be rational are only questions of preference, open questions, and that they do not "protect us from very much"? (MacCormick 1992, 113; see also MacCormick 1978, 301). I think that that claim necessarily deals with the possibility of being moral agents. I agree with Amartya Sen (and John Rawls), who tells us that rationality is conceptually related to freedom, because it means the ability to elaborate one's own life-project, and rationality presupposes freedom as free choice and self-determination; in other terms, there is a dual link between rationality and freedom. This conviction sheds new light on, and perhaps questions, the middle-ground concept of law defended by MacCormick, placed half way as if it were between Dworkin's and Ross'. If my claims is true, or at least plausible, then MacCormick is closer to Dworkin than to Ross. Rationality is an end and there is a tension towards it for Dworkin too. The thesis of the "one-

right answer” in its ideal character is not so far away from a position in which the idea of rationality and the idea of reasonableness are so important and normatively significant. And the review of Finnis’ *Natural Rights and Natural Law* by MacCormick seems to me distant from his *Legal Reasoning and Legal Theory*.

2. Balancing and compromise

The idea of balancing involved in applying the virtue of reasonableness, which in the end consists in a Smithian idea of universalizability, shows how balancing itself is more than mere compromise. Balancing among different positions under the directive of reasonableness means trying to fulfil a claim to correctness for that operation, believing, for instance, that it be impartial. But if that is so, and I think it is, once again the position here is closer to Dworkin’s “one-right answer” thesis, than to Ross’ anti-rationalism. Dworkin does not speak about truth in an objective sense, but in an inter-subjective sense, connecting it to impartiality and to *hic et nunc* universalizability. He has a procedural and empirical, weak but rational, concept of correctness, nothing to do with a transcendent or self-evident idea of truth *à la* Finnis. Here we can find one more reason for the convergence between MacCormick and Dworkin in the critique of the theory of the “strong discretion” of judges (MacCormick 2003, 536). Why, otherwise, does MacCormick believe that “every judge, after all, to be up to the job, will have to possess some small share of Solomon’s wisdom?” (MacCormick 2005, 81). I will not defend the idea that MacCormick and Dworkin have the same theory, not even on this important point. Nevertheless, both defend the idea that justification requires universalization, because it “involves propounding good rational grounds for what one does” (MacCormick 2005, 149). They share the idea that «judges have to universalize rulings as best they can within the context of an existing and established legal order» (*ibidem*). I know that in this way adjudication can become compatible with moderate relativism and never-ending reflexivity, but I think that, in part, the same happens to Dworkinian judges, and for both of them within certain limits. Very unjust law is not law: “provisions which are unjustifiable by reference to any reasonable moral argument should not be considered valid as laws” (MacCormick 2007, 242). On this point MacCormick subscribes to Radbruch’s thesis on inequality (see also MacCormick 2007, 271).

“If it is true that in the conception of law as institutional normative order we must include the idea that the proper purpose of such an order is the realization of justice and the common good, this has certain consequences” (MacCormick 2007, 264).

First of all, it implies a critical attitude towards the *status quo* about state, law, society, and also towards the duty to obey authority (MacCormick 2007, 257), and, furthermore, it takes a stand on the moral quality of deliberations and sentences.

The thesis of impartial balancing (see above 5.2) and the former one about the connection between rationality and freedom (see above 5.1) are two basic points. If they are correct, the connection between law and morality is not so relativistic and weak. The procedural character of correctness in law may be open, but it is strongly (albeit not substantively) normative, and perhaps (I hope) it may “protect us from” some clear injustice, something that is relevant from a moral point of view.

At this point in my argument it comes in part as a surprise to read that MacCormick considers himself very close to Finnis and that the differences between the two theories appear to him irrelevant (MacCormick 1981, 106; MacCormick 2007, 271). The self-definition “post-positivist” with which Neil MacCormick labels himself, on the contrary, shows that MacCormick’s idea of morality connected to the concept of law is close to a relativistic view of morality. But if this is consistent with some statements, for example, that law can «never stop perverted opinions being transformed into perverted laws», it conflicts with other statements and first of all with the implications of the principle of reasonableness which MacCormick accepts and emphasizes in his philosophy of law. For this last reason, his legal theory seems to me to have fundamentally much in common with a procedural idea of natural law like Alexy’s and Habermas’, and this contrasts with moral relativism, on the one hand, and with the ontological and intuitive idea of Natural Law Theory by John Finnis, on the other. Indeed, the structure of Finnis’ theory is conceptually incompatible with a discursive theory.

In conclusion, our question is only apparently a question about labels. It is a question about concepts; a question about justifying the possibility of having a representation of a connection between law and morality which

perhaps “does not protect us from very much”, but at least from very perverted ideologies.

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MacCormick's Latest Views of Legal Reasoning and the Positivist Concept of Law

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I. INTRODUCTION

Reasoning within the law and about the law is a central activity in legal practice. Unsurprisingly, then, legal reasoning has attracted the attention of several leading researchers from different disciplines over the last few decades, to the point of taking hold as an autonomous field of research in its own right.² In jurisprudence, this interest in argumentation is most

¹ Funding for this research has been provided by the Alexander von Humboldt Foundation. My indebtedness goes to several scholars who have supplied helpful comments to previous versions of this essay: I should therefore like to thank Robert Alexy, Francesco Belvisi, and the scholars who took part in the Author's Day on MacCormick's *Rhetoric and the Rule of Law*, an event held at Queen's University of Belfast on 28 April 2006 and organised by the Northern Ireland Legal Quarterly and the Forum for Law and Philosophy. Needless to say, responsibility for the views expressed herein, as well as for any errors of form or content, rests solely with me.

² Among those who have contributed to legal argumentation in recent years, we find not just legal scholars but also philosophers and argumentation theorists—their work has helped us gain a deeper understanding of practical and legal reasoning, in which regard the most valuable insights can be found in C. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, Notre Dame: Notre Dame University Press, [1958]

significant in the seminal works published in the late 1970s through the 1980s by a group of scholars seeking to arrive at a general theory of law informed by the recognition of the centrality of reasoning in legal practice.³ Among these pioneers is Neil MacCormick, who in *Rhetoric and the Rule of Law* has recently revised the theory of legal argumentation that he had originally put forward in 1978 in *Legal Reasoning and Legal Theory*.

Here, I will address a particular aspect of MacCormick's revised theory of legal reasoning, namely, the way his latest views on legal argumentation carry implications for the concept of law. I will compare these views against those set out in his earlier *Legal Reasoning and Legal Theory*, arguing that the recent revision of this theory in *Rhetoric and the Rule of Law* conceptualises the law in a non-positivist fashion. Thus, I will first present the main features of MacCormick's revised theory of legal reasoning, clarifying its nature and scope and showing that this revised theory makes legal reasoning a constitutive element of the concept of law. I will then argue that this conceptual link found to exist between legal reasoning and law is rich in theoretical implications not only for the study of legal argumentation (legal methodology) but also for our way of conceptualising the law (legal ontology). Now, in making legal reasoning constitutive of the concept of law, the revised theory embraces a foundational element of non-positivism, and that is the burden of my argument. Once we have established that fact, we will abandon the traditional image of MacCormick as the torchbearer of legal positivism and come to view him instead as the missing link between Herbert Hart's legal positivism and Ronald Dworkin's non-positivist research programme.

1969; S. Toulmin, *The Uses of Arguments*, Cambridge: Cambridge University Press, 1958; E. van Eemeren and R. Grootendorst, *Speech Acts in Argumentative Discussions: A Theoretical Model for the Analysis of Discussions Directed towards Solving Conflicts of Opinion*, Dordrecht: Foris, 1984; and J. Habermas, *The Theory of Communicative Action*, vols. 1 and 2, Boston: MIT Press, [1981] 1984 and 1987).

³ The most important contributions to the analysis of rational reasoning in law are A. Aarnio, R. Alexy, and A. Peczenik, 'The Foundation of Legal Reasoning', 12 (1981) *Rechtstheorie*, pp. 133–158, 259–273, 423–448; A. Aarnio, *The Rational as Reasonable: A Treatise on Legal Justification*, Dordrecht: Reidel, 1987; R. Alexy, *A Theory of Legal Argumentation*, Oxford: Clarendon, [1978] 1989; A. Peczenik, *On Law and Reason*, Dordrecht: Reidel, 1989; and N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon, [1978] 1994.

II. MACCORMICK'S LATEST THOUGHTS ON LEGAL REASONING

MacCormick's theory of legal reasoning is well known among legal scholars and so does not need to be explained in any detail. Still, a brief introduction that outlines its main features will help us see it in its most recent evolution. MacCormick initially advanced a study of legal reasoning that was highly consistent with Hart's analysis of the concept of law, an analysis that pays little attention, if any, to the structure of reasoning in law.⁴ At this stage MacCormick makes out the study of legal reasoning to consist in an investigation of the argumentative practices that decision-making authorities carry out to justify their decisions. This investigation is both analytical and normative, for it reconstructs the practices of adjudication in their concrete operation within a given order (analytical part), and it also sets out prescriptions about how legal decision-making should be justified from a rational point of view (normative part).⁵ On these premises, MacCormick scrutinises the form of argumentation specific to law and identifies the structure and scope of the rational constraints to which actual adjudicative practices should be subjected.

There are some basic rational constraints that MacCormick imposes on legal adjudication. The first of these requires that justification in law be carried out in keeping with the principle of universalisability;⁶ another basic rational constraint on legal adjudication consists in requiring that justification be carried out in keeping with deductive logic. Legal reasoning will take an entirely deductive, or syllogistic, form on those occasions when

⁴ MacCormick himself states that his own account of legal argumentation in *Legal Reasoning and Legal Theory* can be "represented as being essentially Hartian, grounded in or at least fully compatible with Hart's legal positivistic analysis of the concept of law . . . it was put forward as a theory of legal reasoning that upheld Hartian jurisprudence. . . . The centrality of rule-based reasoning in this book matched the centrality of the 'union of primary and secondary rules' in Hart's jurisprudence" in MacCormick, *supra*, fn 3, pp. XIV–XV.

⁵ *Ibid.*, 13.

⁶ On the significance of the idea of universalizability for legal reasoning, see, among others, N. MacCormick, 'Formal Justice and the Form of Legal Arguments', (1976) *Logique et analyse*, pp. 103–118, at pp. 110–111; 'Universalization and Induction in Law', in C. Faralli and E. Pattaro (eds.), *Reason in Law*, Milano: Giuffrè, 1987, pp. 91–105, at p. 91; 'Why Cases Have *Rationes* and What These Are', in L. Goldstein (ed.), *Precedent in Law*, Oxford: Clarendon, 1987, pp. 155–182, at p. 162 and *supra*, fn 3, pp. 84.

no problems interpose as to relevancy, interpretation, classification, evaluation, or proof, and the justification of a ruling will therefore consist in constructing a legal syllogism, or a long-enough chain of legal syllogisms, in the form “if OF then NC, and OF, therefore NC.”⁷ But this kind of deductive reasoning—a first-order mode of justification—encounters limitations when brought into the realm of law. These limitations are owed to the fact that the premises of a legal syllogism can be questioned, and to the fact that any attempt to work out the factual and legal matters of the case at hand will necessarily be narrative. Hence, when legal reasoning is made to follow a rational course, it will obey further criteria that expand beyond the domain of classical logic.

These further criteria are defined standards of second-order justification, in that their function is to guide us in choosing among rival rulings—all possible because equally valid in form—and in providing a justification for that choice. This is where MacCormick has given a major contribution to the study of legal reasoning: in setting out these criteria of second-order justification, and three fundamental ones in particular, namely, consistency, coherence, and the consequentialist mode of argumentation.⁸ Consistency he describes as a relationship of non-contradiction: a ruling is consistent with other provisions of the normative system if it does not contradict any valid rule of that system. Coherence is a looser requirement that describes the ability of a part to fit into a whole; the parts are thus said to all cohere when—in figurative language—they “hang together” or “make sense as a whole.”⁹ Finally, the consequentialist criterion directs the

⁷ On this aspect, see N. MacCormick, ‘Legal Deduction, Legal Predicates and Expert Systems’ (1992) *International Journal for the Semiotics of Law* pp. 181–201, at p. 182; *supra*, fn 3, pp. 19–52; and N. MacCormick, *Rhetoric and the Rule of Law*, Oxford: Oxford University Press, 2005, pp. 33–48.

⁸ MacCormick, *supra*, fn 3, pp. 100–128.

⁹ The expressions “hanging together” and “making sense as a whole” are found in N. MacCormick, ‘Coherence in Legal Justification’, in A. Peczenik (ed.), *Theory of Legal Science*, Dordrecht: Reidel, 1984, pp. 235–251, at p. 235. Other original attempts at elucidating the notion of coherence can be found in B. Levenbook, ‘The Role of Coherence in Legal Reasoning’, 3 (1984) *Law and Philosophy* pp. 355–374; R. Alexy and A. Peczenik, ‘The Concept of Coherence and Its Significance for Discursive Rationality’, 3 (1990) *Ratio Juris* pp. 130–147; V. Rodriguez-Blanco, ‘A Revision of the Constitutive and Epistemic Coherence Theories of Law’, 14 (2001) *Ratio Juris* pp. 212–232; and Leonor M. Soriano, ‘A Modest Notion of Coherence in Legal Reasoning: A Model for the European Court of Justice’, 16 (2003) *Ratio Juris*, pp. 296–323. A critical approach to the role of coherence in

decision-maker to justify the chosen rulings on the basis of their legal implications and whether these can be accepted. To put it in a formula, on MacCormick's account of the structure of legal justification, a decision is rationally justified if, once universalised, it proves consistent and coherent with previously enacted laws and carries implications that are acceptable from the legal point of view. In this justificatory scheme, a ruling must make sense both in its own legal system and in the outside world. In particular, a ruling's consistency and coherence with the other normative statements inhabiting a given legal system ensures that the ruling can make sense within the system; the acceptability of the ruling's consequences (the consequentialist criterion) ensures its ability to make sense in the world.

This scheme of legal justification has essentially remained the same since the publication of *Legal Reasoning and Legal Theory*. Under that respect the recent changes introduced with *Rhetoric and the Rule of Law* are sparse and mostly concerned with questions of detail, leaving the core of the view unaltered.¹⁰ What instead does stand significantly affected is the picture that emerges of the relationship between legal reasoning and the concept of law. The discussion in *Rhetoric and the Rule of Law* seems to suggest at several places that MacCormick is now committed to the view that the practice of legal reasoning is constitutive of the concept of law, and that law is therefore an argumentative domain through and through. I will call this claim the argumentation thesis—a thesis absent from MacCormick's original account—and will argue it to be deeply embedded in the revised theory.

The argumentation thesis—this new way of understanding the law as closely bound up with legal reasoning—carries a spectrum of theoretical implications. We can appreciate the full significance of this thesis if we consider that it can be used to distinguish the two main contemporary approaches to legal reasoning: the “traditional” approach and the

law is found in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford: Clarendon, 1994, pp. 277–325, and K. Kress, ‘Coherence’, in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Oxford: Blackwell, 1999, pp. 533–552.

¹⁰ This is what MacCormick underlines in his statement that despite the changes made to his original account of legal reasoning, “the basic forms of legal argument” still seem to him to “have been well described in the 1978 book” (MacCormick, *Rhetoric*, *supra*, fn 7, p. 1).

“alternative” one. The traditional approach to legal argumentation acknowledges that most legal operations are argumentative and that legal reasoning accordingly plays a crucial role in shaping the features of legal orders—but the shaping hand of legal reasoning is not, on this view, understood to be so pervasive as to go to the concept of law. This concept can therefore be articulated independently of the main advancements made in the study of legal reasoning, precisely because legal reasoning is understood not as a ubiquitous practice—one that spreads across the whole of the realm of law—but as a specific component, and ultimately a peripheral one. The traditional approach, then, denies the argumentation thesis, and in fact falls in sympathy with legal positivism, which takes into account the various forms of legal reasoning that contribute to shaping the legal system but then rejects the claim that legal reasoning itself influences our way of conceptualising the law.¹¹

By contrast, the alternative approach regards the theory of legal reasoning as a vantage point from which to analyse legal systems and tackle the main problems connected with their existence. Rather than figuring as merely one component among others in a theory of law, as happens in the traditional approach, in the alternative approach legal reasoning takes shape as an all-embracing activity whose consequences invest the study of legal issues across the board. So we can appreciate that the reasoning that legal subjects engage in when seeking appropriate solutions to concrete cases is part and parcel of law, not an external component of it, and therefore no less constitutive of the nature of law than are the law’s general and abstract rules. This view amounts to the claim that in addition to shaping specific stages in the development of a legal system, legal reasoning also shapes the law as a whole, and incisively so. This can be expressed from the viewpoint of the argumentation thesis by saying that legal reasoning should be understood as a defining element of law and so as constitutive of the very concept of law.¹²

¹¹ Two works that paradigmatically exemplify this conception of legal argumentation are Hans Kelsen, *Pure Theory of Law*, Berkeley and Los Angeles: University of California Press, [1960] 1967, pp. 348–356, and Joseph Raz, *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon, 1979, 180–209.

¹² This research programme was first explicitly set out in Aarnio, Alexy and Peczenik, *supra*, fn 3, at pp. 266–270. The programme prompted several attempts to question the traditional concept of law and redefine law as an argumentative practice, and the most well-rounded of

If we follow through on the argumentation thesis, we will arrive at a specific non-positivist idea of law that constructs the law as an argumentative social practice aimed at finding reasonable solutions to legal cases.¹³ Law can thus be defined as a dynamic articulation of defeasible reasons, a set of practices of deliberative reasoning, an order constitutively open to external influences.¹⁴ This compels us to question the positivist “account of law in terms of the interplay of primary and secondary rules,” where the legal is clearly marked off from the extralegal.¹⁵ This positivist account should be replaced by one that recognises the constitutive function of deliberative reasoning in the definition of law. In fact, these two accounts prove ultimately incompatible, as we can appreciate from the fact that positivist theories, for all their variety, are grounded in the idea that law is autonomous from other spheres of practical reason.¹⁶ No such autonomy can pertain to a concept of law proceeding from the argumentation thesis, because the idea of law as an enterprise shaped by deliberative reasoning entails that the legal domain is inherently permeable to external influences.

these attempts are R. Dworkin, *Law's Empire* London: Fontana, 1986, and R. Alexy, *The Argument from Injustice* Oxford: Clarendon, [1992] 2002.

¹³ This concept of law is set out as follows in Dworkin, *supra*, fn 12, pp. 410-413, and Alexy, *supra*, fn 12, p. 127).

¹⁴ This definition is far from incompatible with the statement—central to MacCormick's theory—of the institutional nature of law. See, in this regard, N. MacCormick and O. Weinberger, *An Institutional Theory of Law*, Dordrecht: Reidel, 1986; and MacCormick, *Rhetoric*, *supra*, fn 7, pp. 2-7. In fact, legal reasoning will remain deeply institutional for as long as legal deliberation requires making reference to authoritative sources (a necessary but not a sufficient condition). Thus, far from losing sight of the institutional dimension of law, the argumentation thesis draws that dimension into the core level of legal reasoning, in the connection that must be established between a legal ruling and the institutional shape of the legal order in which that ruling is issued.

¹⁵ H. L. A. Hart, *The Concept of Law*, Oxford: Clarendon, [1961] 1994, p. 82.

¹⁶ This idea is most clearly expressed in the words of Jeremy Waldron, who finds that on a positivist approach, “law can be understood in terms of rules and standards whose authority derives from their provenance in some human source, sociologically defined, and which can be identified as law in terms of that provenance. Thus statements about what the law is—whether in describing a legal system, offering legal advice, or disposing of particular cases—can be made without exercising moral or other evaluative judgement” (J. Waldron, ‘The Irrelevance of Moral Objectivity’, in Robert P. George (ed.) *Natural Law Theory*, Oxford: Clarendon, 1992, pp. 158-187, at p. 160.

In summary of the main points made so far, there is theoretical momentum involved in endorsing the argumentation thesis, since this endorsement will in turn have us embrace a non-positivist account of the nature of law. And this is precisely what seems to happen in the recent evolution of MacCormick's thought: by endorsing the argumentation thesis, he sets his theory within the same theoretical horizon as that of the alternative approach to legal argumentation, and in so doing he winds up taking on board a fundamentally non-positivist element. Thus, once it is established that he has in fact endorsed this thesis, he can be said to have finally parted ways with legal positivism. This conclusion may sound astonishing if we consider that MacCormick has long championed legal positivism, or at least has long been regarded that way—and even his latest work on legal reasoning fails to show strong textual evidence on which basis to qualify his account of law as non-positivist. MacCormick makes at best the modest statement that the trajectory of his thought “has been away from some elements of the legal positivism expounded by H. L. A. Hart . . . that formed the backcloth to the argument in *Legal Reasoning and Legal Theory*.”¹⁷ By the same token, MacCormick's own definition of his theory as “post-positivistic” is a claim still too timid to support on its own the view that MacCormick has now paved the way to a non-positivist concept of law.¹⁸ In fact, the expression “post-positivistic” is open to the ambiguity that it can refer to a range of legal theories whose only *trait d'union* consists in their stemming from legal positivism all the while distancing themselves from it. The expression can therefore be used to indicate that a theory continues to bear a strong connection with legal positivism, but at the same time it suggests that the connection is not so strong as to make the theory entirely traceable to legal positivism. These perplexities I address in the remainder of this paper, where I first argue that MacCormick has actually endorsed the argumentation thesis and will then argue that this thesis is deeply non-positivist. If these two claims prove correct, the conclusion will seem inescapable that MacCormick's recent developments force on him a non-positivist account of the nature of law.

¹⁷ MacCormick, *Rhetoric*, *supra*, fn 7, p. 1.

¹⁸ *Ibid.*, 2.

III. MACCORMICK'S ENDORSEMENT OF THE ARGUMENTATION THESIS

In this section I offer some grounds in support of my claim that MacCormick's latest contribution to legal reasoning commits him to the argumentation thesis—a thesis that he does not anywhere explicitly articulate. The first ground in support of MacCormick's endorsement of the argumentation thesis consists in showing that MacCormick endorses two other claims that, taken jointly, entail the thesis. The first of these claims is that legal reasoning is omnipresent in legal practice and plays a pivotal role in shaping legal orders. The second claim is that legal reasoning is bound by a relationship of reciprocity with the concept of law, in that the way we account for this concept is going to depend on, and be influenced by, the theory we frame of legal reasoning, and vice versa.

This is not the first time, with *Rhetoric and the Rule of Law*, that MacCormick presents legal reasoning as omnipresent in law, to be sure, but in no other work is he as insistent and emphatic in making the point that argumentation exerts a deep influence on law—so much so that the revised theory of legal reasoning presents the point as a truism: “recognition of law’s domain as a locus of argumentation, a nursery of rhetoric,” is “no less ancient than recognition of the Rule of Law as a political ideal.”¹⁹ The argumentative nature of law should thus be seen as a platitude, an idea whose truth can be taken for granted and needs no theoretical support.²⁰ So there is no reason to doubt that “law is an argumentative discipline”²¹ since the “quality of law” is “argumentative”²² and the “character of legal proceedings” is “dialectical or argumentative.”²³ Now, this general point is far from inconsistent with the core of MacCormick's theory of law. But the outright statement of the point, and the centrality it is given in the argument, represents a significant shift in emphasis in MacCormick's recent work.

¹⁹ Ibid., 13.

²⁰ Ibid., 14–15.

²¹ Ibid., 14.

²² Ibid., 16.

²³ Ibid., 26.

Clearly, there may well be historical reasons for MacCormick's decision of making explicit the view that legal reasoning is pervasive. In other words, MacCormick first set out his theory of legal reasoning when legal theory had just begun to address frontally and systematically the question of legal argumentation: few assumptions about legal argumentation could be taken for granted back then. But the situation today has changed almost beyond recognition: after decades of study, there is much more awareness that practically at any stage of what is ordinarily considered the legal domain we resort to reasoning. No longer is it so arbitrary to assume argumentation to be central in law, now that the theory of legal reasoning has developed fully and enables us not only to recast longstanding debates in a new light but also to revise several basic notions in traditional jurisprudence.²⁴ But the historical perspective cannot help us understand the theoretical reasons for the shift in MacCormick's emphasis on the argumentativeness of law. And a theoretical account of this shift is precisely what we are after, because it is in theoretical terms that MacCormick frames his revised attitude toward the ubiquity of legal reasoning, just as it is in theoretical terms (rather than historical ones) that the significance of the shift should properly be understood.

For a better theoretical grasp of MacCormick's new emphasis on the argumentativeness of law, we should read this emphasis in conjunction with another thesis, one that MacCormick has espoused since his seminal work on legal reasoning, and this is the thesis by which a conceptual connection is established between theories of legal reasoning and theories about the concept of law: "a theory of legal reasoning requires and is required by a theory of law. . . . Any account of legal reasoning . . . makes presuppositions about the nature of law; equally, theories about the nature of law can be tested out in terms of their implications in relation to legal reasoning."²⁵ Now, when this thesis—the conceptual connection between the theory of legal reasoning and the theory of law—is made to work in combination with the thesis that argumentative practices are pervasive and

²⁴ On this aspect see S. Bertea, 'Legal Argumentation Theory and the Concept of Law' in F. H. van Eemeren, J. A. Blair, C. A. Willard, and A. F. Snoeck Henkemans (eds.), *Anyone Who Has a View: Theoretical Contributions to the Study of Argumentation*, Dordrecht: Kluwer, 2003, pp. 213–226, where I provide a deeper analysis of the ways in which the study of legal argumentation can influence other parts of legal theory.

²⁵ MacCormick, *supra*, fn 3, p. 229.

shape the deep features of legal systems, the outcome is, I believe, that we must necessarily also conceive of law as an argumentative practice through and through. In fact, this last claim—a restatement of the argumentation thesis—adequately explains the two other theses and provides them with a direct foundation. We can elucidate the connection among the three theses by analysing the way the last of them (the argumentation thesis) singly relates to each of the other two.²⁶

First, the thesis that legal reasoning is constitutive of the concept of law can elucidate and ground the thesis that pervasive in law is the practice of arguing about the law and about questions of law generally. This link between the two theses is manifest in the widely acknowledged view that the concept of law ideally precedes all other questions of law, for it is here—in the concept setting out the nature of law—that many specific legal issues are rooted.²⁷ This view rests not only on theoretical considerations but on practical ones, too: we need to have a concept of law in place (a concept framing the nature of law) before we can proceed to distinguish what is law from what is not law. The distinction made on this basis will in turn be a direct influence on judicial decision-making and on the way cases should be decided. And how judges go about deciding cases (or how they *should* proceed in doing so) certainly does make a practical difference. So legal theorists and practitioners alike need to have a grasp of

²⁶ Remarkably, endorsing these three theses together also makes it possible to better appreciate the extent of MacCormick's sensitivity to legal argumentation: MacCormick's acknowledgment that law is argumentative comes even in the course of an analysis of the lawmaker's perspective—a perspective that, other things being equal, makes it more difficult (not less difficult) to appreciate the law's argumentative dimension. Even so, MacCormick cannot seem to underscore the importance of legislation (the lawmaker's perspective) without also pointing out that "the job of legislation is never completed when the text of a statute leaves the legislature" and that the "final process of concretization or determination . . . will still have to take place through judicial decision"; even more importantly, he observes that legislation "changes things in a certain direction, perhaps, but we cannot be sure exactly what change it will in the end have made, how broad its impact, with what exact effect in concrete situations as these will arise in the domains affected" (MacCormick, *Rhetoric*, *supra*, fn 3, pp. 10–11). As I see it, what makes it possible to state this point in this context (an analysis carried out from the lawmaker's perspective) is a framework of thought shaped by the three related theses to the effect that argumentation is constitutive of law, and so is omnipresent in law, and hence that the theory of legal reasoning and the theory of law are interdependent.

²⁷ This view is widely accepted among contemporary legal theorists. For a contrary view, see R. Posner, *Law and Legal Theory*, Oxford: Clarendon, 1996, p. 3.

the nature of law—they need a general account of law, however tentative it may be—if they are to proceed in any satisfactory manner to take on the specific legal questions that confront them. This shows that questions concerning the nature of law occupy a central place in the legal domain and are indeed pervasive. Which in turn means that likewise central and pervasive are the elements constitutive of law (of the nature of law), in the sense that these elements are bound to bear on the solution to specific legal questions, whether directly or indirectly. The argumentation thesis counts legal reasoning among these constitutive elements, thereby explaining and justifying our belief that reasoning is central to and pervasive in law. In other words, in showing the concept of law to be dependent on legal reasoning, the argumentation thesis shows reasoning to be central to the legal enterprise—central because part of the concept of law, which in turn takes us to the core of legal practice. This amounts to recognising legal reasoning to be omnipresent in legal practice simply by virtue of its being constitutive of the concept of law, and by virtue of the fact that this question—of the concept of law—is widely recognised to be inescapable.

Second, the argumentation thesis can explain why legal reasoning and the concept of law have to be theorised together, in mutual dependence, in that no theory of legal reasoning can be worked out without a companion theory framing a concept of law (describing the nature of law) and, vice versa, no comprehensive understanding of law (of the concept of law) can be achieved without an accompanying account of legal reasoning. The most direct explanation of this two-way relationship between the two accounts consists in pointing out the conceptual link that binds their respective objects of study: the concept of law and legal reasoning. This link is one of mutual engagement—each object being constitutive of the other—and it is for this reason that we cannot have a full theoretical understanding of law without an account of legal reasoning. The constitutive connection between law and legal reasoning explains that in order to conceptualise one element of the pair we will necessarily have to make some theoretical assumptions about the other. Thus, by establishing a necessary link between legal reasoning and the concept of law, the argumentation thesis shows that no theoretical account of the nature of law can make sense independently of an account of legal reasoning, and vice versa. To put it otherwise, the object-level, or discourse-level, connection between law and legal reasoning, while not explicitly stated in MacCormick, should be espoused nonetheless because it ultimately

justifies the methodological (or metadiscourse) connection, which he does instead make explicit.

In summary so far, the three theses—the argumentation thesis, the thesis of the omnipresence of argumentation in legal practice, and the thesis of the interdependence between the theory of law and the theory of legal reasoning—form in my reconstruction a tight-knit unit. Moreover, and more significantly, what gives coherence to this triad and cements it is the argumentation thesis, which connects the two other theses and grounds their truth.

But the explanatory and justificatory power of the argumentation thesis goes beyond that. The argumentation thesis—and this is a further ground for the view that MacCormick has recently endorsed this thesis—provides as well the best explanation of the sympathetic attitude MacCormick has recently taken to Dworkin. Whereas in *Legal Reasoning and Legal Theory* MacCormick takes a thoroughly critical approach to Dworkin's interpretive theory of law, without also engaging in any constructive interchange,²⁸ in his recent *Rhetoric and the Rule of Law* he points up several convergences between his own thought and Dworkin's. MacCormick's recent turn toward the interpretive approach is not unqualified, to be sure: even in *Rhetoric and the Rule of Law* we find significant criticisms of Dworkin's theory. In particular, MacCormick calls into question Dworkin's definition of law as an interpretive enterprise, and especially the notion that "every venture into discussion of what law requires . . . calls for an effort of 'interpretation'."²⁹ MacCormick also takes issue with Dworkin's "thesis about 'constructive interpretation', according to which interpretation regards a whole activity within a certain genre, and seeks to understand it in such a way as to make it the best of its own kind that it can be."³⁰ This way of understanding the relationship between law and interpretation is criticised as amenable to the risk of oversimplification insofar as it prevents us from realising that "there are different objects of interpretation in law, and differences of interpretative

²⁸ N. MacCormick, *supra*, fn 3, pp. 229–274.

²⁹ N. MacCormick, *Rhetoric*, *supra*, fn 7, p. 140.

³⁰ *Ibidem*.

approach and interpretative arguments appropriate to different objects.”³¹ Finally, MacCormick finds that Dworkin fails to appreciate in full the role played by coherence in law, and fails as well to appreciate that the notion of constructive interpretation should at best be seen as an overarching concept enabling us to sum up more-specific argumentative practices revealed to us through the process of rational reconstruction. But these criticisms are made within an overall appreciation of Dworkin and should therefore be interpreted more as constructive than as dismissive. MacCormick’s welcoming attitude, far from sporadic or occasional, emerges most clearly in his willingness to stress the similarities between his own method and Dworkin’s, as well as to stress the substantial agreement in the conclusions reached. Thus, for one thing, MacCormick notes that the method he follows in his latest work on legal reasoning “chimes quite closely” with Dworkin’s method, shaped by the idea that “it is out of rival conceptions of legality rather than by way of some kind of empirical description of things as they are or of the semantics of ordinary language that we develop different possible philosophies of law.”³² For another thing, these methodological similarities are supplemented by an agreement in substance, in the sense that MacCormick considers his own institutional approach “in a broad way compatible” with Dworkin’s interpretive approach to political philosophy.”³³ In fact, when law is conceived of as “an institutional order,” it “amounts to a shared framework of understanding and interpretation among persons in some social setting.”³⁴ The convergence between the two approaches is thus warranted by their agreement that “as a normative order, [the law] is in continuous need of interpretation, and as a practical one, in continuous need of adaptation to current practical problems.”³⁵

MacCormick’s revised attitude and framework can be explained by describing his recent views on legal reasoning as a move toward the same legal paradigm as that which underlies Dworkin’s jurisprudence, a paradigm defined and delimited by the argumentation thesis. On this

³¹ *Ibid.*, 140.

³² *Ibid.*, 28.

³³ *Ibid.*, 6, n. 5; cf. 2–7 and 23–31.

³⁴ *Ibid.*, 6.

³⁵ *Ibid.*, 6.

reading, the critical attitude initially taken toward Dworkin is owed for the most part to the fact that MacCormick's early theory of legal reasoning, one that connects closely with Hart's orthodoxy, belonged to a theoretical horizon that did not include the argumentation thesis and so was altogether different from Dworkin's interpretive view. This prevented MacCormick from fully appreciating the interpretive turn that Dworkin had given to legal theory, and it also prevented MacCormick from engaging in any constructive interchange with Dworkin. But in MacCormick's latest work the situation has changed: the loosened connection with Hart's positivism and framework now does enable him to pay explicit and specific attention to Dworkin's contribution.³⁶ On this reading, then, MacCormick's recent adherence to the argumentation thesis—a defining trait of Dworkin's interpretivism—explains why MacCormick has recently become sympathetic to Dworkin's interpretive jurisprudence, and it more generally explains the relationships between MacCormick's and Dworkin's theories.

In conclusion, MacCormick's revised theory can be shown to require at its core an acceptance of the argumentation thesis, as a device with which to both explain and justify the theory. On the one hand, we can explain and ground on this basis two views in legal reasoning that are foundational in MacCormick—namely, the centrality of argumentation in law and the interdependence between legal reasoning and the concept of law; on the other, we can use the argumentation thesis to make sense of the relationships between MacCormick and Dworkin, as to both method and substantive theory.

IV. THE NON-POSITIVIST DIMENSION OF THE ARGUMENTATION THESIS

My claim that MacCormick's revised theory of legal reasoning embeds a non-positivist element depends crucially on the claim that the argumentation thesis is a defining feature of non-positivism. This latter claim I will support here by showing that the choice whether or not to accept the argumentation thesis discriminates between positivism and non-

³⁶ *Ibid.*, 1.

positivism. So, too, legal positivism cannot accept the argumentation thesis without renouncing some of its foundational views.

The non-positivist dimension of the argumentation thesis emerges paradigmatically in the work of a champion of Anglo-American legal positivism, Joseph Raz. Raz grounds the concept of law on the strong version of the social thesis, or sources thesis, under which “what is law and what is not is a matter of social fact.”³⁷ On the strong version of this thesis, which Raz embraces, the tasks of identifying the law and determining the contents of law “depend exclusively on facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument.”³⁸ This is tantamount to defending the conceptual separation, or separability, of law and morality; that is, to claiming that the criteria of legal validity need not necessarily consist, either partly or entirely, of moral standards.³⁹ In Raz’s version of legal positivism, what requires a morally neutral definition of law is the authoritative mode by which legal institutions function: if the law is to exert any authority, it must be a sort of institution that in principle possesses the fundamental properties of an authority, meaning that like any other authority, it must be able to issue statements identifiable without having to rely on their underlying (moral) justification.⁴⁰ This requirement entails that the law can only be authoritative if its directives are independent of the moral reasons that justify them. Raz concludes on this basis that the nature of law is ultimately a matter of social fact, not of moral values.

But this morally neutral characterisation of law can only hold up on condition of making the concept of law autonomous from legal reasoning, because legal reasoning consists at least in part in “straightforward moral reasoning.”⁴¹ In particular, legal reasoning is understood by Raz to consist

³⁷ J. Raz, *supra*, fn 11, p. 37.

³⁸ *Ibid.*, 39–40; cf. 46–47. This view is defended as well in A. Marmor, *Interpretation and Legal Theory*, Oxford: Clarendon, 1992, pp. 8 and 39.

³⁹ The claim that the separability of law and morality lies at the core of legal positivism is defended in a number of places, among them K. Himma, ‘Inclusive Legal Positivism’, in J. Coleman and S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford: Oxford University Press, pp. 125–165.

⁴⁰ See Raz, *supra*, fn 9, pp. 199–204.

⁴¹ J. Raz, ‘On the Autonomy of Legal Reasoning’ 6 (1993) *Ratio Juris* 1993, pp. 1–16, at p. 8.

in two main practices: reasoning about what the law is and reasoning about how disputes should be settled under the law. The first practice is connected with the application of law, and to the extent that the contents of law are determined on the basis of the sources thesis, the practice is carried out without relying on moral considerations. Not so in the case of the second practice. Reasoning in compliance with the law is a broader, more complex activity than merely applying the law or establishing what the law is, and in this sense it does involve moral considerations. This argument can be rephrased as follows. Legal reasoning "is a species of normative reasoning. It concerns norms, reasons for action, rights and duties, and their application to general or specific situations."⁴² As such, it is not unlike moral reasoning, and this similarity shows that legal reasoning enjoys only a relative and limited autonomy from moral reasoning. In fact, "legal expertise and moral understanding and sensitivity are thoroughly intermeshed in legal reasoning";⁴³ rather than being "impervious to moral reasons," legal reasoning is "an instance of moral reasoning";⁴⁴ therefore, if we make legal reasoning a constitutive component of the concept of law, as the argumentation thesis does, we are in effect letting morality into the law. But this contradicts the sources thesis—and the sources thesis is the core of legal positivism. Raz's treatment thus shows paradigmatically that the argumentation thesis is incompatible with the positivist stance: a legal positivist looking to frame a coherent concept of law understood as determined solely by social facts must keep this concept distinct from legal reasoning, which in contrast is a morally laden practice.⁴⁵

It may be claimed, generalising Raz's argument, that the argumentation thesis should be considered a defining trait of non-positivism since the reasoning behind the argumentation thesis can be constructed as an instantiation of the thesis that denies the separability of law and morality, a separability that lies at the core of legal positivism. The close link the argumentation thesis bears with the thesis setting out a conceptual connection between law and morality can be made more explicit if we elaborate further on the reasons why legal reasoning cannot be conceived of as fully autonomous from moral reasoning. We will do so looking at

⁴² Ibid., 1.

⁴³ Ibid., 10.

⁴⁴ Ibid., 14–15.

⁴⁵ One such coherent account of legal positivism can be found in J. Gardner, J. 'The Legality of Law', 7 (2003) *Associations*, pp. 89-101.

theoretical approaches in both the positivist and the non-positivist camp. To begin with, the proposed picture of legal reasoning as a specialised type of technical reasoning obedient to its own rules bears no resemblance at all to the judicial practice of contemporary legal systems, because we know for a fact that courts engage and find themselves *having* to engage in practical reasoning, which by definition includes extralegal elements. It is essential to note here that this appeal to extralegal reasons is not a contingent feature of judicial practice but is rather demanded by the nature of law and the human being. This is something that we get from Hart in his observation that lawmakers, particularly in certain branches of law, can only frame laws in broad terms, incorporating general standards into the texts of law, and crafting provisions that will not cover all the possible concrete cases of application. This is constitutive of the lawmaker's mode of operating and is due to the fact that legal systems "compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case."⁴⁶ This compromise can take different shapes in different legal systems, in that "in some systems at some periods it may be that too much is sacrificed to certainty. . . . In other systems or at other periods it may seem that too much is treated by courts as perennially open or revisable in precedent."⁴⁷ But compromise we must, at least some extent, for this is simply a "feature of the human predicament," the fact that "we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions."⁴⁸ The two handicaps Hart is referring to are our relative indeterminacy of aim and our ignorance of the future. What result from these two handicaps are both an inability to make rules that satisfactorily cover all possible future controversies and a need to have norms that are relatively undermined and open to an assessment made at the time the situation takes place. So human nature is such that it is beyond our reach,

⁴⁶ Hart, *supra*, fn 15, p. 130.

⁴⁷ *Ibid.*, 130.

⁴⁸ *Ibid.*, 128.

and is even undesirable, to frame laws so detailed that the question whether they apply or not to a particular case never requires a fresh choice. It is through this sphere of choice, incompleteness, and normative indetermination and openness that extralegal considerations seep into legal reasoning. We *need* these considerations in legal reasoning if we are to fill the unavoidable gaps in the indeterminate provisions of open-ended disciplines.

Among the extralegal reasons that make their way into legal reasoning, a prominent and crucial place is occupied by moral reasons. The most straightforward statement to this effect is Robert Alexy's special-case thesis,⁴⁹ whereby "legal discourse is a special case of general practical discourse" and so belongs in the same sphere with moral reasoning.⁵⁰ Thus, while legal reasoning proceeds under constraints that set it apart from moral reasoning, it takes up the same questions as moral reasoning—namely, the practical question of what should or may be done or avoided—and lays a claim to correctness that is partly moral. The moral quality of the claim to correctness advanced by legal discourse is owed to the fact that this claim incorporates a reference to criteria of rationality and reasonableness, criteria that are shaped, among other things, by moral considerations. The permeability between legal reasoning and moral reasoning therefore results from the ultimate unity and systematic connectedness of practical reasoning.⁵¹ The features that legal reasoning shares with moral reasoning—the sphere in which they both operate, the basic questions they both deal with, and the kinds of claims they both advance—make these two activities only partially and limitedly

⁴⁹ On the special-case thesis, see Alexy, *supra*, fn 3, pp. 212–220, and 'The Special Case Thesis', 12 (1999) *Ratio Juris* pp. 374–384.

⁵⁰ See Alexy, *supra*, fn 3, p. 212.

⁵¹ Interestingly, the special-case thesis finds MacCormick in agreement with it, for he describes interpretation as "a particular form of practical argumentation in law, in which one argues for a particular understanding of authoritative texts or materials as a special kind of (justifying) reason for legal decision. Hence legal interpretation should be understood within the framework of an account of argumentation, in particular, of practical argumentation" (N. MacCormick, 'Argumentation and Interpretation in Law', 6 (1993) *Ratio Juris*, pp. 16–29, at p. 16. See also MacCormick, *Rhetoric*, *supra*, fn 7, pp. 139–141). This claim amounts to acknowledging the dependence of legal reasoning on practical reasoning—a dependence that in turn makes up the core of the special-case thesis.

independent of one another.⁵² This means that legal reasoning enjoys only an apparent autonomy, but even more importantly, it means that legal reasoning, insofar as it is constitutive of the concept of law, makes the law permeable to moral influences. Accordingly, on a view shaped by the argumentation thesis, the law cannot be understood as an independent and separate sphere of practical reason the way legal positivism would have it.

V. CONCLUSION

In this paper, I have claimed that MacCormick's recent account of legal reasoning incorporates a non-positivist element deriving from his endorsement of the argumentation thesis: this is the thesis that legal reasoning is constitutive of the concept of law, and the non-positivist element it carries consists in its being instrumental to the thesis establishing a conceptual connection between law and morality. In the result, MacCormick's endorsement of the argumentation thesis distances him from the legal positivist account he initially gave of legal argumentation and brings his revised account in line with the non-positivism theorised by scholars like Alexy and Dworkin.

But this interpretation of MacCormick's revised theory carries as well a more general implication, that is, it corroborates the idea that planted in Hart's legal positivism are the seeds of a non-positivist yield: Hart, perhaps more unwittingly than not, has sown seeds out of which non-positivism has finally grown stronger. And what in particular (on this reading) brought down the legal positivist project, thus enabling non-positivism to flourish, was the attempt to graft a theory of legal reasoning to Hart's general theory of law. As the development of MacCormick's thought shows paradigmatically, developing a theory of legal reasoning consistent with Hart's legal positivist concept of law is an enterprise without prospects: no matter how much we may wish to remain faithful to Hart's concept of law, we are bound to change this concept fundamentally in any attempt to

⁵² In the terms of discourse theory, this interdependence can be expressed by presenting legal reasoning as exhibiting both a discursive, morally laden element and an authoritative (or institutional) one that cannot be kept separate from the former. This makes the discursive element the common ground of law and morality, and its incorporation in the authoritative discourse of law therefore becomes a decisive obstacle to the conceptual separation between legal and moral reasoning.

supplement it with a theory of legal reasoning, even if only to fill a gap. In other words, the moment we set out to investigate legal reasoning from within Hart's jurisprudence, as MacCormick has set out to do, we will find we have to question some central assumptions of legal positivism. What also seems to follow from this reading of the development of legal positivism, though I cannot lay out the case here, is that in Dworkin's interpretive approach we have a much less incoherent development of Hart's reflection on the nature of law than is generally understood. On this reading, Hart's idea of law as a social practice resulting from the combination of primary and secondary rules does not stand in a relationship of mere contrast with Dworkin's account of law as an argumentative social practice: a tension may be present, to be sure, but the relationship can also be understood as one continuity and transition from one theory to the other.

This introduces a further reason why MacCormick's theory bears remarkable theoretical interest: this theory constitutes the missing link between Hart and Dworkin, the intermediate stage in the progressive transition from a dominant legal positivist approach to an argumentation-based one. The evolution of MacCormick's legal theory sheds new light on a contemporary debate that has engaged analytical legal theorists in regard to the concept of law, drawing much interest and causing an equal degree of puzzlement: on one side are those who understand law (the bare bones of law) as an interplay of rules; on the other side, those who understand it as "an interpretive concept,"⁵³ one "not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theatre of behaviour" but rather defined by an "interpretive, self-reflective attitude addressed to politics in the broadest sense."⁵⁴ This is why I think MacCormick's work has been considered so interesting as to receive "the benefit of many critical reviews and comments (both supportive and corrective),"⁵⁵ and why it deserves further reflection and critique.



⁵³ Dworkin, *supra*, fn 12, p. 410.

⁵⁴ *Ibid.*, 413.

⁵⁵ MacCormick, *Rhetoric*, *supra*, fn 7, p. IV.



Coherence and Post-Sovereign Legal Argumentation

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INTRODUCTION

The renaissance of argumentation and of the practice of giving reasons can be located in some point contemporary to the linguistic turn. As an echo of the rise of argumentation theories in philosophy of language, and strongly influenced by the hard reactions and criticisms towards legal positivism that followed the Second World War, argumentation theories soon appeared also in legal theory, most of them considering, on the one hand, that legal argumentation shared some futures of practical or moral reasoning, and on the other, highlighting the specificities that reasoning acquires in this field of human knowledge.¹

The linguistic turn was soon reached by the argumentative turn in the field of legal theory of the mid and late seventies. Three different scholars – Alexy, Aarnio and MacCormick– coming from three different legal

¹ Alexy's special-case thesis is the main reference here. See R. Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, Oxford: Clarendon Press, 1989; 'The Special Case Thesis' 12 (1999) *Ratio Juris*, p. 374-384.

traditions², landed a common concern about argumentation in law that was up in the air, without having notice one another of the parallel developments of their colleagues. Despite the differences among the theories, they shared some features especially regarding the prominent place that argumentation should have in law, and including, though with different intensity, references to the role of coherence in legal thinking.³

Since then, there have been several theoretical proposals that aim to describe, conceptualize, reconstruct and evaluate arguments or criteria used –or that should be used– by legal actors, predominantly by judges and courts, for justifying their judgments or interpretative decisions.⁴ Legal argumentation has been understood both as the procedure of giving reasons for or against one interpretation or decision, and as the result of this practice. The concentration of the attention in judicial reasoning can be explained due to the fact that it is in the judicial application of the law where it is seen more clearly the efforts to give persuasive, just, acceptable or reasonable solutions to legal problems; there, the judge has to decide the case or dispute brought before him based on the law.⁵ Another reason for being judicial reasoning a kind of laboratory for the analysis of how legal argumentation functions is that most national, international and supranational legal orders prescribe as a legal duty that the judges and courts have to justify, motivate, or express the reasons that support their judgments. The duty to justify the decision becomes, then, a normative and

² These are, roughly speaking and without accounting of the particularities that they present in Germany, Finland and Scotland, the Civil-law tradition, Scandinavian tradition and Common-law tradition respectively.

³ A further symptom of the joint concern on this topic were the meetings held between Aarnio, Alexy and Peczenik between 1979 and 1980, that resulted in the well-known collective article by these authors ‘The Foundation of Legal Reasoning’ 12 (1981) *Rechtstheorie* 133-158, 257-279, 423-448.

⁴ A panorama of the theories of legal argumentation can be found in M. Atienza, *Las razones del derecho. Teorías de la argumentación jurídica*, México: Universidad Nacional Autónoma de México, 2003; and in E. Feteris, *Fundamentals of Legal Argumentation. A Survey of Theories on the Justification of Judicial Decisions*, Dordrecht: Kluwer, 1999. On the influences of some of these theories on aspects relevant for legal philosophy, see M. La Torre, ‘Theories of Legal Argumentation and Concepts of Law. An Approximation’ 15 (2002) *Ratio Juris* 377-402.

⁵ I follow here the distinction of Gianformaggio between “solving a legal problem” and “deciding a case or dispute”. L. Gianformaggio, ‘Legal Certainty, Coherence and Consensus: Variations on a Theme by MacCormick’ in Nerhot (ed), *Law, Interpretation and Reality. Essays in Epistemology, Hermeneutics and Jurisprudence*, Dordrecht: Kluwer, 1990, 402-430, at p. 402.

institutional requirement, that enables theories of legal argumentation to function whenever a judicial actor is expected to justify its decision, whether having jurisdiction to judge within the borders of the nation-state or at international or supranational spheres.⁶

MacCormick's theory of legal argumentation has to be comprehended inside his wider reflections about the concept of law. This requires taking into account, on the one hand, the positivistic roots and more specifically the inheritance of H.L.A. Hart's legal theory as points of departure of his own theoretical contributions, and on the other hand, the aspects in which his theory extends and distances from Hart's view. This exceeds, however, the scope of these lines, and I will limit to mention one important element in MacCormick's theory that goes beyond Hartian positivism and which is useful to frame the topic of concern here.⁷

A relevant feature of law is, according to this author, its practicality. Norms are guides for action, and in this respect the question about how norms function in practice, or differently, how the institutional normative order is operationalised, arises a central issue.⁸ Law adjudication, as the main way in which norms are applied to concrete cases, is mediated by argumentation. Although legal reasoning is, to a great extent, a rule-based activity, MacCormick contents that there are also reasons beyond rules that take part of this activity, yet always within the limits of the rule of law. These reasons beyond rules are, eg, principles, values, maxims and the claim to correctness, characteristic of practical reasoning, all of which penetrate legal argumentation and judicial reasoning in particular.

According to MacCormick's concept of law as an institutional normative order, the power to decide or to determine the law legislatively or judicially is a fundamental one. The decision to entrust this competence to legislators and judges means that decision-making procedures are institutionalized and that as such they enjoy the authoritativeness characteristic of law. Nevertheless, these procedures share with morality, with practical reasoning, the discursive character of the justification of their decisions,

⁶ In other words, there is no particular theory of legal reasoning for international courts or for the European Court of Justice. J. Bengoetxea, N. MacCormick and L. Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in G. de Búrca and J.H.H. Weiler (eds), *The European Court of Justice*, Oxford, Oxford University Press, 2001), 43-85, at p. 48.

⁷ For a discussion of the continuities and breakings-off of MacCormick's theory and the positivistic legacy see the articles by Massimo La Torre and Stefano Berteà in this report.

⁸ See MacCormick's contribution to this report.

since justification involves testing relevant principles and choosing the sounder or more plausible solution. This relation between practical reason and law mitigates, as the author acknowledges, the sharpness of the Hartian contrast between law and morality.⁹

Having this important feature of MacCormick's theory in mind, it is significant to mention also two other aspects of it: his conception of legal pluralism and his conception of coherence in legal reasoning. As for legal pluralism, the fact that together with state law there is also law between states, and law ordering the functioning and powers of international and supranational organizations, reflects the coexistence of different interacting institutional normative orders. Additionally, the pluralistic approach to law conceives these legal orders as independent and distinct one another, where conflicting answers can be given to a same legal question without existing a single rule of recognition or a final decision-maker that eliminates the conflict. Thus, each interactive system is constructed according to its own coherence, and at the same time is aware of the existence of other orders.

Focusing now on the place of coherence in legal reasoning, MacCormick considers that coherence is an argument that acts in the second-order justification, consisting in the material justification of the normative and factual premises. This second-order justification follows deductive syllogism (first-order justification) when the latter is insufficient for solving a hard case, or what is the same within this author's theory, when there is a problem of interpretation, relevance, proof or classification.¹⁰ At this second level, three elements have an important role to play: consistency and coherence, on the one hand, and consequences of the alternatives decisions, on the other¹¹. The present analysis will deal exclusively with coherence.

Coherence plays a role both in conceptualizing an institutional normative order as legal system and in legal reasoning. In the latter

⁹ N. MacCormick, 'The Concept of Law and "The Concept of Law"' (1994) 14 *Oxford Journal of Legal Studies* 1-23. This contrast is based on the special features that distinguish law from morality, that is, that law is institutional, authoritative and heteronomous, while morality is personal and controversial, discursive and autonomous.

¹⁰ The first two have to do with the major premise (law), and the others with the minor premise (facts). See N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press, 1978 –quoted from the second edition of 1994, pp. 65-72 and 87-97.

¹¹ *Ibid* at 132. The first two are requirements of the decision making sense within the given system, while the latter looks for the decision to make sense with the perceptible world.

coherence displays its force as a general guideline when justifying legal decisions –overall coherence– and as a particular argument concerning facts and norms. But what happens with these types of coherence when confronted not just to one but to multiple legal systems that interact? Should we continue to map this legal reality as plurality of systems each of one having their own internal coherence, or should we accept that there is primacy of one order upon the others and that hence the coherence of the “inferior” systems has to be reconstructed as fitting with the coherence of the former? This attempt to correlate coherence with pluralism alerts us of some possible difficulties. Indeed, there seems to be a tension in MacCormick’s legal theory between, on the one hand, the prominent theoretical role given to coherence in the conceptual reconstruction of the legal system and the argumentative law-applying practice, and on the other, the pluralistic conception of law when trying to account for the coexistence of different legal systems. Does coherence prejudices in some way about the incorrectness of legal pluralism and tip the balance in favour of a monistic approach to law; or is this friction only apparent?

This paper will critically reconstruct MacCormick’s idea of coherence in legal reasoning confronted with the idea of legal pluralism, and examine how and to what extent both ideas play in the case-law of the European Court of Justice (ECJ). For this purpose, I will first deal with MacCormick’s argument of coherence, framing it inside the general theoretical debate about the concept and value of this argument in legal reasoning (1). Secondly, attention will be given to legal reasoning in the European Community, with special focus on the way in which the ECJ uses coherence, and on the possibility of rendering compatible this argument with a pluralistic approach to Community law (2). The final section will offer some conclusive remarks (3).

II. THE IDEA OF COHERENCE IN LEGAL ARGUMENTATION

The idea of coherence seems inherent to legal thinking,¹² and at the same

¹² A. Aarnio, ‘Why Coherence – A Philosophical Point of View’, in A. Aarnio (ed), *On Coherence Theory of Law*, Lund: Juristförlaget, 1998, 28-40, at 34. According to Aarnio, coherence theory of law defines what kind of contextual connection yield the most

time is considered as a significant value of law.¹³ Connecting these general statements with legal argumentation, everyone would accept that coherence is a positive and desirable feature of legal reasoning. Moreover, it is commonly acknowledged that it is a criteria of its soundness, or even a component of justice according to law.¹⁴ Put it negatively, the lack of coherence is considered to be a failure to make sense.¹⁵

However, this starting agreement would probably disappear if one tries to ascertain what each of the potential participants in it means by coherence. The ambiguity of the concept of coherence, its different uses, and the different theories developed around the idea of coherence make it advisable to look closer into its meaning.

Before going through MacCormick's idea of coherence, I would like to give a brief general picture of the terms in which the debate about coherence in legal theory and more concretely in legal reasoning develops.

1. Concept and Conceptions of Coherence

The idea of coherence has to do with elements or parts sticking or hanging together,¹⁶ or with something (eg an object) being in harmony with another thing. Epistemologically, the word comes from the Latin *cohærere* ("cohere") that means to stick (*hærere*) together (*com-*). Referring to the transitive verb "to cohere", Rescher claims that "all coherence must be coherence with something".¹⁷ To this statement one can add that what can cohere are either the parts of a single object or two or more objects together. Further precisions of this notion derive from distinguishing between coherence as a predicate, as a property, and as a relation.¹⁸

Theories of knowledge and theories of truth give a different but close

extensive possible acceptance of the legal text in the respective legal community (cf. p. 39). In a different sense, Bobbio refers to coherence as a "legal virtue". Legal coherence, for this author, is the respect of the legality principle (*pacta sunt servanda*). N. Bobbio, *Studi sulla teoria generale del diritto*, Torino: Giappichelli, 1950, p. 149 ff.

¹³ N. MacCormick, 'Arguing about Interpretation', *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford: Oxford University Press, 2005, pp. 132 and 139.

¹⁴ N. MacCormick, 'Being Reasonable', *ibidem* at p. 188.

¹⁵ N. MacCormick, 'Coherence, Principles and Analogies', in *supra*, fn 13, at p. 189.

¹⁶ S. J. Pethick, 'An Investigation of Coherence and Coherence Theory in Relation to Law and Legal Reasoning' (DPhil thesis, University of Oxford 2000) 18.

¹⁷ N. Rescher, *The Coherence Theory of Truth*, Oxford: Oxford University Press, 1973, p. 32.

¹⁸ Pethick, *supra*, fn 16, at pp. 28ff.

concept of coherence. Coherentists theories of truth state that the truth of a proposition consist in its coherence with some specified set of propositions.¹⁹ Based on this general formulation, Rescher has developed one of the most popular coherence theories of truth, focusing on the criteria of truth, that is, on the conditions of application of the concept, and not on the meaning or definition of truth.²⁰

Taking now a step into legal theory, Berteau indicates that, during the last decades, coherence has become a very important topic in this field,²¹ and has attracted the attention of scholars both theoretically and practically. At theoretical level, coherence is a core element in some theories of law, theories of legal argumentation, conceptions of legal systems and even in theories of legislation.²² At the level of the application of the law, the judicial decision is expected to cohere with the existing body of legal norms and past decisions, while also the different arguments that compose the judicial decision should cohere.

Some trouble with the notion of coherence can arise, from the one side, because there are different concepts of coherence, and from the other, because a same concept of coherence can be named with different words.

¹⁹ J. Young, 'The Coherence Theory of Truth', *Stanford Encyclopedia of Philosophy*, available at <http://plato.stanford.edu/entries/truth-coherence> (accessed 25 October 2007). According to this author, the different versions of coherence theories of truth derive or well from different accounts of the coherence relation (between the proposition and the truth conditions), or well from a different account of the set of propositions with which the true proposition coheres.

²⁰ In his own words, he makes "an attempt to specify the test-conditions for determining whether or not there is warrant for applying the characterization "is true" to given propositions". Rescher, *supra*, fn 17, at p. 1. For the conception of truth as a possible property of a whole system of statements, see C. Hempel, 'On the Logical Positivists' Theory of Truth', 2 (1935) *Analysis*, 49-59, at p. 49.

²¹ S. Berteau, 'Looking for Coherence within the European Community' 11 (2005) *European Law Journal*, 154-172, at p. 154. See also the references cited by this author, *supra*, fn 2, at p. 154. As Pethick emphasises, coherence is in vogue not only in law, but also in a wide range of fields such as physics, optics, linguistics, pragmatics, theology and philosophies of logic, mind and language. From a different angle, coherence is used in several aspects of theories: as method, explanation, justification and description. Pethick, *supra*, fn 16, at p. 5. Finally, Raz also makes a claim in the same sense, linking the popularity of coherence in practical philosophy with Rawls' conception of reflective equilibrium. J. Raz, 'The Relevance of Coherence' in *Ethics in the Public Domain. Essays in Morality of Law and Politics*, Oxford: Clarendon, 1994, at p. 261.

²² Some concepts of legal system and some theories of legislation are based on the hypotheses of the ordered legislator that presuppose that the rationality of the legislator can avoid incoherencies between norms.

To place correctly the points on which legal theorist agree and disagree, and to evaluate the weaknesses and strengthens of the concepts and theories of coherence, one should start by specifying these conceptual and terminological problems.

Within the legal field, coherence can be ascribed to, or predicated from, different objects, and can adopt different degrees of generality. Firstly, it can be held as a regulative ideal,²³ as an interpretative paradigm,²⁴ or as a desirable value that plays an important regulative function for the operationalisation of social and legal systems.²⁵ Searching for coherent legislation, interpretation of norms, and decisions is guidance for the behaviour of people that work within or with the legal system. The ideal character of this feature stresses the fact that it cannot be but an assumption when operating with a particular legal system. Legal systems are complex sets of norms promulgated in different times (and in this sense, they are answers to particular needs of a certain period, despite its general applicability) with different hierarchies and degrees of specialization, and enacted by different people or parliaments. Coherence, then, can hardly be taken as an actual feature of the system. Legal systems are better understood as a kind of congeries of norms that represent different political and social interests, and therefore, it is not strange that there can be contradictions between them.²⁶ Secondly, it can be considered as a criterion or argument for legal interpretation, which can be used in a positive and negative way. In the first case, it is used to justify a decision as coherent with the rules and principles of a particular sphere of law, with precedents or with the legal system as a whole; in the negative sense, it is use to reject a different or opposite decision for being incoherent with the relevant norms and precedents or with the system.

A few influent concepts and conceptions of coherence in contemporary legal theory can help to complete the picture of its place and role. A notable example of the importance of coherence in legal theory is

²³ This is the thesis advanced by J. Bengoetxea, 'Legal System as a Regulative Ideal', 53 (1994) *Archiv für Rechts- und Sozialphilosophie*, pp. 59-88, at p. 65.

²⁴ K. Günther, 'A Normative Conception of Coherence for a Discursive Theory of Legal Justification' 2 (1989) *Ratio Juris*, 155-166, at p. 155.

²⁵ F. Ost, 'L'interprétation logique et systématique et le postulat de rationalité du législateur' in M. van de Kerchove (ed.), *L'interprétation en droit. Approche pluridisciplinaire*, Bruxelles : Publications des Facultés Universitaires Saint-Louis, 1978, 97-184, at p. 141.

²⁶ Raz, *supra*, fn 21, at p. 280; Berteau, *supra*, fn 21, at p. 156.

Dworkin's concept of law as integrity.²⁷ Law as integrity is composed of two principles: "a legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law be seen as coherent in that way, so far as possible". The latter concept is further developed, stating that this principle "instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified– expressing a coherent conception of justice and fairness".²⁸ Therefore, judges have to decide hard cases finding, in a coherent set of principles that rule people's rights and duties, "the best constructive interpretation of the political structure and legal doctrine of their community".²⁹ As law is an interpretative concept inside the Dworkinian theory, it functions like a chain novel that follows the principles of narrative coherence,³⁰ being this use of the expression "narrative coherence" different from MacCormick's one as it will be shown below.³¹

The particular requirements of a general theory of coherence elaborated by Alexy and Peczenik express a different version of coherence in law.³² Starting from a simple concept of coherence,³³ these authors concentrate

²⁷ By contrast, Raz argues that the notion of law as integrity contains no commitment to any degree of coherence. See the Appendix to 'The Relevance of Coherence', *supra*, fn 21, at 303-9.

²⁸ R. Dworkin, *Law's Empire*, Cambridge: Harvard University Press, 1986, at pp. 176, 217. This author gives a further specification: "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provides the best constructive interpretation of the community's legal practice".

²⁹ *Ibid* at p. 255.

³⁰ For the resemblance between law and a chain novel, see *ibidem*, pp. 228ff.

³¹ As some scholars claim, the Dworkinian use of 'narrative coherence' is wide, and resembles MacCormick's 'normative coherence'. Nerhot, 'Interpretation in Legal Science. The notion of narrative coherence' in Nerhot, *supra*, fn 5, 193-225, at p. 206. See also J. van Dunné, 'Normative and Narrative Coherence in Legal Decision Making' in F. Atria and N. MacCormick (eds.), *Law and Legal Interpretation*, Aldershot: Dartmouth, 2003, pp. 409-429, at p. 410. This article was originally published in 69 (1998) *Archiv für Rechts- und Sozialphilosophie* 194-205.

³² R. Alexy and A. Peczenik, 'The Concept of Coherence and Its Significance for Discursive Rationality' 3 (1990) *Ratio Juris* 130-147.

³³ "The more the statements belonging to a given theory approximate a perfect supportive structure, the more coherent the theory". *Ibid* at p. 131. Peczenik was an author profoundly concerned with coherence in legal doctrine. From all his works, see one of the latest ones, which concentrate much of his ideas on this subject A. Peczenik, 'Coherence in Legal

on the criteria of coherence, mainly on the properties of what they called supportive structure.³⁴ Additionally, in Alexy's opinion, the idea of coherence—that includes consistency, comprehensiveness and connection—is a genuine, though unsaturated, criterion of rationality.³⁵

All legal theories that deal with coherence employ and combine different possible classifications. According to some of them, coherence can be epistemic or constitutive³⁶, local or global³⁷, formal or informal.³⁸ From a different perspective, some authors have gone deeper in the structure or form of this argument, to see how it should function in practice.³⁹

Doctrine' in E. Pattaro (ed.), *Scientia Juris. Legal Doctrines as Knowledge of Law and as a Source of Law. A Treatise of Legal Philosophy and General Jurisprudence, volume 4*, Dordrecht: Springer, 2005, pp. 115-65, at pp. 164-5.

³⁴ These properties are: the number of supportive relations; the length of the supportive chains; strong support; connection between supportive chains; priority order between reasons; reciprocal justification (empirical, analytical or normative). Other criteria are generality, conceptual cross-connections, number of cases, and diversity of fields of life.

³⁵ R. Alexy, 'Coherence and Argumentation or the Genuine Twin Criterialess Super Criterion' in Aarnio, *supra*, fn 12, at pp. 41ff. Alexy responds to Raz's objection that value pluralism excludes comprehensive coherence since the balance between incommensurable values does not exist, by pointing out that the lack of definitive determination of coherence as a guide does not undermine the acceptability of the criteria. Put it differently, this unsaturated criterion can be thought as a 'criterialess criterion of rationality'. Further, he argues the fact that this is a value-laden criterion only reflects that evaluations are necessary to create a coherent system.

³⁶ Raz, *supra* n 21, at p. 263. This classification is also used by Berteau, *supra*, fn 21, at p. 157.

³⁷ Berteau, *supra*, fn 21, at pp. 157-8.

³⁸ This last classification is not as extended as the other ones mentioned above. A. Amaya, 'Formal models of coherence and legal epistemology' 15 (2007) *Artificial Intelligence and Law*, 429-447. The paper examines two formal approaches to coherence: coherence-based models of belief revision and the theory of coherence as constraint satisfaction. These theories, in the author's view, clarify the concept of coherence, the dynamic aspect of coherentist justification, and coherence-enhancing mechanisms in the course of legal decision-making. Regarding this last aspect, it is argued that informal theories of coherence fail to provide concrete guidance to legal decision-makers. At the end, a symbiotic relation between formal and informal coherentist theories would be a fructiferous way of dealing with coherence in legal justification.

³⁹ Following a pragma-dialectical approach, Berteau reconstructs the two possible forms of the argument of coherence. See S. Berteau, 'The Arguments from Coherence: Analysis and Evaluation' 25 (2005) *Oxford Journal of Legal Studies* 369-391, at p. 379. For this pragma-dialectical see van F. van Eemeren and R. Grootendorst, *Argumentation, Communication and Fallacies. A Pragma-Dialectical Perspective*, Hillsdale, New Jersey: Lawrence Erlbaum Associates, 1992. In my contention, however, these forms of the argument of coherence lump together different arguments, ie, systemic, teleological and consequentialist arguments. It is more a general formula of the interaction between arguments, than the

For the purpose in hand, it is relevant the distinction between coherence predicated of the legal system and coherence of adjudication.⁴⁰ A coherent legal system is formed by an ordered set of interrelated normative propositions. In turn, coherence in adjudication means or well that all the parts of a single judicial decision cohere, or well that the legal decision coheres with the legal system. The common feature is that, both at the level of a system or at the level of adjudication, coherence means that the parts make sense as a, or with the, whole.

The coherence of the different elements of a single decision has been analysed and applied to the ECJ by Leonor Moral, by proposing a modest and operative notion of coherence, that she calls “criterialess criterion of coherence”. Based on Alexy and Peczenik’s theory, this notion is composed of two main elements: a comprehensive account of reasons –that is, the need to include as many justifying elements as possible– and the existence of supportive structures between a set of reasons and the decisions. The modest notion of coherence assists judges in pursuing an ideal: “to make sense of the diversity of law”,⁴¹ that is, to rescue the value of pluralism and attempt to give an order to the plural entity of Law, making it intelligible without rejecting its multiplicity, nor the constant tension between the values and principles that compose it.⁴²

In syntheses, then, one can speak of coherence regarding a) a decision in which all its parts cohere; b) a decision that coheres with the system; c) a system that coheres as a whole. All different levels of coherence are, nevertheless, interconnected. Even if a legal decision in its own is considered as coherent in the sense that all its parts or all the arguments that compose it cohere, this decision must be coherent with the rest of the normative elements of the legal system wherein it is adopted, since the

strict representation of the argument of coherence. A similar representation is the one presented by Eveline Feteris with regard to consequentialist argumentation, when she links the positive value of consequences with the desirability of the goal, purpose, value that the applicable norm or principle aims to achieve. See E. Feteris, ‘A Pragma-Dialectical Approach of the Analysis and Evaluation of Pragmatic Argumentation in a Legal Context’, 16 (2002) *Argumentation* 349-367; and, ‘The Rational Reconstruction of Argumentation Referring to Consequences and Purposes in the Application of Legal Rules: A Pragma-Dialectical Perspective’ 19 (2005) *Argumentation* 459-470.

⁴⁰ This distinction is used both by Berteau, *supra*, fn 21; and by L. Moral Soriano, ‘A Modest notion of Coherence in Legal Reasoning. A Model for the European Court of Justice’ 16 (2003) *Ratio Juris* 296-323.

⁴¹ Moral, *ibidem*, at p. 302.

⁴² *Ibidem*, at p. 302; Berteau, *supra*, fn 21, at pp. 158-9; Raz, *supra*, fn 21, at p. 298.

decision does not occur in the vacuum. At the same time, the overarching ideal that the law has a coherent structure –or, better, that must be thought of and seen as a coherent system– stands behind the evaluation of a decision or interpretation as coherent.

Lastly, a very common use of coherence in the legal method tradition is the one of systemic argument that means, in simple words, that the interpretation or decision has to be coherent with the legal system.⁴³ When the decision coheres with the system, and what we mean by legal system are the two natural inquiries that emerge from the simplified concept just given. Indeed, both issues have been widely and differently tackled by legal theorists, but a panorama of them exceeds the purpose of this essay. As for the second one, different concepts, features and even types of systematicity have been distinguished.⁴⁴

2. Coherence in Legal Justification: MacCormick's Theory

MacCormick's attention to the idea of coherence in law is already present in his first essays on legal reasoning, in which he emphasise its important position inside the structure of legal justification and the idea of law as a system.⁴⁵ As a starting point, he remarks that logical consistency, or absence

⁴³ The relation between coherence and the idea of system has been emphasised in several fields. In this sense, for example, some coherentist theories of truth make explicitly this connection: "The groundwork of the coherence theory has its roots in the idea of *system*". Rescher, *supra*, fn 17 at p. 31.

⁴⁴ For the concept of normative system and its features (completeness, independence and coherence) see C. Alchourron and E. Bulygin, *Introducción a la metodología de las ciencias jurídicas y sociales*, Buenos Aires: Astrea, 2002, pp. 81-107. This book was originally published in English as *Normative System*, Viena and New York: Springer, 1971. Bengoetxea, in turn, distinguishes two models of systems within legal theory: a formal system, which features are completeness, consistency and decidability, and a legal order, that is a notion that aims at overcome the difficulties of the later. Bengoetxea, *supra*, fn 23, at p. 67. Some authors group the problems related with the notion of system in four: which are the elements of the system; which are the relationship between those elements; which is the environment of the system and which is the relation between the system and its environment; and finally, the problem of temporality or evolution of the legal system. M. van de Kerchove and F. Ost, *Legal System between Order and Disorder*, Oxford: Oxford University Press, 1994, pp. 10ff. Finally, regarding the different types of systematicity, this last book also offers a panorama of three main distinctions of systems used by scholars: static and dynamic; formal and substantive; and linear and circular (cf. pp. 28-72).

⁴⁵ N. MacCormick, 'Formal Justice and the form of Legal Arguments' in C. Perelman (ed.), *Études de logique juridique*, Bruxelles: Bruylant, 1976, pp. 103-118, at pp. 114-5

of contradiction between law propositions,⁴⁶ is not an enough criteria for understanding or achieving coherence, since it is the content of the premises, and not only the formal inexistence of contradiction, which matters. He remarks that complete consistency is not a necessary condition for coherence, because coherence is a matter of degree, unlike consistency.⁴⁷ Differently from logic consistency, coherence can be predicated not only of statements, but also of behaviours. In this last case, coherence seems to be related with instrumental rationality.⁴⁸ Finally, coherence is complex as it depends on the interaction between different arguments and the interpretation of the applicable norms and system.

On the other hand, coherence can be distinguished from universalisation. The latter is an essential feature of justification of practical reasoning, and in applying this feature, legal reasoning aims at realizing formal justice or the egalitarian character of the rule of law. More categorically, there is no justification without universalisation. Universalisation consists of the judge's compromise to extending the ratio of the present decision to future similar cases. Universalisability, or the possibility of universalising reasons, nevertheless, does not implies that they are absolute in character, because the new particular facts or circumstances of a new case can make the universal reason inapplicable, or lead to an exception or qualifications due to the interaction of other relevant principles.⁴⁹

"Universal" contrasts with "particular" as "general" contrasts with "specific": the first pair accounts for logical properties, whereas the other two are quantitative properties. Legal rules and principles are universal, and so are the rulings that justify particular legal decisions. Normative propositions concerning particular cases or classes of circumstances, on the

⁴⁶ This distinction is kept also in his recent writings, e.g., in MacCormick, *supra*, fn 14, at p. 190.

⁴⁷ Gianformaggio considers this distinction, together with the one between weak and strong derivability, of fundamental importance. Gianformaggio, *supra*, fn 5, at p. 420.

⁴⁸ P. Comanducci, 'Osservazioni in margine a N. MacCormick's "La congruenza nella giustificazione giuridica"', in P. Comanducci and R. Guastini, *L'analisi del ragionamento giuridico*, Torino: Giappichelli, 1987, pp. 265-272, at 272.

⁴⁹ N. MacCormick, 'Universals and Particulars', in *Rhetoric and the Rule of Law*, *supra*, fn 13, at pp. 98-9, 78, 89. He further specifies: "The "because" of justification is a universal nexus, in this sense: for a given act to be right because of a given feature, or set of features, of a situation, materially the same act must be right in all situations in which materially the same feature or features are present" (at 91).

other hand, can be more or less general. Therefore, universalisation should not be confused with generalization, since the latter does not tell us what to do; that is, it does not give any guidance or rational pattern of behaviour,⁵⁰ but it only describes cases.

Reaching this point one can say that coherence is connected with formal justice, or even that it is an expression of justice in the treatment of the members of a community under a common legal system.⁵¹ “Treating like cases alike is possible only given the enunciation of general norms as principles of decision which supply criteria of likenesses between different cases”,⁵² which means that formal justice presupposes a coherent reconstruction of the principles of the legal order and a uniform application of them. Thus, the compliance with formal justice, or the equal treatment among similar circumstances, is only possible if the system is conceived coherently.

Legal reasoning uses both the idea of overall coherence as a general guidance in justifying decisions and as a particular and well-defined argument. Let us first say a few words as regard overall coherence.

A) Overall coherence in legal reasoning

When arguing in favour of a particular interpretation of a legal text, together with presenting different types of arguments –linguistic, contextual, teleological– the interpretation should be shown to be an acceptable understanding of the norm as part of the legal system. It is in this context where the legal material acquires its utterance. Therefore, the ideal of overall coherence governs the view of the legal system as a system, and helps to make sense, bring together and order the multiplicity of different kinds of norms that conforms the whole legal system.⁵³ Accordingly, coherence steps in the idea of system of law when conceived as a set of interrelated norms that have a common ground of formal validity that norms should cohere or hang together purposively. In this sense, law

⁵⁰ *Ibid* at pp. 93-5.

⁵¹ McCormick, ‘Legal Narratives’, in *Rhetoric and the Rule of Law*, *supra*, fn 13, pp. 230-1.

⁵² McCormick, ‘Formal Justice...’, *supra*, fn 45, at 114-5. This is the link that La Torre makes, when he states that the coherence test supplements formal justice by considering the system as a reasonable test of practical requirements. M. La Torre, *Constitutionalism and Legal Reasoning. A New Paradigm for the Concept of Law* (Dordrecht, Kluwer, 2007) 63-4.

⁵³ McCormick, *supra*, fn 13, pp. 127-32.

can be considered as “an expression of reasonably tenable values of principles concerning human social interaction”.⁵⁴

On the other hand, the systemic character of law is partially ideal, since it is at least in part realized when the law is implemented or applied to practical problems. As Bengoetxea claims, even when law is treated by legal agents as if it were a system in the formal sense –and for that reason, having the features of completeness, consistency and decidability that characterize it– a more realistic picture shows that these features cannot be assured *a priori*, but only *a posteriori*, in a post-interpretative stage. Coherence is one of the important regulative principles that operate in making law as systematic as possible, together with consistency, decidability, and completeness. This systematization *a posteriori*, nevertheless, will never be total, due to the diachronic and evolving character of law.⁵⁵

As it has been shown, the idea of overall coherence in legal reasoning is connected with the regulative idea of system since the former contributes to pursue the latter. As well as the idea of system, coherence is a regulative idea, in the sense that it cannot be claimed of a legal order *a priori* because there actually are incoherencies –well, e.g., because norms are enacted in different moments by different authorities, well because contemporary legal systems contain a vast number of norms–, because it only guides judicial decision-making in the systematic reconstruction of law. A further common feature is that both are against of ad-hoc justifications or solutions in law, or of isolated decision considered exclusively in its own merit.

B) Coherence as a specific argument: normative and narrative

In the context of legal justification, coherence applies both to matters of law (normative coherence) and to matters of facts (narrative coherence). Beginning with normative coherence, it can be described as a matter of common subservience by a set of laws to a relevant value or values, and

⁵⁴ MacCormick, *supra*, fn 51, p. 231.

⁵⁵ Bengoetxea, *supra*, fn 23. He argues that the regulative potential of legal orders consists in approaching law to the idea of (formal) systems, or more precisely, in the efforts made at different levels by legal dogmatic, law-making and law-interpretation and application for reconstructing law as a complete, consistent, coherent, closed and decidable whole.

avoidance of conflict with other relevant values or principles.⁵⁶ Put it differently, “a set of rules is coherent if they satisfy or are instances of a single more general principle”. The observance of principles is, in words of MacCormick, an intrinsic “means of realising values”, and values are, in turn, the product of a system of practical reason. In short, principles and values are extensionally equivalent.⁵⁷ However, this extensionality does not mean that every value is operationalised as a legal principle in a legal system.⁵⁸

The test of normative coherence implies justifying legal rulings or normative propositions in the context of a legal system conceived as a normative order.⁵⁹ Coherence is a character of systems viewed synchronically, at one moment, and entails axiological compatibility among rules. What is significant, then, is not formal derivability, but that the relevant norm is shown to be axiologically congruent with the values and principles from which it derives. More clearly, coherence of norms “is a matter of their ‘making sense’ by being rationally related as a set, instrumentally or intrinsically, either to the realisation of one common value or values; or to the fulfilment of some common principle or principles”.⁶⁰ The coherence of the set of higher principles or values, on the other hand, depends on their ability to express as a whole a satisfactory form of life as the one promoted by Aarnio.⁶¹

For achieving normative coherence, the judge shall ask himself about the possible values or principles underlying the relevant set of rules and rulings, and their adjustment or adequacy with the pre-established body of law.⁶² Principles, then, provide guidance in interpretation of statutory texts, and in this interpretative activity coherence shall include the (theoretical fictitious) intention of the legislator to legislate coherently.⁶³

⁵⁶ MacCormick, ‘Coherence, Principles...’, *supra*, fn 15, p. 192.

⁵⁷ N. MacCormick, ‘Coherence in Legal Justification’ in A. Peczenick, L. Lindhal and B. van Roermund (eds.), *Theory of Legal Science*, Dordrecht: Reidel, 1984, 235-251, pp. 236-8.

⁵⁸ MacCormick, ‘Coherence, Principles...’, *supra*, fn 15, p. 192.

⁵⁹ *Ibidem*, p. 189.

⁶⁰ *Ibidem*, p. 193.

⁶¹ *Ibidem* at p. 194. Concerning A. Aarnio see *On Legal Reasoning*, Turku: Turun Yliopisto, 1977, pp. 126-129; and *The Rational as Reasonable. A Treatise on Legal Justification*, Dordrecht: Kluwer, 1987.

⁶² Justification through principles has been opposed to justification through consequences. See J. Wróblewski, ‘Justification through principles and justification through consequences’ in C. Farrali and E. Pattaro (eds.), *Reason in Law*, Milano: Giuffrè, 1984, 129-161, p. 161.

⁶³ MacCormick, *supra* fn 57, p. 242.

Yet, I have been presupposing the “relevance of normative coherence” (a expression coined by Raz), but in fact the arguments expressed until now do not really support the core idea that coherence justifies an interpretation, judgment or decision, or plays a relevant role in that justification.⁶⁴ MacCormick tackles this problem pointing out that besides the conception of practical rationality that requires universality and generality of practical principles, legal systems have a particular hierarchical structure of derivability from general principles to particular and specific rules. This chain is at the same time a validity test and a justification test, since the detailed provisions should stand as subserving a more general set of coherent principles, and can be justified appealing to them. Understood in this sense, coherence has only weak justificatory force, given that it only assures derivability, but does not evaluate the goodness or badness of the higher principle from which the rule derives. Nevertheless, normative coherence functions as a negative test, in the sense that judges must at least comply with this weak derivability of a decision or a ruling from the pre-existent body of law, and to explain the law in this way is an important “formal” judgment in legal reasoning.⁶⁵

On the other hand, narrative coherence deals with facts. It is a test of truth or probability of the facts of the case and their evidence that has to do with the justification of the findings of facts and the drawing of reasonable inference from evidence.⁶⁶ Since legal disputes concern generally to past facts, and in absence of direct proof, facts and courses of actions must be reconstructed, and narrative coherence shall be observed in doing so.⁶⁷

Narrative coherence uses two principles of explanation: the principle of

⁶⁴ For a contrary view, see Pethik, *supra* fn 16, 315ff, who claims that MacCormick does not really explain why coherence justify, since he treats what is necessary to justify but not what is sufficient for the law to be a complete or finite coherent set.

⁶⁵ MacCormick, ‘Coherence, Principles...’, *supra*, fn 15, pp. 203-4.

⁶⁶ *Ibid* at p.189.

⁶⁷ Dealing with the problems of proof and evidence, MacCormick linked explicitly narrative coherence with a coherence theory of truth even before distinguishing between normative and narrative coherence. He started from the question “What warrants us to treat any present statement about the past as true or false or more or less probably true or false?”. MacCormick’s response is that the answer should be based on a coherence theory of truth that deals not with the meaning of truth but with the procedures for proof the statements that cannot be directly checked for their present correspondence with present facts. N. MacCormick, ‘The Coherence of a Case and the Reasonableness of Doubt’ (1980) 2 *Liverpool Law Review* 45-50, at 46.

universal causation (all what happens can be *prima facie* explained in terms of some cause occurring before or simultaneously to the event to be explained), and the principle of rational motivation (human decisions or actions are based on different reasons, such as principles, values, plans or purposes). However, human decisions are a partial exemption to the principle of universal causation, in the sense that if you explain the former through reasons, there is no need to explain it through causes.⁶⁸

When a problem of proof is at stake, or in other words, when the question is how to establish true or acceptable accounts of past events, narrative coherence “provides a test as to the truth or probable truth of propositions about unperceived things and events”, explaining the proposition within the ordinary explanatory schemes. The relative probability and coherence of a proposition relating unperceived events depend on a number of other events supposed to have occurred.⁶⁹ The more coherent story is the one that involves fewer improbabilities. The justification of beliefs or perceptions through this test tries to make the phenomenal world intelligible, and intelligibility is a condition of rationality. For a succession of events is credible only if it is coherent, and insofar as it is backed by a causal and motivational explanation. Yet, in the establishment, reconstruction or proof of facts, a moderate scepticism should remain, such as the one that stands behind the formulas “intimate conviction”, “balance of probabilities”, or proof “beyond reasonable doubt”. This kind of formulas requires the subjective exercise of judgment, that is, they do not operate objectively, and do not lead to absolute certainty. In this sense, narrative coherence is a “necessary but not sufficient condition for real-world credibility”.⁷⁰

Regarding the temporal dimension of narrative coherence, MacCormick states that it is located in analytical time, in the sense that events are presented in a temporal sequence before-simultaneously-after.⁷¹ Linked with this, narrative coherence has diachronically character because its appreciation is made through time, taking into account interconnected

⁶⁸ MacCormick, *supra*, fn 51, p. 222.

⁶⁹ This resembles the supportive relations and mutual consistency as fundamental elements of the theory of coherence exposed by Alexy and Peczenik. See *supra*, fn 34.

⁷⁰ MacCormick, ‘Legal Narratives’, *supra*, fn 51, pp. 226-7.

⁷¹ The difference delineated here is between perspective or real time (past, present and future) versus analytical time (before, simultaneously, after). These dimensions are both interrelated, since “the capacity for thought in analytical time is a condition for acting in real time”. *Ibid* at p. 216.

events that occur in different temporal moments.

The main common feature between normative and narrative coherence lies on the idea of rationality, significant both in the construction of social systems as the legal one, and in the interpretation of the perceived events of the natural and human world. The rational normative order and the rational world-view as expressions of coherence, thus, are rooted in this overarching idea of rationality. The latter provides justificatory force to both types of coherence, and orders, connects and makes intelligible our ideas, impressions and, more generally, our practical life. In this vein, as it was already said, a lack of coherence involves a failure to make sense.⁷²

On the other hand, coherence is not a complete argument that can justify a decision by its own. In the case of normative coherence, for example, the decision-maker has to justify that the principles from which the norm is an instantiation (ie those that support the norm) are the correct ones and that they operate in the specific branch of law or in the whole legal order. In other occasions, arguments that emphasise the aims of the norm, or the consequences of the decision, will reinforce or complete the justification of the decision. Similarly, narrative coherence is only part of the external justification of the minor premise of the syllogism, since the factual assertion and the causal nexus need also justification, and because the factual statement comes together with its normative qualification.⁷³ In this respect, the consideration of law as an argumentative practice needs to attend to different types of argument, and to how they fit together.

Nevertheless, important differences remain between normative and narrative coherence. Quoting a conclusion of the Scottish scholar, “narrative coherence has to do with the truth or probable truth of conclusions of fact. Coherence here justifies beliefs about a world whose existence is independent of our beliefs about it. But, as Ota Weinberger has so often and convincingly shown, there is no analogous reason for believing in some sort of ultimate, objective, humanly-independent truth of the matter in the normative sphere. Coherence is always a matter of rationality, but not always a matter of truth”.⁷⁴

⁷² MacCormick, ‘Coherence, Principles...’, *supra*, fn 15, p. 189.

⁷³ Comanducci, ‘Osservazioni in margine’, *supra*, fn 48, pp. 274-5.

⁷⁴ This is stated in a revised version of his article ‘Coherence in Legal Justification’, in W. Krawiets, H. Schelsky, G. Winkler and A. Schramm (eds), *Theorie der Normen. Festgabe für Ota Weinberger zum 65. Geburtstag*, Berlin: Dunkler und Humblot, 1984, pp. 37-53, at p. 53.

A further difference is that normative coherence has synchronic character (is at-one-time), in contrast with the diachronic character of narrative coherence (through time). In other words, narrative coherence orders the flux of events through “convincing diachronic linkages”, while normative coherence between the norms and the system is appreciated at the time of the judgment or decision-making.⁷⁵

Some scholars have objected the synchronic character of normative coherence, since it ignores the diachronic character of legal interpretation and the evolutionary character of the legal rules, principles and doctrines. MacCormick faces this objection answering that sharing this last idea does not blur the difference, which still plays an important role. The coherence over time necessary for the development of the body of law and their interpretation –integrity– is an additional requirement to normative coherence.⁷⁶ Normative coherence is appreciated in a specific moment in which the decision is being justified; integrity, by the contrary, enables to comprehend the legal system as *diritto vivente*. Thus, viewing the contrast or adjustment between the norm and the system synchronically is not an obstacle for conceiving the system as an evolving body of law. Normative coherence is a guiding ideal for the application of norms of the system, but the meaning and interpretation of the system with which these norms have to cohere with change and evolve through time and cultures.⁷⁷

Agreeing that justification consists of an argumentative process that asserts that a linguistic entity (statement or assertion, prescription or judgment) has a certain value, an additional difference can be pointed regarding the diverse values that justification tries to attribute to normative and narrative coherence. The values assigned to normative coherence as a justification criterion are the principles underlying the decision, and in the case of narrative coherence, the values are truth and probability.⁷⁸

Finally, as it has been suggested in the previous reflections, MacCormick’s legal theory of coherence is not only a criterion of

⁷⁵ *Ibid* at p. 229.

⁷⁶ MacCormick, *supra*, fn 51, p. 235. In his own words: “the diachronic normative coherence that integrity demands is coherence across a system which at each moment in its development ought (so far as humanly possible) to exhibit synchronic coherence as a momentary system”.

⁷⁷ In the same line of argument, it has been stated that coherence in the law does not exclude change; “it only implies that change must be constrained by certain pre-existent and fundamental views, rules, principles, and values”. Peczenik, *supra*, fn 33, p. 147.

⁷⁸ Comanducci, *supra*, fn 48, pp. 266 and 273-4.

justification, but also the building method of the practical system proposed by him.⁷⁹ This hierarchically constructed system of rules, principles and values is universalised when applied to a specific case. At the top of the pyramid one can find the ultimate principles that express a “satisfactory form of life”. In this framework, normative and narrative coherence are operative criteria for justifying (judicial) decision-making (coherence of adjudication), and it is also the ideal value (integrity) that guides the reconstruction of the system as a set of coherent rules derived from higher and more general principles (coherence of the system).

II. LEGAL REASONING IN A POST-SOVEREIGN CONSTELLATION

1. Institutional Theory of Law and Integrity in a Post-Sovereign Constellation

Until now, I have focussed principally on the argument of coherence within the scope of legal reasoning. However, the ideas of law as integrity and of system related with this argument connect the spectrum of analysis with the concept of law and with the notion of system underlying it. MacCormick’s concept of law as *institutional normative order* is the legal framework under which legal argumentation should be understood. Simplifying, a normative order is a kind of ideal order that guide choices and that necessarily involves judgment. When this normative order is formalised through validly enacted rules, one can speak of institutional normative order. What is of interest here is that law as institutional normative order is conceived of as a systemic whole that “makes possible the explicit enactment of legislated rules and the articulated development of background principles through adjudication and through development of legal science”.⁸⁰ Both legislation and adjudication are institutionalised, and both legislators and judges should develop the law having in mind the idea of systemic (coherent) whole.⁸¹ As I have already advanced, the notion

⁷⁹ *Ibid* at p. 272.

⁸⁰ MacCormick, *Institutions of Law. An Essay in Legal Theory*, Oxford: Oxford University Press, 2007, p. 304.

⁸¹ *Ibidem*; N. MacCormick, ‘The Legal Framework: Institutional Normative Order’, in *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, Oxford: Oxford University Press, 1999, p. 7.

of system as an ordered, self-consistent and coherent body of norms functions as a regulative ideal for the concept of law and for legal argumentation.⁸²

It is interesting to note, and important purpose of this paper, that the concept of law as institutional normative order, the notions of system and integrity, and the theory of legal argumentation elaborated by MacCormick are not constrained by the nation-state conception, but can be applied to other entities, such as the ones that belong to the nowadays called post-national constellation.⁸³

European Community (EC) is one of the representative entities of this post-national constellation. In MacCormick's opinion, there is a post-sovereign polity or commonwealth that comprises "no-longer-fully-sovereign' states", and where the relationships of the various parts depend on a "still-to-be-elaborated" principle of subsidiarity, and not on a zero-sum game of competition for sovereignty.⁸⁴ In this "post-sovereign" Europe, sovereignty is now parcelled between different organs and powers. This new entity and the way of understanding the interactions of the legal and political powers can be called a "commonwealth", in the sense of a group of people that looks consciously towards a common good, and to that end, envisages their representatives or authorities to come into a new form of political structure and to engage in common constitutional arrangements.⁸⁵

From a legal point of view, the main problem here is the interaction between the nation-state law systems and the Community law as a new *sui generis* legal order, each of which has their own validity mechanisms. This coexistence of distinct genuinely institutional normative legal orders, called legal or juridical pluralism, renders necessary to look for a way of achieving common legal standards between the diversity of states, and, at the same

⁸² Using a different formulation, Weinberger also says that legal systems "are thought-objects". See O. Weinberger, 'The Norms as Thoughts and as Reality', in N. MacCormick and O. Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism*, Dordrecht: Kluwer, 1986, pp. 35-7.

⁸³ J. Habermas, *The Post-National Constellation*, Cambridge, Massachusetts: The MIT Press, 2001.

⁸⁴ N. MacCormick, 'A Very British Revolution?', in *supra*, fn 81, at p. 95; 'After Sovereignty: Understanding Constitutional Change' 9 (1998) *The King's College Law Journal*, 20-38, at p. 38.

⁸⁵ N. MacCormick, 'Democracy and Subsidiarity in the European Commonwealth', in *supra*, fn 81, p. 143.

time, for settling the boundaries in the interaction of the Community legal order and the state-law of the Member States.

Moving this ideas into the judicial decision-making process, the interaction between systems has to deal with the problems of how the ECJ and the national courts interpret and apply Community Law, how to harmonize the interpretations and correct application of that body of law,⁸⁶ how to guarantee the coherence and integrity of a certain branch or of the whole Community law system, and how all these tasks can be compatible with the content and understanding of national legal orders. The construction of European law, it has been argued, should be influenced both by the interpretation of it by the ECJ and by the way in which it is interpreted and applied by the national European courts. A coherent EU legal order would require both vertical discourse (between the ECJ and national courts) and horizontal discourse (between national courts). The problem would be then how to manage no-hierarchical relations between the different legal orders and institutions, and how to integrate the validity claims of national and EU constitutional law. This is precisely the difficulty which Maduro tries to solve through his principles of “contrapunctual law” that aim at harmonizing these different legal levels and to promote discourse and mutual influence.⁸⁷ A similar reasoning can be found in MacCormick’s theory when he affirms that the interactive and pluralistic character of the systems under analysis would need a mutual respect of the national interpretative judgments in order not to fragment the Community law by unilateral judicial or legislative decisions of the states, on the one hand, and it would require that ECJ reaches its decisions considering their potential impact in national constitutions, on the other.⁸⁸ Within these principles of contrapunctual law, vertical and horizontal coherence have the role of ensuring the uniform and coherent application of the EU law,

⁸⁶ In this sense, the norms should be not only formally operative in the different Member States, but also operative in the same sense. This is the purpose of the preliminary rulings put before the ECJ by the national courts, to obtain a common or uniform interpretation of the norms, focusing on the principles that underlie them. MacCormick, *supra*, fn 51, p. 231.

⁸⁷ M.P. Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in N. Walker (ed.), *Sovereignty in Transition*, Oxford, Hart Publishers, 2003, 501-537, at pp. 518-9.

⁸⁸ MacCormick, ‘Juridical Pluralism and the Risk of Constitutional Conflict’, in *supra* fn 81, pp. 118-21.

guaranteeing, at the same time, the constitutional pluralism of Europe.⁸⁹ This task is far from being a simple one and it potentially conflicts when contrasted with the idea of coherence, as it would be argued below.

2. Legal Reasoning in the European Community

Only few scholars have engaged in translating the main questions of contemporary legal philosophy into the European legal order. More concretely, theories of legal argumentation, as one of the popular concerns in the national legal sphere since the end of the seventies, have not been deeply studied at the European level. Leaving aside some very notable efforts in examining the legal reasoning of the ECJ,⁹⁰ this subject has been almost unattended, and still, paradoxically, its importance has increased due to the progressively protagonist role of the Court in modelling and constructing Community law.

As some scholars have pointed, the analysis of the judicial decision-making process should focus on the legal reasoning of the Court, and not

⁸⁹ Maduro, *supra*, fn 87, pp. 527-9. He highlights the problems derived from the interpretation and application of the EU law by national courts: "There is one European legal order as internally conceived by the European Court of Justice while there are different and isolated European legal orders as applied by the different national legal communities". Different concepts of horizontal and vertical coherence are the ones proposed by S. Besson, 'From European Integration to European Integrity: Should European Law Speak with Just One Voice?' 10 (2004) *European Law Journal* 257-281, at pp. 262ff. They are not restricted to adjudication, but are instances of a general conception of the principle of integrity. However, the ones proposed by Maduro seem to me clearer. See also C. Tietje, 'The concept of coherence in the Treaty on European Union and the Common Foreign and Security Policy' 21 (1997) *European Foreign Affairs Review* pp. 224-31.

⁹⁰ The book of Joxerramon Bengoetxea is still the leading text on this topic, providing an interesting and complete account of the legal reasoning of the Court. See J. Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Oxford: Clarendon, 1993. There is a previous attempt to examine this issue, but from the point of view of the interpretation methods in A. Bredimas, *Methods of Interpretation and Community Law*, Amsterdam: North-Holland, 1978. More recently, some scholars are interested in applying some argumentation techniques in the analysis of the Court's case-law. See references in fn 40. There have been, nevertheless, a bunch of scholars that have venture to apply some theoretical models and philosophical issues to international law and organizations (Kelsen is the outstanding example here), and to the European legal order in particular. Among these ones, and besides Neil MacCormick, whose important contributions are being examined here, it is worth mentioning the work of Frank Dowrick, René Barents, Ian Ward and Mattias Kumm.

in seeking to define the ideology that guides its interpretative activity, because this approach is misleading and unhelpful.⁹¹ More specifically, it should centre in the justifying reasons that support its judgments. As well as national courts, the ECJ uses different types of arguments to justify its decisions, such as linguistic or semiotic, systemic or contextual, and dynamic.⁹² In general lines, the Court has followed both a systemic and teleological approach to interpretation, attempting to show that the decision fits, on the one hand, with the norms and principles of Community law or of a specific branch of it (as authoritative reasons), and, on the other, with the *telos* or purpose of a provision or set of provisions of the Treaties, taking into account, by this way, the common objectives, policies and aims of the European integration process.⁹³ This has pushed the ECJ to act as a vehicle for integration, both by contributing to show Community law as a coherent whole, and by promoting the objectives and principles of Community law.

The principles of Community law are either contained in the Treaties⁹⁴ or unwritten principles recognised by the ECJ,⁹⁵ and they are generally used as standards of interpretation or review of national or Community

⁹¹ The critiques against the judicial activism of the Court, as the one of Rasmussen, is not a good starting point of the analysis, because they presuppose a sharp division between law and politics, instead of realising that the important thing is to attend at how to manage the overlap between them, and to rescue the reasons that justify this active role of the Court. See Bengoetxea, MacCormick and Moral Soriano, *supra*, fn 6, at pp. 43-4.

⁹² *Ibid.*, at p. 57-8. For this classification, see Z. Bankowski and N. MacCormick, 'Statutory Interpretation in the United Kingdom', in N. MacCormick and R. Summers (eds.), *Interpreting Statutes. A Comparative Study*, Aldershot: Dartmouth, 1991, pp. 364-73; Bengoetxea, *supra*, fn 90, at pp. 233ff.; J. Bengoetxea, 'Una defensa del consecuencialismo en el Derecho' 2 (1993) *Telos (Revista Latinoamericana de Estudios Utilitaristas)*, 31-68, at pp. 34-5; Bengoetxea, *supra*, fn 23, at p. 76.

⁹³ Bengoetxea calls this combination "systemic-cum-dynamic interpretation". Bengoetxea, *supra*, fn 90, p. 234.

⁹⁴ These general principles are the ones prescribed in art 6 TEU: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. To these ones, one should add the principle of solidarity, ruled in art 1(3) TEU and art 2 EEC Treaty.

⁹⁵ de Witte defines the principles of supremacy-primacy of EC law, direct effect and direct applicability as "unwritten principles, recognised by the European Court of Justice, which possess a high law status by the fact that they may be invoked as a standard for the review of Community acts". B. de Witte, 'The Role of Institutional Principles in the Judicial Development of the European Union Legal Order' in F. Snyder (ed.), *The Europeanisation of Law. The Legal Effects of European Integration*, Oxford: Hart Publishers, 2000, 83-100, at p. 83.

acts.⁹⁶ The latter principles are part of what has been called the “material constitution” of the European Community.⁹⁷

The relevance of principles in the legal reasoning of the ECJ is considerable, since they are used as a way of giving coherence to the system. But this kind of theory of coherence is not a strong normative one, because it does not claim the derivability of the system from universal rules (and do not presume a pre-established priority order between reasons), and because, rather than assuming coherence as a present or actual value, it instruct judges to coherently reconstruct the legal system, making connections between its parts. Thus, before colliding legal principles the Court will have, firstly, to assign a content or meaning to them and to determine their sphere of application; secondly, to see which is the value or force of that principle to decide the case; and thirdly, to decide the conflict favouring one of the colliding principles and justifying that the one adopted is more coherent with the rest of the norms of the system considered as a whole than others. This set of operations is commonly called “balancing” of arguments or principles.⁹⁸

3. Coherence in the Reasoning of the ECJ and Legal Pluralism

One of the duties of the ECJ is to guarantee the unity and consistency of Community law (art 225 EEC, art 62 Statute ECJ), and to ensure the correct interpretation and application of it by the Member States (art 220

⁹⁶ See the classification of principles of EU law proposed by Bengoetxea, *supra*, fn 90, at pp. 76-9, 225ff. A further classification is the one proposed by P. Pescatore, ‘Los principios generales del Derecho como fuente del Derecho Comunitario’, 40 (1988) *Noticias C.E.E.*, 39-56; and by J. Raitio, *The Principle of Legal Certainty in EC Law*, Dordrecht: Kluwer, 2003, at pp. 94ff.

⁹⁷ J. E. Fossum and A. J. Menéndez, ‘The Constitution’s Gift’ 11 (2005) *European Law Journal* 380-410, at pp. 390ff.; A.J. Menéndez, ‘Some elements of a Theory of European Fundamental rights’ in A.J. Menéndez and E.O. Eriksen (eds), *Arguing Fundamental Rights*, Dordrecht, Springer, 2006, 155-184, at pp. 156ff.

⁹⁸ Bengoetxea, McCormick and Moral Soriano, *supra*, fn 6 at pp. 64-5. They identify three criteria that play an important role in the balancing of reasons made by the Court: the rule of reason, the test of proportionality, and the principle of non-arbitrary (at pp. 67ff, 79). Even if here the notion of balance is used in this collective article, McCormick thinks that it is inappropriate to use the idea of weight in relation to choice among legal principles, since principles are not always making the same contribution to every act or judgment in which they counts as a reason. McCormick, *supra*, fn 49, at p. 87.

EEC).⁹⁹ Unity and consistency can be understood here as coherence. The ECJ uses the argument of coherence for complying with this legal duty in several ways. A complete panorama of these uses would need a detailed study of all of the case-law of the Court, searching for implicit references to coherence, or for explicit references to this argument under a different terminology. The purpose here is a much modest one: to identifying some of the uses that the Court gives to the notion “coherence”, to determine how these uses fulfil the duty to ensure the unity and consistency of Community law, and to analyse this results in the light of the theoretical framework provided by MacCormick. Additionally, I will present and criticise the author’s conception legal pluralism and the tensions between this notion and the argument of coherence.

The following paragraphs will analyse the uses of the argument of coherence by the Court,¹⁰⁰ grouping them according to the effects that coherence has in extending or restricting the scope of Community law: 1) the use of this argument as a means of potentiating the coherence of Community law, and by this way, extending its scope; 2) the use of coherence as a way of grounding limits to the scope of Community law, insofar as what prevails or aims to be protected is coherence operating at the national sphere.¹⁰¹

⁹⁹ For a discussion on three judgments in which the Court of Justice tries to remedy the incoherencies produced by the disobedience of national courts to follow the ECJ’s interpretation, see J. Komárek, ‘Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order’ 42 (2005) *Common Market Law Review* 9-34. The author discuss three judgments, namely Case C-224/01, *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239; Case C-453/00, *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECR I-837; Case C-129/00, *Commission of the European Communities v Italian Republic* [2003] ECR I-14637, in which the Court tries to ensure the correct application of Community law by national courts.

¹⁰⁰ Following the interesting suggestion of Bengoetxea, I turned to the French versions of the case-law studied for determining if there was a terminological disparity –that could in turn through light of a conceptual divergence– between the English and French word used in these cases. As in English, the French word used is *cohérence*. A related collective book has been recently published: S. Prechal and B. van Roermund (eds), *The Coherence of EU Law. The Search for Unity in Divergent Concepts*, Oxford: Oxford University Press, 2008. Though it seems by the title that it could be covering issues similar to the ones of this essay, i.e. coherence in the legal reasoning of the Court, the book focuses instead on the lures and limits of conceptual divergence in EU law, or on determining to what extend this divergence jeopardizes, or on the contrary favours, unity or convergence. The contributions concern mainly two widely used concepts in EU law: rights and discretion.

¹⁰¹ These different attitudes, indeed, reflect a much deeper issue, specifically the diverse conceptions of the European Community as a democratic polity. This is precisely the aim

A) Coherence as a means of consolidating and extending the scope of Community law

Following MacCormick's uses of coherence, both overall coherence and, with some differences, normative coherence, are used by the ECJ as a way of strengthening and extending the scope of Community law. The following account of some cases will illustrate this attitude.

a) Overall coherence or integrity

The idea of overall coherence or integrity of legal systems has been frequently applied to the European legal order.¹⁰² The European Community has been considered as a community of principles –written and unwritten– that come either from Community law and its interpretation, or from the common constitutional traditions of the Member States. The value of integration as the *telos* or core idea of both the European project and the scheme of the Treaties stands as a guiding principle for interpreting the Community law by the Court. Moreover, integration requires integrity understood as creating connections between the different elements of the European legal order and the values and policies that support them. Integrity or this idea of overall coherence, in turn, is only possible if the principle of integration guides the

being developed by the RECON project that studies three ways of understanding and reconstituting democracy in Europe, namely the renationalizing, federalizing and cosmopolitan strategies. Under these strategies, the European Union is conceived, respectively, as a functional (problem-solving) international organization, as a federal state based on a collect identity, and a rights-based post-national union with an explicit cosmopolitan imprint. See the papers by E. O. Eriksen and J. E. Fossum, 'Europe in Transformation. How to Reconstitute Democracy?', RECON Working Paper No. 01/2007, available at http://www.reconproject.eu/main.php/RECON_wp_0701.pdf?fileitem=5456091 (accessed 30 October 2007); and 'A Done Deal? The EU's Legitimacy Conundrum Revisited', RECON Working Paper No. 16/2007, available at http://www.reconproject.eu/main.php/RECON_wp_0716.pdf?fileitem=16662534, (accessed 30 October 2007).

¹⁰² At legislative level, reference to integrity is made in art. 299 (3) TEU, which prescribes that the Council, in adopting the measures of application of the Treaties referred in subparagraph 2, shall prevent to undermine integrity and the coherence of the Community legal order. A mere reference to this disposition is made in the Case C-282/00, *Refinarias de Açúcar Reunidas SA (RAR) v Sociedade de Indústrias Agrícolas Açoreanas SA (Sinaga)* [2003] ECR I-4741.

interpretation and application of the Community law.¹⁰³

Overall coherence or integrity as a principle of European Union can be found in art 3 TEU, when it prescribes that the “Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*”. Consistency and continuity have been considered as the principle of European integrity, which has a controversial scope and vague content.¹⁰⁴ Scholars have proposed several theoretical approaches concerning the role and content of this principle. Nevertheless, in what follows, I will not present these approaches, but rather focus on integrity in legal reasoning, that is, on how the Court uses the idea of overall coherence in its case-law.

To start with, one can find that the Court refers to coherence with different formulations, such as “coherence of the community system”, “coherence of the community law”, “coherence of the community legal order”, and “coherence of the community legal system”. Thus, the Court has ruled that the principle of coherence of the Community legal order must be taken into account when interpreting the provisions of directives. According to this principle of coherence, e.g., it has been ruled that “secondary Community legislation [has] to be interpreted in accordance with the general principles of Community law”.¹⁰⁵ Following a similar vein, the failure to recognize the jurisdiction of the Court to ensure uniform interpretation of the rules deriving from the ECSC Treaty is “contrary to the objectives and the coherence of the Treaties and irreconcilable with the continuity of the Community legal order”.¹⁰⁶

The Court also follows this general idea when it claims that “every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on

¹⁰³ Bengoetxea, MacCormick and Moral Soriano, *supra*, fn 6 at pp. 48, 82-5.

¹⁰⁴ Besson, ‘From European Integration to...’, *supra*, fn 89, pp. 262ff.

¹⁰⁵ Case C-499/04, *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG*, [2006] ECR I-2397; Case C-1/02, *Privat-Molkerei Borgmann GmbH & Co. KG v Hauptzollamt Dortmund* [2004] ECR I-3219.

¹⁰⁶ Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA*, [2007] ECR I-6199; Case C-221/88 *European Coal and Steel Community v Acciaierie e Ferriere Busseni SpA*, [1990] ECR I-495.

which the provision in question is to be applied".¹⁰⁷ Even if the formulation of this systemic argument does not connect in an explicit way the applicable norm or norms with the principles underlying them, the ECJ normally makes reference to principles of Community law in justifying its decisions¹⁰⁸. In other cases, this systemic argument adopts the form of appeals to the scheme, spirit, or system of the Treaty.¹⁰⁹

By using these type of justificatory reasons, the ECJ is preserving and emphasising the own and particular coherence of Community law, as a new logic derived from the purpose and aims of the founding Treaties. At the same time, this coherence takes into account the constitutional traditions common to the Member States, as a way of rescuing some sort of common European rationality.

Both attitudes consolidate and reinforce not only a kind of European identity, but they privilege one specific type of coherence, the one that the ECJ considers to be operating inside the Community legal order. The use of this coherence has a clear purpose of delimitating national competences, and by this way, posing limits on their sovereignties. In stressing the idea of coherence of Community law, the Court does not incorporate the diversity of national legal orders to the legal order that coherence aims at protecting, but or either imposes the primacy of the supranational system or stresses the convergence of the legal traditions of those orders.

b) Normative coherence in particular branches of the Community law

Community law can be thought of as different subsystems of rules interconnected under several common values, principles or goals. The construction of one particular subsystem can be conceived as the process

¹⁰⁷ Case 283/81, *CILFIT e Lanificio di Gavardo SPA c. Ministero della sanità*, [1982] ECR 3415.

¹⁰⁸ These principles, it has been argued, are the result of a selective choice of the best or most suitable principles and traditions that operate in the constitutional systems of the Member States. M. Cappelletti and D. Golay, 'The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration' in M. Cappelletti, M. Seccombe and J. Weiler (eds), *Integration through law: Europe and the American federal experience*, Berlin: W. de Gruyter, 1985, 261-351, p. 351.

¹⁰⁹ Case 193/85, *Cooperativa Co-Frutta Srl v Amministrazione delle finanze dello Stato*, [1987] ECR 2085. In a different field, the Court has decided that excluding measures adopted by the European Parliament from the action for annulment would lead to results contrary both to the spirit of the Treaty and to its scheme. Cf. Case 294/83, *Parti écologiste 'Les Verts' v European Parliament*, [1986] ECR 1339.

of identification of specific common principles that operate in that law domain. This particular principles should be respected when interpreting and applying its provisions, and, in this sense, maintaining its own internal coherence.

The argument from coherence is used here to support decisions that respect the particular coherence of the corresponding branch of law¹¹⁰. A first example can be found in cases regarding the conservation of nature and natural resources within the framework of the Habitats Directive adopted by the European Community (*Natura 2000*).¹¹¹ This Directive aimed at ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States, and at the same time aimed at setting up “a coherent European ecological network of special areas of conservation”.

Within these regulations, the ECJ uses the argument to favour decisions that protect a coherent European ecological network,¹¹² or simply the coherence of Natura 2000,¹¹³ which is an objective legally required in implementing environmental national policies. Here coherence seems to stand not only for the need to adjust the decision to a certain pre-established environmental system of norms and principles, but a value or a principle in itself. In some other cases, eg, coherence seems to imply the

¹¹⁰ In an interesting reflection, Bengoetxea suggested that this subsystemic coherence could resemble a way of institutional thinking according to MacCormick's theory. The idea of coherence used by the Court would be appealing to system logic present in these different areas or case-studies, much closer to a regulative ideal than to coherence as a discursive argumentative tool. Regarding the classifications given above, it could also match with the local coherence in Berteau's sense. Reference to this classification is given *supra* n 37.

¹¹¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, pp. 7-50.

¹¹² Case C-371/98, *The Queen v Secretary of State for the Environment, Transport and the Regions*, [2000] ECR I-9235; Case C-508/04, *Commission v Republic of Austria*, [2007] ECR I-3787.

¹¹³ Case C-304/05, *Commission v Italian Republic*, [2007] ECR I-7495; Case C-239/04, *Commission v Portuguese Republic* [2006] ECR I-10183; Case C-209/04 *Commission of the European Communities v Republic of Austria*, [2006] ECR I-2755; Case C-117/03, *Società Italiana Dragaggi SpA and Others v Ministero delle Infrastrutture e dei Trasporti and Regione Autonoma Friuli Venezia Giulia*, [2005] ECR I-167; Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, [2004] ECR I-7405; Case C-324/01, *Commission v Kingdom of Belgium*, [2002] ECR I-11197. See also Case C-220/99, *Commission v French Republic*, [2001] ECR I-5831; Case C-71/99, *Commission v Federal Republic of Germany*, [2001] ECR I-5811; Case C-67/99, *Commission v Ireland*, [2001] ECR I-5757.

need of conscientious work in the determination of the protected areas.¹¹⁴ However, the Court does not explicitly tackle with the meaning and content of coherence in this field.

A different matter where the Court uses this intrasystemic argument of coherence concerns remedies. As Berteau points, the Court of Justice has come forward several times to clarify and to fill the gaps of the Treaty provisions regarding remedies in judicial review, thereby shaping Community law. In doing so, the Court has often invoked the notion of coherence. In particular, the Court “has made coherence considerations in seeking to (a) shed light on the relationship between action for annulment and preliminary ruling, (b) establish what types of acts are subject to review, (c) elucidate the organic connection between itself and national courts and (d) work out some of the details about the standing that different subjects enjoy with regard to the action for annulment”.¹¹⁵

In fact, in a large number of decisions the ECJ has solved several problems of the functioning of the system of remedies by appealing to the coherence criterion. In those cases, the path that the Court follows is to identify some vacuum in the regulation of the Treaties and applying a solution in accordance with the general framework of the system of remedies built up by the Court. In the same way in which the Court appeals to some “general system of the Community Law”,¹¹⁶ the Court has created a special order in the “system of legal remedies”¹¹⁷ or in the “system of judicial protection”.¹¹⁸ By this way, the Court provides an universalisable argument for solving other cases, namely, the respect of the general system of remedies. A good example of this use of coherence can be seen in the field of preliminary rulings procedure.

Art 234 EEC states that any court or tribunal of a Member States national can request to the Court of Justice to give a preliminary rulings

¹¹⁴ Case C-244/05, *Bund Naturschutz in Bayern eV and Others v Freistaat Bayern*, [2006] ECR I-8445; Case C-371/98, *The Queen v Secretary of State for the Environment, Transport and the Regions*, [2000] ECR I-9235.

¹¹⁵ Berteau, *supra*, fn 21, p. 162.

¹¹⁶ Joined cases 3, 4 and 6/76, *Cornelis Kramer and others*, [1976] ECR 1279; Case 185/73, *Hauptzollamt Bielefeld v Offene Handelsgesellschaft in Firma H. C. König*, [1974] ECR 607; Case 22/70, *Commission of the European Communities v Council of the European Communities*, [1971] ECR 263.

¹¹⁷ *Les Verts*, *supra*, fn 109.

¹¹⁸ Case C-461/03, *Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit*, [2005] ECR I-10513.

concerning (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB and (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. However, in general terms, the ECJ has ruled that according to European law is not mandatory to send the request if the judges have no real doubt in the application of the European law.¹¹⁹ If the judges consider that the norm or provision is clear, or if the question is irrelevant for solving the case, or if it was already solve previously, they are not supposed to send the request and they can interpret themselves the European legal order, according to the guidelines provided by the Court.¹²⁰

But the Court found problems in applying this principle in the case of validity of an act of the Community institutions ruled in letter b) of art 234. The general permission enabling national judges to declare the invalidity of those acts when the ground of invalidity is clear was consider undesirable. To solve this situation, the Court said that “the possibility of a national court ruling on the invalidity of a Community act is likewise incompatible *with the necessary coherence of the system of judicial protection* instituted by the EC Treaty”.¹²¹ Explaining this argument, the Court claimed: “it is important to note in that regard that references for a preliminary ruling on validity constitute, on the same basis as actions for annulment, a means of reviewing the legality of Community acts. By means of arts 230 EC and 241 EC, on the one hand, and art 234 EC, on the other, the Treaty established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions and has entrusted such review to the Community Courts”.

The same solution was adopted in the leading case *Foto-Frost v Hauptzollamt Lübeck-Ost*¹²² where the impossibility of national courts to invalidate acts of the institutions was based on “the necessary coherence of the system of judicial protection established by the Treaty”. The Court further argued that the Treaty established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of measures adopted by the institutions. Accordingly, and

¹¹⁹ The *acte claire* doctrine was first recognized in *CILFIT*, *supra*, fn 107.

¹²⁰ See H. Schermers and D. Waelbroeck, *Judicial Protection in the European Union*, The Hague: Kluwer, 2001 (6th edition), at pp. 57ff.

¹²¹ *Schul*, *supra*, fn 118, (emphasis added).

¹²² Case 314/85, *Foto-Frost v- Hauptzollamt Lübeck-Ost*, [1987] ECR 4199.

“[S]ince article 173 gives the Court exclusive jurisdiction to declare void an act of a community institution, the coherence of the system requires that where the validity of an act is challenged before a national court the power to declare the act invalid must also be reserved for the court of justice”.

In these cases, especially in the cases of remedies, the use of the idea of coherence as a way of fostering the supremacy of the European legal order acquires special force. What the Court does through this case-law is to create subsystems endowed with their own internal coherence, and having these subsystems as parameters, it rules out divergent solutions incoherent with the particular subsystem. As it has been pointed out above,¹²³ the problem here is that, as coherence is an incomplete argument, there is a further need to justify the principles governing such a subsystem, because they cannot be taken for granted. Put it differently, once the Court uses the idea of a particular coherence of a certain legal branch, then the justification of its decisions is made by appealing to that coherence, but the content of the coherence of the subsystem or the justification of the subsystem itself is not given.

The same expansive attitude is at stake when the Court, facing conflicts between Community law and European institutions, ruled that it had exclusive competence to resolve them. Even when the Court has in previous case-law encouraged national courts to ensure the protection of the constitutional provisions of the Treaties upon conflicting norms in their domestic decisions, the concentration of the competence to annul acts of community institutions was considered by the Court to be an issue upon which is preferable to retain exclusive competences. By using the argument of coherence of the system of remedies, the Court stresses the hierarchical character of its interpretation and understanding of Community law.

B) Coherence as a means of strengthening national system and limiting the scope of Community law

There are few cases in which the Court is interested in remarking and protecting the coherence of national systems, or more accurately of subsystems within them, and by this way limiting the scope of Community law. One of them comes from the case-law concerning taxes. To

¹²³ See the text that follows fn 72.

comprehend in a better way this example, let us set the framework of the problem briefly.

Free movement of goods as constructed by the EEC Treaty implies two different constraints on tax systems: a) the abolition of all tariff barriers at intra-EC borders (arts 23-27); and b) the abolition of all non-tariff barriers at intra-EC borders (arts 28-31). These kinds of prohibitions have direct effect, and persons and undertakings can be relied upon before national courts in order to invalidate incompatible domestic law.

However, there are three kinds of exceptions to these direct consequences. Rules relating to mode of sale –eg, shop closure, restricted sale of certain goods only in certain shop, restricted sale areas, etc– affect in the same way trades on imported goods and trades on domestic products. Accurately speaking, these measures have some effect in the free movement of goods, but the effect is remote and for that reason these types of mode of sale are not forbidden (*rule of remoteness*).

A second possibility to avoid the prohibitions is contained in art 30 EEC in the sense that the state can legally apply restrictions justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

A third possibility, not stated in the Treaties but created by the ECJ, is the so-called *rule of reason* by which a restrictive national measure is acceptable if (i) it is necessary to protect a legitimate public interest, (ii) it does not distinguish in any way between domestic and imported goods, and (iii) its restrictive effects do not go any further than necessary to protect that legitimate interest (proportionality).¹²⁴

In relation to different or restrictive tax treatment of cross-border situation compared to similar domestic situation, the Court has accepted only three justifications under the rule of reason: (a) the need to protect the *coherence* of the national tax system (fiscal coherence), (b) the need for effective fiscal supervision, and (c) the need to prevent tax avoidance, fraud and abuse.

¹²⁴ For a wider discussion concerning the rule of reason in case-law on taxes, see B. Terra and Wattel, *European Tax Law*, The Hague: Kluwer, 2005 (4th edition), at pp. 41ff.

Fiscal coherence was accepted for the first time in the *Bachmann case*.¹²⁵ This case was about the possibility to deduce the tax payment insurances paid in foreign European countries. The Court observed that if these deductions were forbidden the measure could be against the interest of foreign people because normally they would take their policies with foreign insurers. But, at the same time, the Court accepted the argument that this prohibition would be better for maintaining the coherence of the national tax system. In fact, in Belgium, that favours this prohibition, there is a direct link between the deductibility of contributions and the taxation of the future benefits. This link makes the system coherent. And this coherence could have been disrupted if it would have been accepted that Belgium should do those kinds of deduction, since Belgium “is not able to subject foreign insurer to a withholding tax on the benefits paid, nor is it able to tax payment by foreign insurers to persons who ... do not live in Belgium anymore by the time the policy expires”.¹²⁶

It can be seen from this judgment that the reasoning of the Court took into account the special link between deduction and taxation of future benefits, gave it the treatment of a system, and protected this special linkage from possible breaches.

In the following cases, however, the ECJ regretted its acceptance of fiscal coherence as a mechanism to justify fiscal restrictions. After *Bachmann* the Court began to precise the features of the link between the tax benefit and the subsequent taxation. This link, ruled the Court, has to be immediate,¹²⁷ exist within the same tax, and concern the same taxpayer and the same contract.¹²⁸ Through this kind of conditions, the use of fiscal coherence has been notably reduced.

According to the case just described, the aim of the Court is to understand integration respecting the solutions given by each legal system in this specific matter. This could be consider as a kind of legal pluralism, since the Court recognizes that the formation of a Community common legal order may be done also by means of strengthening the internal legal

¹²⁵ C-204/90 *Hanns-Martin Bachmann v. Belgian State*, [1992] ECR I-249.

¹²⁶ Terra and Wattel, *supra*, fn 124, p. 108.

¹²⁷ Opinion of Mr Advocate General Mischo delivered in Case C-324/00, *Lankhorst-Hoborst GmbH v Finanzamt Steinfurt*, [2002] ECR I-11779.

¹²⁸ Terra and Wattel, *supra*, fn 124, at p. 120. See Case C-484/93, *Peter Svensson and Lena Gustavsson v Ministre du Logement et de l'Urbanisme*, [1995] ECR I-3955; Case C-251/98, *Baars v Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem*, [2000] ECR I-2787.

coherence of its units, even when the latter held different legal solutions for the same matter.

Similarly, it can be concluded that the Court includes, in interpreting its duty to ensure the effectiveness and compliance with the provisions of the Treaties and its duty to enhance integration, the respect of the particular coherence of national (sub)systems. Nevertheless, this self-restrain attitude consisting in not interfering or affecting national legal systems in areas excluded from the scope of Community law, is a marginal tendency, and in fact is gradually decreasing.

C) Coherence and Legal Pluralism

The reason why an account of law as institutional normative order leads to a pluralistic conception of law is, in MacCormick's theory, to be found on the fact that that conceptualisation of law negates any analytical nexus between law and state.¹²⁹ It is not just that the conception of law is detached from the figure of the sovereign, but that law can exist independently from polities having the features of a state. Law can exist in organizations or associations without jurisdiction over a well-defined territory, or without having the monopoly of coercive power.

Institutional normative order, however, needs to entrust in some organ the competence of determining conclusively what counts as authoritative norms of the system. In other words, it requires the institutionalisation of the judgments on the validity of the norms of that system in hands of the legislative and judicial bodies. The complex legal reality at the present shows, in MacCormick's opinion, that there are different valid normative orders interacting, each of which has its own ground of validity, and none

¹²⁹ In the exposition of MacCormick's ideas, I follow mainly the article 'Juridical Pluralism...', *supra*, fn 88. Further critics concerning the articulation of legal pluralism inside a coherentist account of law can be found in Agustín Menéndez' chapter in this report. Bengoetxea has pointed out that pluralism strictly occurs seldom. He has emphasised that we should have in mind Jean Carbonnier's distinction between *pluralisme* and *diversité*. This last one entails diversity of interlocking legal sources or systems which can conflict, but the important thing is to determine if there are mechanisms that solved them (for example, finding a common rule of recognition that give the *Kompetenz-Kompetenz* to certain organ). We are only facing legal pluralism when a clash of jurisdictions takes place, that is, when, given a legally relevant situation, two different solutions are given based on different systems and there is no clear solving-problem rule or authority.

of them subordinating its validity to a different system.

Applying this conceptual framework to EC law, it results that both Member States and Community legal orders have its own criteria of validity for recognising norms as binding rules ("Community-validity", and "Member State-validity")¹³⁰. In the case of the Member States, this criterion can be found mainly in the Constitution, while in the case of Community law, this criterion consists of the norms of the founding Treaties (material constitutional) together with the interpretation principles acknowledged by the ECJ. To say it differently, the legal pluralism denies constitutional dependency of states one each other or of states on the Community. This picture, however, does not yet explains the principle of primacy of Community law. The application of Community law by Member states, goes the argument, have been recognized by the Member States as part of their legal orders, that is, they have amended their criteria of recognition for including domestically the principles of direct effect and primacy of EC law. In this regard, it is claimed that EC law validity criteria is not superior to the constitutional validity criteria of the Member States. The same can be argued concerning the ultimate character of the highest decision-making authorities of the different systems. The ECJ interprets in last resort and authoritatively the norms of Community law, while the higher courts of the Member states interpret the norms of their legal orders and the interaction between EC law and their constitutional norms.

In my view, however, and as the result of the duty assumed by the Member States in order to accept and incorporate in their reasoning the interpretations of the ECJ (art 234 EEC), it is not clear that there is a sharp independence, or an absence of some sort of hierarchical relation, among the ECJ and national higher courts, or ultimately, between EC law and Member States legal orders. The argument that Member States voluntarily amended their recognition or validity criteria is not a strong one, since if states do not incorporate in their legal orders Community law and its authoritative interpretation by the ECJ they would be in a situation of lack of compliance and would eventually incur in liability.

It is certainly correct not to understand the doctrine of supremacy of Community law as a "kind of all-purpose subordination of member-state-law to Community law", and it would be also a hard to accept thesis to

¹³⁰ MacCormick, *supra*, fn 88, pp. 113; see also p. 103; N. MacCormick, 'On Sovereignty and Post-Sovereignty', in *supra*, fn 81, at p. 132.

hold “that accession to the Community or Union necessarily entails subordinating the state’s constitution as a whole package to Community law”.¹³¹ Indeed, there is a relevant range of topics excluded from Community law or that belong to areas out of the reach of integration purposes or agreements. But, in my contention, the important thing here is, firstly, to determine the domains where there is interaction and overlapping, or from a different perspective, to identify the existence of a conflict, or of conflicts relevant to EC law. The second problem consists in determining if there is, and if there should be, a mechanism to solve the conflict. The third problem is whether all conflicts should be judicially solved or else if there is space, within the framework of European integration, to maintain unresolved issues and/or to resolve them through different channels. And here the answer given by the Court seems to me conclusive: the Court does not look with good eyes leaving conflicts unresolved, and whenever there is a conflict, it engages in its resolution. In this latter process, the ECJ has ruled that it is the one entitled to interpret Community law and determining the way in which certain national norms constitute a breach of EU law.

Some of these difficulties are well-known by MacCormick. He acknowledges that the way of understanding the interlocking legal systems as hierarchically independent has some problems, and more specifically, that the application of a pluralistic legal view to the relations between state-law systems of the Member States of the EC and the Community legal order confronts ongoing challenges. At the same time, he has moved from a position of “radical pluralism” to what he calls “pluralism under international law”. Both types of pluralism stress that Member States and Community legal orders have independent validity rules and that there is no hierarchical relation among them, but an interactive one, and that each system has its own decision-making final authorities. They only differ in the nature of the relations between the states and Community law, on the one hand, and international law, on the other. According to pluralism under international law, international law set conditions or a framework for the interaction between states and Community law systems, while radical pluralism considers these conditions only a third perspective, but not a hierarchically superior obligation. A consequence of this difference is that under radical pluralism there are legal problems that cannot be solved

¹³¹ MacCormick, *supra*, fn 88, pp. 116-7.

legally, but through revolt or revolution, recalling Phelan's proposal, whereas according to pluralism under international law there always remains the possibility of recourse to international adjudication or arbitration to solve the conflict. This last view resembles, in fact, Kelsen's theory of legal monism, in the sense that international law governs the pluralistic relations between the law of the Community and the Member States. In other words, the pluralism takes place under a monistic framework imposed by international law.

Together with the problems inherent to legal pluralism just mentioned, a further difficulty consists in articulating it with the overarching idea of coherence in law and in legal reasoning that inspires MacCormick's theory. For the simple image of coherence as the parts making senses with the whole, or the idea that a coherent norm or decision is the one that is derived from a more general value or principle, seems to require hierarchical relations, or genus-species articulation. What does it mean, then, to promote coherence respecting diversity? In my opinion, it can only mean that there are areas in which, though there are conflicting solutions to some problem given by diverse systems, there is no interaction or overlapping. From this point of view, plurality would entail that there is no real conflict among diverse responses to a same question, because they hold in an area where the systems preserve independence of decision-making procedures. Coherence as making sense of the parts of a system implies to reconstruct the relations between them and in this reconstruction, some priority criteria are generally present deciding which element should prevail, or some mechanisms are created to solve the collision between elements.

Landing these ideas in the relations between Member States legal systems and Community law, legal pluralism can only account for a description of diverse legal sources that coexist. But when law is applied to practical cases, there is a hierarchical rule that entrusts the problem-solving capacity to the ECJ when facing conflicting interpretations of Community law. Ultimate decision-making by this Court will inevitably imply options of principles, of values, and at the end, of systems. And this point of view, internal to the law as a solving-problem instrument, responds to a monistic

approach to law,¹³² not to a pluralistic one.

Someone could object this conclusion, saying that if not in all the cases that reach the Court at least frequently decisions are justified appealing to the constitutional traditions common to the Member States. In this sense, the Court could be recognizing the plurality of orders interacting with Community law. The interesting point here is that these traditions, which are effectively used as guides for the coherent reconstruction of Community law, are the result of a convergence of common principles – though coming from the different Member States – rather than the expression of legal pluralism – which entails different solutions for the same legal problem.

III. CONCLUSION

Finally, I would like to briefly point out some conclusions concerning the theoretical model of the argument of coherence proposed by MacCormick, the way in which the ECJ uses this argument and the relation between coherence and legal pluralism, both theoretically and in the Court's case-law.

Firstly, as for the theoretical model, both normative and narrative coherence are, though they have only weak justificatory force, an initial useful test in the justification of legal reasoning, since they implies an effort to reconstruct in the better way as possible the chain of axiological derivability of the principle that rules the case or the chain of relevant facts respectively. Overall coherence complements these specific forms of the argument of coherence, making further connections among the elements of the system, and enabling the decision-maker to interpretatively reconstruct the legal order as a coherent whole.

Admittedly, there are limits to the use of coherence in legal argumentation, of which MacCormick is aware. However, an incomplete or insufficient argument continues to be a criterion of justification, and these limits only mean that it will be needed other arguments to justify the decision, such as teleological or deontological ones. What is important for a sound argumentation is making explicit the connections, reasons and

¹³² This claim coincides with the one made by S. and B. van Roermund in the introductory essay to *supra*, fn 100, at p. 1, stating that there is one single authority, and that this unity opposes pluralism.

arguments that underlying the decision, and to show why the given solution is the better or preferable one for the case. MacCormick itself contents that the best objectivity available in human sciences is that of an honest interpretation that is, on the one hand, open to the values it presupposes, and on the other, alert to failures and successes of the system.¹³³

Secondly, in the cases considered, the Court uses the argument of coherence in a twofold way: on the one hand, as a means of reinforcing the autonomy and extending the scope Community law as system, and on the other, as a way of recognizing particular national logics that operate within their legal systems or subsystems and of posing limits to application of Community law. However, the Court does not employ them with equal force or frequency. Indeed, the extended attitude is to use overall coherence or coherence of Community subsystems for highlighting the *sui generis* character of the EC legal order, for bringing into Community law cases that, even if the matters they refer to are not clearly or explicitly within its scope, and for defending the primacy of Community law over national legal orders in the matters inside the scope of Community law. By the contrary, the self-restrain attitude –well by means of the creation of exceptions to previous decisions of the Court itself, well by protecting the coherence of national subsystems on specific domains– is employed rather seldom.

Interestingly, and from a different point of view, the Court sometimes appeals to the coherence/incoherence of a norm or decision as a way of problematising a case, and hence, transforming this conflict in relevant for the Community law. The conflict, in turn, is decided according to the argument of coherence. Therefore, the Court at the same times invokes coherence for defining the existence of a legal problem, and for solving or justifying its decision.

Under MacCormick's theoretical framework, the notions of coherence used by the Court correspond, roughly speaking, to the author's idea of overall coherence and of normative coherence. Overall coherence operates in the Court's reasoning as a way of stressing the own logic of Community law. The decision to be adopted must be the one that fits better with the norms of this legal order, especially with its general principles or with its material constitution. However, this sole argument needs to be backed also

¹³³ MacCormick, *supra*, fn 80, p. 305.

by a sound supportive structure of reasons, and it is not enough a mere appeal to the coherence of the Community law to justify the decision. For this argument to be a strong one, the Court should argue why a certain solution coheres with the system, and to what extent it is preferable to others. On the other hand, the way in which the Court uses the argument of normative coherence do not strictly correspond to the one proposed by MacCormick. While he considers normative coherence as reconstructing the chain of derivability of the norm according to which the case is to be solved, the Court refers to coherence as the systematicity of each some specific spheres of law (environmental protection, remedies and taxation) In these cases, the ECJ first creates subsystems at the European or national sphere by attributing them a particular internal coherence, and then decides the case according to its compliance or not with this subsystemic coherence. More than an argument, coherence here refers to the particular logic or principles governing these subsystems. The problem arises when the Court does not clearly delimitate these subsystems, does not explicitly mention the principles that operate within them, and falls short to explain what does coherence means for a particular subsystem. Again, mere appeals to coherence fail to justify the decision, and can lead to high degrees of discretion. Appeals to coherence should be, then, transformed into arguments of coherence by giving justificatory reasons that supports the particular decision.¹³⁴

Thirdly, as I have tried to argue, there is an internal theoretical tension in MacCormick's legal theory between coherence and pluralism. Coherence inside a legal system requires a hierarchical order among their elements or mechanisms that enables to reconstruct this order a posteriori. For the connections that coherence pursue –in the form of derivability or other ones– aim at dissolving conflicting responds to a same problem, at eliminating inconsistency, and at giving a final answer to the problem concerned. Of course this is true only concerning the intersection of different systems regulating a same conflict diversely, and not of all the different legal solutions to a problem in cases when there is no interaction. Since pluralism claims independency and non hierarchical relations among systems, the role that coherence could have inside interactive systems is difficult to appreciate.

¹³⁴ Berteau highlights this difference between appeals to coherence and the argument from coherence, *supra*, fn 39, 378.

At the practical level of the case-law, it can be argued that where the Court enhances the coherence of national legal subsystems a sprout of legal pluralism can be recognize, since the Court is tolerating the coexistence of diverse solutions within the legal orders of the Member States. But the expression of legal pluralism in the particular case analysed seems to wither away when the Court changes its decision by restricting the scope of application of the exception of internal coherence. A reason for this attitude could be the purpose of progressive convergence or approximation of national legislations in the areas included or that can affect Community law principles, freedoms and rights, and expansion of the scope of Community law via interpretation of ECJ.

The main use of coherence by the Court as increasing the reach of Community law does not favour a legally pluralistic conception but a rather monistic conception of the European legal order. It is the Court the final decision-maker in charge of solving conflicting interpretation or collisions of norms. In deciding these conflicts the Court establishes a hierarchy among competing principles or relations of priority among norms, and by this ways, aims at reconstructing Community law as a coherent whole.



Part III

The Legal and Constitutional Theory of European Integration



Are we beyond sovereignty? The sovereignty of processes and the democratic legitimacy of the European Union

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I. INTRODUCTION

The EU is frequently being qualified as a politico-legal system *sui generis*, on the one hand suggesting that we are confronted with structural elements of law generation, institutional engineering and polity building that are without precedents in a strong sense, and on the other hand emphasising the need to reflect this *sui generis* character in conceptual, analytic and normative terms. In this latter sense, *sui generis* perspectives have guided endeavours to find a new language to capture Europeanisation, to frame its internal structure of fragmentation, diversification, and differentiation, to explain its modes of allocating binding authority and of resolving normative conflicts. Yet, the various

¹ I am grateful to the participants of the conference 'The post-sovereign constellation. Law and Democracy in Neil MacCormick's legal and political theory', Bergen 2007, to Neil MacCormick, Agustín Menéndez, John-Erik Fossum, Nadja Meisterhans and Rainer Schmalz-Bruns for helpful and valuable comments on the manuscript..

reflections on the EU – like those more broadly directed towards trans-, supra-, inter- or post-national legal phenomena – did not really escape the normative and analytic terminology that has since early Enlightenment accompanied national and international legal developments, institution building and social integration more generally, namely with regard to questions of political authority and its legitimate sources, binding instruments and coercive forms on the one hand and of the legitimating, contesting, appellate or autonomy-enforcing power of society on the other hand. Likewise, the various discourses about an emerging European polity challenging traditional understandings of law and democracy are systematically embedded in broader discourses of modern legal developments at the subnational, national and international level. Although it is frequently not made explicit, to my mind, European discourses mirror or reflect transformations of national *and* of international law in a twofold way: In phenomenological terms the politico-legal system of the EU has often been paradigmatically taken as a litmus-test for ‘state-centred’ notions and concepts, starting from questioning the status of European law as ‘law’ in systematic terms, and ending up in inquiring whether the incremental processes of European constitutionalisation are resulting in a constitution proper. This is even more obvious with regard to normative questions – in this context, intensifying debates about the need, conditions and prospects of democratic legitimacy, or about the status of the individual legal subject and the meanings of ‘European citizenship’ shifted the focal point towards identifying ‘statehood’ qualities of the European polity and towards reflections about the place and appropriateness of sovereignty, for instance (cf. MacCormick, 1996 and 1999, see also Walker, 2003 and 2006). In this regard, the conceptual challenges of political and legal theory are mainly derived from the institutional and structural changes resulting not just from pluralisation of law but more radically from the disintegration of legal orders, the fragmentation of legal regimes, the disaggregation of institutions and the decentring of legitimate sources of law – and accordingly, reservations about the feasibility of an overall perspective of law as a purposive (legal) system, i. e. as a ‘kingdom of ends’, seem to rise.

At the diagnostic level, law still appears to be the ultimate medium for solving coordinative and cooperative problems beyond the nation state and for trans- and supranational integration (in political and legal as well as in sociological terms). What is striking in phenomenological terms is that, on

the one hand, we can observe that law is fragmented into partial, functionally and/or regionally differentiated legal regimes, and that pluralisation and contestation in this respect are rising. On the other hand, law is still embodying an emancipatory, equality enforcing promise and supplying a language of normative universals. Against this background, and by illustrating some observations concerning international legal developments I would like to illuminate the intuition that there is a kind of universalistic drive in legal developments which is not a side effect of a concrete institutional configuration – like traditionally embodied in a ‘sovereigntist’ nation-state paradigm – but which is constitutive for law as a means and medium of social integration. If we take law as a medium of social integration seriously, it provides us in the nutshell with a language facilitating justifications of the autonomy of agents in terms of rights. Beyond that it seems quite natural that reflections about trans- and supranational legalisation end up by considering law in terms of a universalist proclivity, but also in terms of legitimacy, democracy and related normative concepts (this idea is illustrated by some sociological considerations in part II.).

I will take up these – although sketchy – phenomenological remarks to unfold a constitutional perspective on legal integration (part III. and IV.) that proceeds in three steps. It starts with the assumption that, firstly, legal integration is possible only by establishing structures of a formal system; and it argues that, secondly, this embedded formalism is a normative rich one, i. e. an ethical formalism which aspires universal (and hence reciprocal) justification; thirdly and accordingly, it can be qualified as a formalism acquiring constitutional quality which is open for proceduralisation, reflexivity and democratic contestation: At the baseline the universalistic drive of law is directed at the idea of law as a *formally* coherent system with an immanent monistic structure guiding its institutional reproduction. Insofar as law is imbued with a universalising ‘ethos’ – this is the case because the very language of law is responsive both to resolving and mediating norm-collisions and to rights-talk –, it is more than a structural monism, or better, more than a pure formalism that is constitutive for law, but a normative formalism. In other words, law as a universality-aspiring system is characterised by a Kantian rather than by a Kelsenian formalism. In Kantian terms, the (purely) formal structure of law is translated into a procedural scheme where the normative quality of (a merely) structural formalism is secured by reflexive procedures. Reflexive

procedures, in turn, suggest a notion of constitutionalisation which is not just contingently but internally linked to the idea of transformation through democratic self-determination and the public use of practical reason.² A constitutional perspective of law, I would like to argue, shares a very general starting point with Neil MacCormick in that legal integration is a reaction to needs of cooperation under the auspices of plurality and equality-claims, but in distinction to his view it envisages a procedural meta-scheme of mediation that is neither a ‘contingent matter’³ nor beyond the formal notion of a monist system. I will suggest that the normative qualities of law as a mode and medium of integration can be derived from two sorts of principles constituting the idea of law. The first one relates to the formal characteristics of law as an agency-centred concept and argues that law is necessarily universalist in aspiration, and hence an inclusive and cooperative concept (part III.). The second one relates to the procedural second-order mechanisms and argues that they are constitutional in aspiration and hence reflexively structured in order to proceduralise conflicts of supremacy (part IV). In this regard, my aim is to find a way out of the dilemma that the *factum brutum* of pluralism can in normative terms be preserved (equality-securing), but at the same time and with regard to its negative consequences (norm-collisions and hegemonic norm-interpretation) be resolved only by neutralising and abrogating pluralism at a higher level. By taking Kant’s reflections about the ‘provisional’ nature of law as a heuristic perspective, I will argue for a scheme of institutionalising a meta- or second-order level to proceduralise the constitutive paradox of pluralism, i. e. collisions of validity-claims under conditions of equality. In this sense I will approach the question of sovereignty indirectly – by asking when and under which conditions it might be in normative terms better to suspend sovereignty, i. e. to be anti-sovereigntist (but not necessarily anti-monist). Although I do share MacCormick’s diagnostic starting point emphasising that we have to take egalitarian pluralism seriously and that we should hence be sceptical about sovereignty-centred (and as such

² I owe this specification to Agustín Menéndez and John Erik Fossum.

³ I would like to question his altogether sceptical conclusion ‘that the correct understanding of the interaction between different normative systems is a contingent matter, not one that flows from the very concept of normative order’ (MacCormick, 1998: 538, see below, part III. and IV). Even if this remark is interpreted in sociological and pragmatic terms, it neglects the fact that the ‘very concept of normative order’ is addressed to reflexively structure interactions between normative systems, and insofar it is directed at counterbalancing what I would like to term the ‘structural ignorance of pluralism’.

plurality-denying) forms of conflict resolution (cf. MacCormick 1998 and 1999, also 2001 and 2004), I would like to draw different conceptual consequences with respect to the subsequent idea of a constitutive plurality of law(s) and legal order(s) and accentuate the necessity of the unity of law as an overarching system of normative integration (cf. MacCormick, 1993b: 18, 1989 and 1996). In order to secure equality and reciprocity, law has to supply procedural remedies for normative conflicts, but this is possible only if we do not lose an overall perspective on the law and its reflexive mechanism – in this vein law has to take the shape of a formal purposive legal system.

II. AMBIGUITIES OF LEGALISATION

A sketchy look at how modern developments of trans- and international law are in diagnostic terms interpreted reveals comparable analytic problems and conceptual questions as with regard to European integration and constitutionalisation. In the light of current debates on governance beyond the nation state, legalisation and juridification seem to be the ultimate and irreversible trends of domesticating anarchy, injustice and factual hegemonies of particular ‘sovereign’ nation states. However, legalisation as well as juridification of trans- and international relations are in phenomenological, in systematic and normative terms rather ambiguous: The binding and implementing force of principles, rules and normative standards is contested, the status of norms and the subjects of the law are indistinct, processes and practices of jurisgeneration are highly inconsistent, legacies are fragmented according to standards and fields of jurisdictions. Various normative spheres like *lex humana*, *lex mercatoria*, *lex electronica* etc. seem to be evolving – yet, not simultaneously and within an overarching ‘order’. We are confronted with specialisations of trans- and international law in different legal regimes like ‘trade law’, ‘human rights law’, ‘environmental law’, ‘criminal law’, ‘security law’ and with formations of regionally differentiated transnational law regimes that have not just led to fragmentations of law but also to a ‘reversal’ of legal hierarchies (see Koskeniemi, 2007, International Law Commission 2006). Trans- and international law can neither rely on a clear-cut hierarchy of norms like *lex superior derogat lex inferior* nor on an institutional hierarchy between constitutional and lower courts. As a consequence, conflicts of jurisdiction arise, esp. with regard to the question of which legal regime is (legitimately) the point of reference to resolve a normative conflict. The

basic problem is for instance to justify whether the facts of a case or conflict are an object of security law or human rights law, of human rights law or trade law, of trade law or environmental law, of *lex electronica* or *lex mercatoria*, of EU-Law or WTO-Law, and so forth. Quite similar to the problems associated with the fragmented structural elements of the EU-internal politico-legal order, questions of allocating and balancing institutional remedies to solve subsequent conflicts over jurisdictions come to pass.

At the other side of the coin we can reconstruct a generic process of an 'ethos of universal law' that has been affecting the coordinates of 'sovereignty'. If we start from a very broad and general observation, we can argue that transnational and global processes have challenged territorial premises of sovereignty and particularistic presumptions about rights based in a strong sense on national belonging. Most human rights lawyers point out that the post-World War II emergence of international human rights law represents one of the most profound challenges to the notion that state sovereignty is irreducible and impermeable (see Koh, 2000 and Twiss, 2004, for a critical account Schilling, 2005). Apart from that, the emergence of cosmopolitan norms has been accompanied by various debates about refugee-, immigrant- and asylum-statuses (see Benhabib, 2007), and accordingly, transformations of citizenship-concepts⁴ have lead to a decoupling of rights and identity – not least by invoking human rights conventions and demanding the recognition of rights for particularly vulnerable, discriminated or minority groups (see Soysal, 1994, Delanty, 2000). These decouplings of rights and national belonging challenged the claim that nation-states are the ultimate source of normative authority and exclusive allocators of individual, social and political rights.

If we take a look at the historical processes of embedding and codifying 'universal' individual rights in an international legal order, the caesura of World-War II and the European experiences with fascist regimes is of paradigmatic relevance. The post-World War II period was marked by the need to deal with the legacy of the Nazi-regime and the unprecedented genocidal scope of the Holocaust which nurtured the idea of universal law (and justice) in a twofold way, in terms of universal law as a compulsory

⁴ See about the notion of flexible citizenship Ong, 1999; about citizenship of residency Benhabib, 2004; about transformations in general Sassen, 2006.

legal code (a prospect leading to the *Universal Declaration of Human Rights*) and in terms of universal jurisdiction (leading to *International Tribunals* for crime-prosecution, and more recently to the establishment of the *International Criminal Court*). Especially the drafting of the *Universal Declaration of Human Rights* was inspired by the need to prevent uncivilised and barbaric state behaviour such as known from the Nazi-regime stripping citizens of civil and legal protection, subjecting them to inhumane practices and denying them the basic necessities for survival. A parallel course of action was related to the judicial prosecution of Nazi-crimes, for the first time recognizing individual responsibilities and rights against the presumption of the auspice of national sovereignty: The base for the war crime tribunals in Nuremberg and Tokyo was laid down in the *London Agreement* concerning the charter of the *International Military Tribunal* (IMT). It lists a number of crimes that have previously not been part of international law, and explicitly recognised the ‘individual subject’ with rights and according responsibilities. In that respect, Art. 6 IMT emphasises the jurisdiction of the *Tribunal* dealing with individual responsibility. Art. 6a IMT lists ‘crimes against peace’, Art. 6b concerns ‘violations of the wars or customs of war’, and Art. 6c IMT enumerates ‘crimes against humanity including murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population...or persecutions on political, racial, or religious ground...whether or not in violation of domestic law’. For the first time in the history of international law, political accountability and criminal responsibility have been determinately interwoven into judicial procedures. This *caesura* surely provided the foundation and created important precedents to push the Nuremberg concept of crimes against humanity in a global arena (see f. i. Coliver, 2006, Danieli, 2006 and Teitel, 2004).⁵

⁵ Cf. Levy and Sznajder, 2006 who analyse that the historical memories of past failures to prevent human rights abuses ‘have become a primary mechanism through which the institutionalisation of human rights idioms and their legal inscription...have transformed sovereignty’ (659), because these memories are successively articulated through cosmopolitan legal frames and refer to supra-national principles; see also Hirsch, 2003. So, even particular national and ethnic memories are transformed by ‘cosmopolitanised memory’, and hence an ‘increasingly de-nationalised understanding of legitimacy is contributing to a reconfiguration of sovereignty itself’, Levy and Sznajder, 2006: 659. This is evidenced by two processes, ‘one, the political will of states to engage with rights abuses is becoming a prerequisite for their legitimate standing in the international community and increasingly also a domestic source of legitimacy; two, and related, legal inscriptions of

Interestingly enough we can discern that the project of modern international law was also one of emancipating in dogmatic terms from domestic law by constructing it as a legal system on equal stance with national law – even more striking is that this endeavour has already played a role with regard to the nascent international *corpus juris* during the inter World-War-period. In the 1930s textbooks about cases and precedents as well as methodologies for treaty-interpretation were systematically edited. The literature on international law included reflections about the ‘superior’ character and status of universal law in normative terms, among others projections of the *League Covenant* as ‘higher law’ comparable to domestic ‘constitutional law’ (cf. Lauterpacht, 1933, Jellinek, 1880, Koskenniemi, 2001), and inter-war lawyers argued a good deal for the systematic nature of public international law (see Kelsen, 1928, Verdoss, 1926, Grewe, 1988, see also Eyffinger, 1988). One notion that is indeed foundational for the idea of modern universal law is the formal notion of a ‘quasi-constitutional’ quality of international law, i. e. the conviction that an international rule of law creating a system of law is intrinsic to the idea of international law (insofar as it is intrinsic to juridical thought) and that it constitutes general law, i. e. general principles of law as structurally given in international law (cf. International Law Commission 2006).

Another aspect of potentially sovereignty-transcending developments concerns what is referred to as the cosmopolitanisation of jurisdiction. The cosmopolitanisation of jurisdiction or judicial globalisation is itself a complex field of different practices and institutional structures, relating to the spread in transnational, esp. regional human rights courts⁶,

memories of human rights abuses do recast the constitution of International Law itself and also constitute significant precedents for the cosmopolitanisation of national jurisdictions’, Levy and Sznajder 2006, 661. For a very good case study about South Africa see Nagy, 2006 who reconstructs South African’s post-apartheid search for justice as a ‘cosmopolitan remembering of the nation’ (626). She works out how the practice of the *Truth and Reconciliation Commission* was paralleled by litigation under the US *Alien Tort Claims Act* (against multinational corporations assisting the apartheid regime). She demonstrates that the transitional path towards ‘national unity and reconciliation’ was accompanied by apartheid litigation outside the national system as a ‘cosmopolitan quest by the victim’. About the effects of cosmopolitan justice discourse on legal discourses in Chile see Golob, 2002 who illustrates how Chileans were pushed to reflect on why a so-called consolidated democracy forced victims to seek justice in inter- and transnational fora.

⁶ Such as the *European Court of Human Rights* (but also the *European Court of Justice*, the *CoE General of Human Rights* (DGII) and the *European Committee for the Prevention of Torture* which are of relevance in the context of human-rights jurisdiction at European

international human rights agencies⁷ on the one hand, and to a broadening of the institutional application of universal jurisdiction,⁸ on the other. Part of what is frequently referred to as phenomena of ‘judicial globalisation’ is not only the spread of trans- and international judicial bodies of various kind (tribunals, arbitration bodies, courts), material scope (human rights law, trade and economic law, environmental law etc.) and area of jurisdiction (transnational, f. i. European, Asian, pan-American or global), but also a spread of interpretative schemes transcending national-statist jurisprudence. That is to say, national judiciaries take recourse to trans- and international legal sources as well as comparative methods considering the decisions and the jurisprudence of foreign (esp. constitutional) and transnational courts (see Slaughter, 2004, Flaherty, 2006). Part of this trend is a growing international network-structure between judges and court-members as well as coordinating practices of different national jurisdictions in international litigation.⁹ These practices of judicial

level), the *Inter-American court of Human Rights* (as well as the *Inter-American Commission on Human Rights* and the *Inter-American Commission on Women*), and the *African Court on Human and Peoples’ Rights*.

⁷ Note for example. the replacement of the widely criticised UN *Human Rights Commission* by the UN *Human Rights Council* that was approved with a vote of 170 to 4 by the General Assembly 2006. The main innovations concern the enforcement of mandatory periodic reviews, the institutionalisation of regular (i. e. four) meetings per year and individual (not regional) voting patterns. An overview of *Human Rights Bodies* of the UN is available at <http://www.ohchr.org/english/bodies>. Quite important are also the *Committee on the Human Rights of Parliamentarians* of the *Governing Council of the Inter-Parliamentary Union*, the *International Association of Refugee Law Judges* and in particular the various *National Human Rights Commissions*.

⁸ A good illustrating case of claiming universal jurisdiction is Judge Baltasar Garzon’s 1998 order of detention against Augusto Pinochet (for murder and disappearances of Spanish Citizens during the ‘Dirty War’) arguing that these crimes against humanity gave Spain the right to prosecute the offenders under International Law; cf. Donovan and Roberts, 2006.

⁹ Flaherty, 2006 points out that leading national courts from India, Canada, Zimbabwe, Hong Kong, South Korea, Botswana, Israel, and Germany f. i. engage in practices of ‘judicial borrowing’ and in cutting across lines of jurisdiction and legal sources. The South African constitution even requires reference to international and comparative law for domestic interpretation. In his study of the US-Supreme Court jurisprudence Flaherty (ibid.) points out that even US courts – after an isolationist phase – consider international and foreign sources, most notably in decisions on privacy, affirmative action, and the death penalty; see also Cleveland, 2005, Posner and Sunstein, 2006). Most notably, Flaherty analyses the ‘universalist’ mainstream doctrine of the Founding generation of US-constitutionalism stressing that its Federalist leadership was holding ‘the law of nations in sufficient regard as to create a presumption that the Constitution should be interpreted consistent with international law where possible’, Flaherty, 2006: 480.

borrowing of legal sources beyond their respective national system is not just resulting from functional imperatives and structures of interdependence, it is to a certain extent the result of ‘global mirror’ justifications holding that where a global consensus in terms of customary international law or *jus cogens* f. i. exists, international and comparative legal materials presumptively reflect commitments that are held domestically as well as internationally, especially with regard to fundamental rights (see Flaherty, 2004 and 2006). So, unsurprisingly, in constitutional and human rights issues national courts frequently cite the human rights jurisprudence of such transnational tribunals as the European Court of Justice and its Inter-American counterpart.¹⁰ If we regard the more concrete idea of universal jurisdiction for human rights violations in the sphere of crimes against humanity the practical implementation by national courts has – and still is – particularly difficult and thorny. However, apart from the failure of effectively guaranteeing individual plaintiffs access to judicial remedies and of incorporating the possibility of universal jurisdiction into national codes of criminal procedure, the cases and esp. the public resonance to the proceedings illustrate a growing concern with the global enforcement of individual and human rights (for a good overview see Kokott, 1999, cf. Davies, 2006). Interestingly enough, U.S. courts have traditionally been quite reluctant in accepting their duty of applying universal jurisdiction; yet, there have been quite some spectacular cases under the *Alien Tort Claims Act* of 1789 dealing with international breaches of human rights. The *Alien Tort Claims Act* allows foreign victims of serious human rights abuse abroad to sue the perpetrators in U.S. courts, it states that ‘the district courts shall have original jurisdiction of any civil action by an alien for a tort...committed in violation of the law of nations or a treaty of the United States’. So the *Alien Tort Claims Act* grants U.S. courts jurisdiction in any dispute where it is alleged that the ‘law of nations’, or international laws, are broken. Beginning in 1981 with landmark *Filartiga* decision (*Filartiga v Pena-Irala*, 630 F2d 876, 2d Cir 1980), U.S. courts have recognised that a limited

¹⁰ Flaherty, 2006: 503 notes: ‘Domestic reliance on jurisprudence of other jurisdictions will lead to better informed judges, lawyers, and commentators...Greater comparative knowledge in turn will continue to produce better considered and usually more just decisions that affect society in general. And outside any particular jurisdiction, the practice can only help fortify the international rule of law, and so foster greater global order and stability’; cf. Slaughter, 2004.

number of international crimes including genocide, crimes against humanity, war crimes, torture, disappearances, extrajudicial executions, forced labour and prolonged arbitrary detention violate the 'law of nations' and that claims for such abuses can therefore be brought under the *Alien Tort Claims Act*.¹¹ Under the *Alien Tort Claims Act* and the *Torture Victim Protection Act* cases have been brought forward against the Japanese legacy during WW II for sexual slavery (comfort women-cases), against the Castro-regime for forced labour, against the Bosnian Serb leader Radovan Karadic (rape camps), against the former dictator of Haiti, Prosper Avril, and against a Guatemalan defence minister and Indonesian military official, among many others. In a class-action civil suit against the estate of Ferdinand Marcos, the former dictator of the Philippines who had substantial assets in the United States, victims were receiving compensation. Three victims from El Salvador filed suit against two Salvadoran Generals, who were living in retirement in Florida. In 2002, a jury in West Palm Beach Florida found the generals liable for torture.¹² More recently, suits have been filed against multinational corporations accused of direct complicity in crimes committed by foreign governments and their security forces, or accused to assist grave human rights abuses.¹³

¹¹ This jurisprudence is backed by *The Torture Victim Protection Act* of 1991 which approves of these decisions and extends rights to U.S. citizen plaintiffs to bring claims against individuals acting under 'actual or apparent authority, or colour of law, of any foreign nation' for torture and extrajudicial killing.

¹² It has frequently been pointed out that the 'politics' surrounding litigation under the *Alien Tort Claims Act* is much more important than the success of the lawsuits, not least because it represents a public fora for a universal and cosmopolitan quest of justice. Frequently, the cases are accompanied by public *amici curiae* briefs of broad transnational social support. A good example is the above mentioned apartheid litigation: *Re South African Apartheid Litigation*; 346 F. Supp. 2d 538; U.S. Dist. LEXIS 23944 is a consolidation of nine lawsuits by three groups of plaintiffs and NGOs who are suing 35 multinational corporations for supplying goods and services to the apartheid security state in the face of international sanctions and for sustaining the apartheid legacy. Nagy, 2006 works out that this kind of litigation is also a result of the problems associated with the *Truth and Reconciliation Commission* that was limited in its mandate to very concrete and grave injuries, i. e. it 'emphasised torture, severe assault, and murder over the everyday violence of racial discrimination, forced removals, and pass laws' (632).

¹³ These cases are surely embedded in debates about state responsibility for international activities of transnational corporations. In this context, national and international courts started to investigate the extent to which extraterritorial activities of transnational corporations that directly or indirectly (by omission or assistance) violate international human rights law gives rise to home state responsibility as an obligation under international law (esp. customary international law and human rights law). See McCorquodale and

In a philosophical perspective, modern developments of international justice as well as injustice are embedded in a longstanding debate between legal and moral cosmopolitanism and their sceptical counterparts, sovereignty and state centred views – debates that have greatly influenced reflections about the EU as a transnational regime too (cf. Habermas, 1998b and 1999b, Eriksen, Fossum and Menéndez 2004, Beck and Grande 2007). Broadly speaking, the ‘family’ of contemporary cosmopolitanists¹⁴ draw upon ideas of world citizenship and inclusion, of more or less Kantian principles of universal rights relying on the assumption of moral dignity and equality of all human beings as individuals and legal subjects, regardless of their ethical self-interpretation, culture or nationality. At the diagnostic level they share the intuition that transnationalisation and globalisation go beyond mere functional interdependencies and coordinative schemes established and maintained by self-contained nation-states, and that globalisation is about cooperative problem-solving concerned with the moral space of general humanity and acknowledging individuals as agents of justice. In programmatic terms they envision a global order able to establish universally justified and applicable principles and norms. These perceptions run counter to statist views of the international order insofar as they deny the strict notion of nation-states as the ultimate source of legal and moral authority, and the strict notion of the integrity of nation-states that is guaranteed by the principles of non-intervention and national self-determination and sovereignty. Statists, be it in the shape of republican or nationalist approaches, are not just concerned with the protection of ethical and cultural plurality, but share the conviction that the state or the nation provides the best context in which rights and obligations, political self-determination, reciprocity, trust and solidarity is conserved: Shared values, loyalties, common concern and identity are conditions of political authority that can neither – so the assumption – be reproduced in a global order without borders nor be directed at ‘general humanity’ (cf. Rorty 1998, Chwawszca and Kersting, 1998, see also Bohman and Lutz-Bachmann, 2002).

Simons (2007) for an excellent analysis of recent cases and decisions. Cf. the *Articles on the Responsibility of States for Internationally Wrongful Acts* of the *International Law Commission* and the *General Comment on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant of the Human Rights Commission*.

¹⁴ For an overview about the debates cf. Cheah and Robbins, 1998, Pogge, 1992, Lu, 2000, Vertovec and Cohen, 2002, Brock and Brighouse, 2005 and Appiah, 2006.

Regarding current political and legal philosophical discourses, there seems to be a revival of sovereignty-centred approaches and a growing scepticisms towards the idea of a *societas generis humani*¹⁵ which is accompanied by a rather defensive withdrawal of universalistic aspirations with respect to the constitutive principles of transnational politico-legal orders – notwithstanding a broad body of phenomenologically inspired and empirical studies analysing cosmopolitan reference points in transnational jurisgeneration.¹⁶ Whether inspired by democratic and

¹⁵ Cf. paradigmatically Benhabib, 2004 and 2006, Cohen, 2006, Nagel, 2005, Canto-Sperber, 2007, Dahbour, 2006, Christiano, 2006, Heyd, 2007 and Sangiovanni, 2007, cf. earlier examples Rieff, 2002, Miller, 2000, Cosnard, 2003.

¹⁶ Processes of trans- and international legalisation and codification have always been accompanied by critical debates, counter-proposals, practical contestation and resistance. However, a lot of studies illustrate that attempts to challenge legal practices and to establish ‘counter-legacies’ are themselves driven by the notion of an ‘ideal’ legal order. To my mind, it is plausible to interpret these challenges and critiques as attempts to ameliorate factually existing legal orders while – at the baseline – sharing the notion of a ‘universal code’, Günther, 2001 hypostatizing a regulative vision of universal right. As I have argued elsewhere, cf. Hitzel-Cassagnes and Meisterhans, 2007, by way of analysing human rights and global justice movements during the last decades, one can show that they are oriented towards a universal idea of justice and that they are in particular challenging the specialisation and fragmentation of international law in normative terms. Be it the counter summits of ‘global civil society’ that are by now regularly taking place parallel to WTO-meetings, G8 summits and WEF-meetings, or be it the global social movements to promote solidarity with the south, to promote enforceable labour standards, environmental, developmental and human rights-standards, they all insist on acknowledging and enforcing human-rights standards within specialised legal regimes. Quite often, they appeal to a global social contract emphasising the responsibility to effectively guarantee human rights and to balance them with trade- and property-related rights and freedoms. One of the underlying ideas is that, if we take f. i. the Preamble of the *Universal Declaration of Human Rights* seriously stating that national and international human rights law rests on the ‘recognition of the inherent dignity and of the equal and inalienable human rights of all members of the human family [as] the foundation of freedom, justice and peace in the world’, and if we consider that human rights have become part of the general principles of law recognised by civilised nations (Art. 38 Statute of the *International Court of Justice*), human rights should be re-integrated into the law(s) of worldwide organisations. In this sense, specialised regimes cannot exclude human rights from their field of specialisation, they cannot rest agnostic in this respect; see also Petersmann, 2001 and 2006. The *Global Compact* initiative launched by UN Secretary Kofi Annan in 1999 can be interpreted in this light – as an attempt to integrate human rights considerations in the functionally differentiated and specialised organisations and agencies. So, in a way, these emancipatory, environ- and developmental movements are asking to re-integrate the idea of a ‘universal code’ in international legal regimes, or in other words: to acknowledge a ‘universal rule of recognition’, cf. Raz, 1979, capable to permeate different rationalities; cf. Günther 2001. About the ideal of a global social contract see He and Murphy, 2007, Smith, 2004 and

republican motives or by social and anti-hegemonic intuitions, sovereignty of states or of peoples is being revived as a normative cornerstone of contemporary order(s). Even within the European Union, especially in the context of the various enlargement-debates, issues of sovereignty, supremacy and identity again turned out to be a focal point of normative reflections about integration and the constitutionalisation of the European polity.¹⁷

Buchanan, 2003; about transnational associational solidarity and networks see della Porta, 2005, della Porta and Mosca, 2007, Giugni and Passy, 2001; and about global civil society see Anheier, Glaius and Kaldor, 2001. For interpreting these protests and scandalising movements in normative as well as in conceptual terms differently, see for instance Teubner, 2006 and Fischer-Lescano, 2005 who analyse the litigation for access to moderately priced HIV medication as well as the demonstrations of the *mandres* in Argentina f. i. as societal contributions to legal evolutions by way of enforcing responsiveness by irritation.

¹⁷ The intensification of political and scholarly debates on the Eastern enlargement and on criteria of accession during the 1990s challenged anew the status of European Integration and constitutionalisation; cf. Breda, 2006, Albi and van Elsuwege, 2004, Walker, 2003, Weiss, 2005, Priban, 2005. Not just opponents of enlargement raised various questions about the 'integrative capability' of potential new member states and the compatibility of their political and legal systems; cf. Breda, 2006, Ellison, 2005, Kitous, 2006, Schlesinger, 1992, Smith, 1991; cf. about enlargement-debates in general Schimmelpfennig and Sedelmeier, 2002 and 2005. Altogether, worries about failures and dysfunctional effects of accession increased in several aspects, most notably (a) with regard to successful and structurally embedded incorporation of the 'acquis communautaire' of the (old) European Union's legal status quo into the frameworks and practices of the new member states' the legal orders, (b) with regard to gaps and differences in standards of (individual) rights, of remedies and of judicial protection, esp. in the fields of equality rights, minority protection, social and labour rights, and to a certain extent citizenship rights; cf. Blanco Sio-Lopez, 2006, Breda, 2006, Gosewinkel, 2005, Petersen, 2005, Reich, 2005, Sloat, 2004 and Pridham, 2006, (c) with regard to dysfunctional or disruptive effects on the very progress of European constitutionalisation and the danger of giving up a fragile but somehow accomplished 'constitutional compromise' and disrupting the institutional balance within the EU as well as the status quo of interaction between national and supranational (esp. legal) actors and institutions; cf. Sadurski, 2003, and (d) with regard to questions of 'Europeanness', i. e. to differences of the political, cultural and 'ethnic' background dividing parts of the new members from the 'old' European Union. What seemed to be at stake were the ideational preconditions of a functioning European Polity, be it in the sense of a necessary common pre-political cultural identity or in the sense of a mere co-operative (and political) orientation and commitment to the 'rules of the game'; cf. Dangerfield, 2006, Marin, 2006, Schlesinger, 1992, Vaughan-Whitehead, 2003, on the one hand, and the 'harmonious' scheme of cooperation (due to increased plurality and diversity within an enlarged Union, further fragmentation through enhanced co-operation and opt-outs, and due to deepening conflicts over cultural and political values) on the other hand; cf. Anderson, 2005, Lefevre, 2004, Thym, 2005, de Burca and Zeitlin, 2003, Ehlermann, 1998, Gaja, 1998, Scharpf, 2002.

Neil MacCormick's work is in this respect a very consequent and instructive exception, because he has always in a critical stance and seriously been engaged with the question of how post-sovereignty might be thinkable. As I would understand many of MacCormick's writings, the conceptual and normative background is at the baseline an empathetic philosophy of pluralism – be it in relation to the institutional theory of law (2007), to his constitutional studies about federalism and subsidiarity (2005b and 2005c), to his version of republicanism (1996), to his methodological studies (1993, 1994, 2005a and 2007), or to his work on transnational law, sovereignty and 'post-sovereignty' (1996, 1999, 2001, 2004 and 2006). Beyond this background of a philosophical pluralism guiding his reflections on institutions, political authority and legal systems, MacCormick was able to urge us to be aware of the multi-layered structure and diffuse conceptual elements of sovereignty on the one hand, and of the contested nature as well as the ambivalent (and declining) performative power of sovereignty on the other hand. I would like to take these two insights as a starting point for some reflections on the normative qualities of law as a mode and medium of integration. In a first step I will take MacCormick's insight that constitutive pluralism structures both, modern societies in general and cooperative and integrative second-order systems in particular. If we take pluralism seriously, he insists, we have to take into account that equality is the basic structuring principle of cooperation and integration – be it in the sense of equal respect and concern or in the sense of mutual acknowledgement and recognition (cf. f. i. MacCormick 1993b, more recently 2005b and 2005c). I will take this issue of equality to unfold that law is also an inclusive, i. e. a democratic project, and that it is necessarily universalistic in aspiration. In presenting an ethical formalism that is with respect to the idea of universality departing from MacCormick's version I hope to capture the procedural principles of law as an agency-sensitive mode of cooperation. I will then consider MacCormick's sovereignty-critical stance that is among others hinting at the fact that sovereignty is not just a constructive principle but also a negative concept. It is negative and closing due to its potential to exclude and deny sources of normative claims: Claiming to 'be' sovereign frequently implies misrecognition in the sense that the recognition of conflicting validity-claims is denied. In this latter quality sovereignty is a pre-reflexive concept – alternatively, I would like to unfold a more Kantian inspired argument for reflexivity which aims at the proceduralisation of supremacy-conflicts.

III. LAW'S ETHICAL FORMALISM

A very general starting point for elaborating law as an inclusive medium of integration is the idea that once the language of law is used, agents are trapped in its particular grammar necessarily striving towards a formal universalist alignment. The underlying idea is that law *in nuce* already relies on an ethos of universality and that this reliance is not arbitrary insofar as any kind of legality is constitutively structured by an inherent logic that strives for (principled) unity and coherence – despite factually existing differentiation and fragmentation. Even if we depart from a diagnostic perspective that emphasises differentiation, diversification and fragmentation of law and legal regimes as well as subsequent interpretative conflicts, norm collisions and conflicts about jurisdictional competences, the very language of law has to take recourse to a kind of ‘universal code’ (cf. Günther, 2001) hypostatizing a regulative vision of universal right – this structural aspect in turn renders law responsive to individual demands of justice and to participatory inclusion of agents of justice. Such a reference to a ‘universal code’ is a *conditio sine qua non* of rights-talk in its own right. In this way it is far from being an arbitrary or contingent matter to refer to a universal code of recognition as a point of orientation. What is left if we depart from the idea of a universal scheme for reconciling normative conflicts is the contingency and hazard of autonomous ‘legal’ regimes. In this light, we can put on view that factually fragmented multi-level and multi-institutional arrangements are not antithetical to the idea of a ‘universal’ legal framework aligned by an abstract rule of recognition. In a way this is a version of Kelsen’s (1992) reading of law’s internal logic, i. e. of his assumption that there is a necessary relation between legal ‘meanings’ in the sense that legal norms (however fragmented, decentred or disaggregated they might *prima facie* be) cannot evolve independently, but that they are embedded in a system of interrelated, derivative and coherence-driven processes of interpretation. Here too, the point is to acknowledge that if one chooses the language of law, one cannot withdraw from its inherent normativity which basically follows a monistic alignment. A monist alignment in turn implies that legal regimes are neither adversary to a universal legal framework nor detached from a *Stufenfolge* of law. The idea is that legal meaning can only be generated by reference to some broader already established interpretative scheme that renders this meaning meaningful. There must be some kind of universal principle from

which validity can be derived. This basic *Grundnorm* or rule of recognition might be vague and abstract, though still an indication of unity and coherence.¹⁸

At that point, however, I would like to argue for a normative¹⁹ instead of functional (Kelsen, 1992: 329) reading of coherence and unified architecture, i. e. the structural elements of law are not just derived from the idea of law as a system unified at a very general level by a rule of recognition (Kelsen, 1992: 336 ff.) but from the idea of law as an inclusive system of self-determination (cf. Kant 1964d, 1956b: 33 ff., 1956c: 119 ff. and 1956d) – both requisites can be applied to jurisgenerative processes of transnational law in order to ameliorate these processes for the sake of effectuating the stake of ‘agents of justice’. The assumption is that legal systems (however fragmented and contested they are) essentially depend on a universal alignment in order to meet their own pretensions (or better:

¹⁸ Although MacCormick's terminology is very much inspired by a kind of Hartian, i. e. sociological and pragmatist, understanding of the rule of recognition, I would still read his conceptual and normative reflections as a way of upholding the idea of conflict management and resolution on the base of a ‘universal’ notion of reciprocity and inclusion on the one hand, and as a search for institutional structures and mechanism that establish a cooperative scheme of conflict management on the other hand; cf. also his methodological reflections: MacCormick 1989, 1993 and 1994, more recently 2005a. Joerges, 2001 and 2005 is another proponent who works out that the idea of reciprocal recognition as equals (implying that conflicting normative claims have to be accepted, *prima facie*, as justifiable, i. e. as open to a reciprocal game of reason giving and reason taking) has to be taken as a premise in order to resolve conflicts by recourse to meta- or second-order rules acceptable to all parties concerned; Joerges 2001: 4; cf. also Joerges and Neyer 1998. *Unitas in diversitas* is his formula for integrating desaggregated and fragmented legacies into a meta-scheme of shared coordination. Especially with regard to the EU quite a lot of scholars draw from the political and democratic theory of Habermas, 1998a and Rawls, 1992 and 1998 for instance putting an emphasis on the feasibility of inclusive and discursive procedures capable of both rationalising and legitimising normative conflict resolution. In this light the emphasis lies on the institutionalisation of practices of reciprocal justification and on the establishment of a ‘logic of appropriateness’ that can provide the base for balancing conflicting legacies. Cf. about debates on transnationalisation in legal and democratic terms and for attempts to conceptualise a normative ideal of ‘deliberative supranationalism’ Schmalz-Bruns, 1992, 1999 and 2007, Joerges, 2001 and 2005. Cf. Bohman, 2005 about the idea of a shared understanding of deliberative conflict management in the sphere of transnational constitutionalisation. About constitutional conflicts in the European Union cf. Habermas, 1998b, 1999 and 2003, Bohman, 2004, Closa, 2005, Gerstenberg, 2002, Eriksen, 2005 and Menendez, 2005.

¹⁹ Cf. Habermas’ Tanner-Lectures on Weber’s functional formalism and his elaboration of a normative, i. e. ethical formalism of law which greatly shaped his material reflection about the democratic rule of law in ‘Between facts and norms’; Habermas 1998a.

in order to fulfil the hope they raise by claiming to be a legal system) for overcoming exclusiveness, arbitrariness and hegemonic distortion. Although at first sight the development of a plurality of legal regimes seems to be antithetical to universal and monist interpretations of law, at second sight, however, we can identify law's inherent normativity and function that is to guarantee equal treatment and normative coherence (see f. i. Günther, 2001: 541). In this respect, the fragmentation of legal regimes is factually challenging transparency, responsiveness and representativeness of a legal system, but it cannot escape an internal legal perspective supplying a universal and inclusive legal grammar. References to an abstract legal code are – despite fragmentation and decentralisation – ineluctable, and the internal legal logic is accordingly not to produce fragmented, exclusive rationalities alien to universality, but to organise diversity by a universal meta-code. In the name of legal justice, legal certainty and legal fairness, plurality has to be organised by an abstract, but shared reference to a code of fair and cooperative conduct, because what is otherwise at stake is that specialised and partial regimes of jurisdiction become decoupled and independent from justification and public deliberation, and accordingly from 'reciprocal recognition'.²⁰

If we specify law's inherent logic as a normative one, it leads to the conclusion that legal practices have to be considered as essentially cooperative and necessarily inclusive – however, in order to assure cooperation and inclusion a broader understanding of procedural justice has to be taken into account. To capture the argument: Firstly, law and legal arrangements are not just conflict solving or conflict resolving devices but cooperative arrangements from the outset. Even if we take the functional interests of actors as a starting point, juridical procedures rely on transcending these partial and exclusive interests – by referring to

²⁰ Mac Cormick's version of an ethical formalism (or legalism) embodies a similar notion, f. i. when he states that 'autonomy and independence within interdependence are the deepest justifying grounds for legalism', 1989: 192. With regard to his characterisation of legalism however, i. e. 'as the stance in legal politics according to which matters of legal regulation and controversy ought so far as possible to be conducted in accordance with predetermined rules of considerably generality and clarity, in which legal relations comprise primarily rights, duties, powers and immunities reasonably clearly definable by reference to such rules, and in which acts of government however desirable teleologically must be subordinated to respect for rules and rights', 1989: 184, I would prefer a more abstract and generalised version of formalism – esp. because a strong universalist account of formalism would be more open for matters of proceduralisation (see below).

neutral reference points, by principled considerations like *audiatur et altera pars* or *ius respicit aequitatem*, by considering side-effects and negative externalities to third parties, and by reacting responsively to externalities. Secondly, in order for cooperation and subsequently mediation to work, reciprocal recognition has to be assured. The original legal parties, the arbiter or judicial agent as well as those concerned, i. e. potential third parties or agents of justice, have to mutually acknowledge themselves as equal legal subjects. This recognition as equals is a premise of the idea of reconciliation through law. Thirdly, and this is a point that will lead to questions of procedural and institutional principles, the realisation of reciprocal recognition relies on notions of inclusion – not least because reciprocal recognition can be guaranteed only if it includes all agents of justice concerned. However, the decision as to those to be included in order to include all those concerned is not to be predetermined but left open to critical challenges, and it should be open to contestable as well as revisable processes of justification. This implies that procedural remedies to responsively grant access to potential agents of justice are vital for any legal order to function properly. The normative expectations just sketched lead to the conclusion that – in systematic and institutional terms – a constitutional order, i.e. an order able to assure an inclusive second-order scheme, has to be established. In one way or another, one can then sustain that it is a ‘moral’ duty following from law’s inherent normative promises to institutionally engineer second-order mechanisms. Beyond this background it is possible to show that concepts of transnational legalisation frequently neglect the potential self-blocking and arbitrary structures of normative regimes that are not embedded in a second-order system of mediation. There are mainly two kinds of negative effects to be mentioned, firstly, insofar as legalisation implies differentiation and fragmentation of legal regimes that highly rely on partial and contractual agreements, these arrangements are vulnerable to arbitrariness, hegemony and exclusion on the one hand, and vulnerable to fragmentation of and conflicts about jurisdiction on the other. Secondly, access to law-generation is exclusive and not responsive to different ‘agents of justice’. Accordingly, contestation and societal inclusion can neither be structurally embedded nor procedurally guaranteed but at best be granted in a mode of benign *ad-hocism*.

The overall assumption is hence that legal integration can be acceptable in normative terms only if it is rooted in a broader scheme of

proceduralisation, and that such a scheme has to involve a second-order system of mediation and inclusion (essentially relying on the notion of a universal code and therefore on a monist idea of law). European integration and esp. European constitutionalisation should be understood in this light, as a procedural scheme enabling conciliation between conflicting normative principles, norms and rules, in order to ensure results that are acceptable to all those concerned and affected, and in order to prevent hegemonic self-interpretation in negligence of conflicting normative demands. Constitutionalism can be taken as a systematic articulation of the idea of inclusive (and democratic-procedural) legalisation guaranteeing jurisgenerative and jurisprudential practices of mutual self-restraint. The remaining question is, how to capture the idea of constitutionalisation as a system of mutually self-restrained norm-generation and –application, i. e. as a procedural system of horizontal checks and balances, at the institutional level, and how to guarantee reciprocal recognition and inclusion within such a constitutional second-order scheme. One answer could be to render legal regimes more sensitive to justificatory practices,²¹ to the normative demands of various ‘agents of justice’ and to the need to establish institutional reflexivity.²² In a final step I would like to employ the Kantian idea of ‘provisional law [provisorisches Recht]’ to make an argument for a more coherent proceduralisation of

²¹ The argument is that, at the intra-institutional level, the principle of justification can alter a system of partial self-organisation to a system of mutual self-restraint. *Nemo iudex in causa propria* would be the organisational principle to assure institutional self-reflexivity and to prevent institutional hegemony. Who is entitled to generate, to implement, to interpret and to enforce norms and of who is obliged to comply to which extend and in which context can only be adequately decided if mediation is based on procedural remedies helping to coordinate responsible collective action.

²² The hope is hence that European law can be organised by an inclusive constitutional (not just legislative) infrastructure in order to organise practices of institutional self-observation that reach beyond partial responsiveness. Broadening the notion of institutional justification and reflexivity; see Forst, 1999, on the idea of rationalisation through deliberation see Apel, 2002; Habermas, 1991, 1998a und b, 1999a and b, can help to reconstruct the plurality of legal regimes and to narrow their detachment from normative demands by afflicted agents of justice. Insofar as the idea of enforcing such law is been driven by a cooperative search to identify agents of justice, the crucial point is that norm generation, in order to be legitimate, relies on the inclusion and consent of those who are concerned subjects. Therefore, norm-generation should be open to all those agents willing to obligate themselves to practices of reciprocal justification, i. e. to a game of ‘reason-giving and reason-taking’; cf. Kant 1956b: 82 ff, 1956d: 339 ff. and 577 ff., also 1964b.

supremacy-conflicts which is at the same time an anti-sovereigntist argument.

IV. LAW'S PROVISIONAL STRUCTURE

The contestedness of the corpus of European law, especially with regard to the *acquis communautaire*, has, to a certain extent, been driving European integration. Looking back, it seems that the development of the European Union has been characterised by continuous conflicts about the substantial content and scope of law that can be considered being part of the *acquis* (cf. already Graig and de Burca, 1998 and 1999, Shaw, 2000, and de Burca and Weiler, 2002). As such, the *acquis* itself has always been a contested concept, its acknowledgement by the national legal orders in particular hesitant and disputed (see e.g., Berteau, 2005, von Bogdandy, 2003, Dann, 2005, Dann and Rynkowski, 2006, Wiener and Schweltnus, 2004), and there have always been conflicts about the material content and meaning of the 'acquis' as a body of law (see also Jorgensen, 1999). The reasons are of various kinds:²³ (a) the *acquis communautaire* is fragmented into quasi-constitutional principles of law (supremacy and direct effect on the one hand, basic and individual rights, and proportionality on the other), procedural and administrative statutes, and material codes in different areas (from purely economic-, competition- and market-law to social and political or citizenship rights), (b) the legal instruments of the *acquis* are differentiated according to range and binding effect depending on different kinds of legal source (treaty-law, regulations, directives, or precedents), (c) what might be the most crucial aspect is that the structure of the *acquis* highly depends on a broader definition of the European Union as a functional, social or political community. Understanding the ideas about the general scheme of the Union as a kind of background orientation, it seems quite obvious that they determine the concept of rights associated with them, e. g. negative rights of (economic) freedom on the one hand versus positive (social, political, and procedural) rights on the other. These systematic dissimilarities can be illustrated by concrete

²³ A lot of insights about contested issues can be found in studies dealing with the evolution of European law and constitutionalisation. Cf. especially Graig, 2002, Bodnar, Kowalski, Raible and Schorkopf, 2003, von Bogdandy and Bast, 2006, Weiler and Wind, 2003, Christiansen and Reh, 2005, Church and Phinnemore, 2006, Barnard, 2007, see also Williams, 2004.

conflicts about the legal status quo of the European Union, be it the conflicts about the enforcement of supremacy and direct effect as cornerstones of European constitutional principles, the jurisdiction relating to non-discrimination and equality (the extension from a negative, market-related principle to a universal norm of equality allowing affirmative action, the incremental incorporation of social rights and protective measures, or the jurisdiction about the political and procedural notions of citizenship-rights. In all these areas, processes of the EU's incremental 'constitutionalisation' have been contested.

In normative terms, the idea of constitutionalising the European Union is ambiguous in several aspects, at least when compared with the standards traditionally associated with constitution-making proper: First of all there is a lack of a factual foundational moment including something like a constitutional assembly and in particular a visible *pouvoir constituant* able to articulate and execute a general, constitutionalising will. Basic features of the development of the European legal system (i. e. supremacy, direct effect, the incorporation of human and fundamental individual rights, the establishment of a system of judicial review and appeal) have frequently been characterised as being part of a process of constitutionalisation, no matter that, in normative terms, these qualifications have always been subject to disagreement. Even if one is willing to accept the factual and incremental development of the European legal system as a process of constitutionalisation, serious questions about the justification and legitimacy of this constitution arise – questions, the European Union has itself tried to tackle by establishing such forums like the charter of fundamental rights and the European Convention. Still, in normative terms this (factual, incremental, mainly informal and elite-driven) constitutionalisation can be legitimised only if it is subsequently exposed to processes of justification. Under – compared to the traditional notions of constitutionalisation proper – rather unfavourable conditions, only public processes of justification can promise to generate – *ex post facto* – reciprocal understanding as well as mutual recognition and acceptance.²⁴

²⁴ I cannot *in extenso* outline and justify this normative starting point that is basically relying on conceptual notions of discourse theory and deliberative democratic theory. For further and principled elaboration see Habermas, 1998 and 1994, Forst, 1999 and 2005, Schmalz-Bruns, 1995, Michelman, 1988 and 1989. For approaches relating to the supra-, trans- and international level see Habermas, 2001 and 2003, Bohman, 2004, Closa, 2005, Gerstenberg,

Legitimate processes of justification in turn have to meet two sets of normative criteria. On a general level, such processes have to be essentially discursive or dialogical and inclusive: A reciprocal game of reason-giving and reason-taking has to be established, i. e. processes of justification relying on principled deliberation and open for contestation and revision. This implies the notion of equal concern and respect which has to be realised by securing the equality of voices on the one hand and the potential inclusiveness of all stakes on the other. In formal terms, these processes of justification have to be characterised by transparency, openness and reversibility. Along these lines, constitutionalisation can be regarded as legitimate only if it is able to meet normative standards of deliberation, but in order to realise these normative standards, processes of justification have to be embedded in an institutional structure which is capable to embody these principles and to ensure the normative acceptability of deliberative outcomes.²⁵

This line of thought leads me back to the argument that is underlining the idea of a second-order scheme and that is trying to tackle the problems of conflicting claims of supremacy and sovereignty. Kant's regulative ideal of a democratic generation of law and of self-legislation within the framework of *civitas* or *res publica* is strongly linked to a fallibilist intuition, i. e. an awareness of deficiency, an awareness that keeps in mind the precarious prospects of procedurally and institutionally realising the 'dignity of a rational being, obeying no law but that which he himself also gives' (Kant, 1956c and 1956d)-²⁶ or in other words, of guaranteeing the co-originality of democracy and law. On the one hand, factually existing institutional structures are expected to be deficient, but on the other hand, institutions are obliged to acknowledge democracy enhancing and enforcing principles. What I would like to take up and clarify in a twofold way is Kant's concept of the provisional, i. e. his idea that law and accordingly institutions are provisional in nature. For him, freedom and self-

2002, Gerstenberg and Sabel, 2000, Eriksen, 2005, Auberger and Hitzel-Cassagnes, 2005, Joerges, 2002, Menéndez, 2005 and Schmalz-Bruns, 2005.

²⁵ This kind of procedural openness within a reciprocal game of reason-giving and reason-taking leads to a scheme of reflexive integration able to render constitutionalisation acceptable in normative terms. If integration is conceptualised as a process of mutual recognition and understanding, it also highlights the role of reciprocal dialogues which foster mutual learning-processes (apart from ensuring the acceptability of the outcomes).

²⁶ This and the following quotes of Kant are my own translation.

determination is based on reason(ing) as a faculty that enounces laws which are imperative, 'or objective laws of freedom and which tell us what ought to take place, *even if this might never happen* [*ob es gleich vielleicht nie geschieht*]' (Kant, 1956a: 675, emphasis added). In my reading, this afterthought about the precarious prospect of factual realisation is constitutively built into the architecture of his thinking, and I would like to take this critical consciousness seriously in order to plea for an idea of proceduralisation as a permanent, provisional and reflexive structure of legislation. In his epistemological groundwork '*Metaphysics of Morals*' he specifies that

'all legislation, whether relating to internal or external action, and whether prescribed a priori by mere reason or laid down by the will of another, involves two elements: First, a law which represents the action that ought to happen as necessary objectively, thus making the action a duty; second, a motive [Triebfeder] which connects the principle determining the will [Bestimmungsgrund der Willkür] to this action with the mental representation of the law [Vorstellung des Gesetzes] subjectively, so that the law makes duty the motive of the action [dass das Gesetz die Pflicht zur Triebfeder macht]' (Kant, 1956d: 323).

His 'categorical imperative' most prominently reflects the idea that an articulation of the condition of freedom is possible only in the form of a universal law [allgemeines Gesetz] which is at the same time a litmus test for our reasoning:

'For reason brings the principle or maxim of any action to the test [der Probe unterwerfen], by calling upon the agent to think of himself in connection with it as at the same time laying down a universal law, and to consider whether his action is so qualified as to be fit for entering into such a universal legislation [durch denselben sich zugleich als allgemein gesetzgebend zu denken, er sich zu einer solchen allgemeinen Gesetzgebung qualifiziere]' (Kant, 1956d: 331).

At first sight, this phrasing seems peculiar insofar as it is not obvious how these insights can – in the light of the rigid and final character of formality – lead to proceduralisation, reflexivity and reversibility. A procedural conceptualisation is accessible when considering two further but related

arguments, firstly the argument that we ought to differentiate between a hypothetical and constitutive status of regulative ideas, and secondly that processes of a public use of reason are the ultimate – above mentioned – litmus test for formal legislation. In the chapter '*Of the regulative employment of the ideas of pure reason*' of his book '*Critique of pure reason*' he introduces the thesis that transcendental ideas, i. e. those ideas reflecting upon the conditions of the possibility of reasoning, cannot be of constitutive use or employment (Kant, 1956a: 565). They are not supplying us with material concepts defining objects but they are ordering, structuring and at best enlightening in character. In this sense Kant talks of the regulative and hypothetical status of regulative ideas.²⁷ They are – in very general terms – a touchstone of rules of reasoning (and truth) where reason touches upon the conditions and borders of its realisation (Kant, 1956a: 567). This regulative structure is the same with regard to the realisation of autonomy, self-determination and freedom, i. e. with regard to the law of freedom: 'I term all that is possible through free will, practical. But if the conditions of the exercise of free volition are empirical, reason can have only a regulative, and not a constitutive, influence upon it' (Kant, 1956a: 673).

Kant's notion of personality, i. e. of persons as ends in themselves, strongly relies on a model of (rational) accountability. Insofar, the idea of the free will or of freedom more generally is intrinsically related to the concept of individuals or persons as both moral and legal subjects that are responsible and accountable, and whose actions are in principle imputable:

'A person is a subject who is capable of having his actions imputed to him. Moral personality is, therefore, nothing but the freedom of a rational being under moral laws [...] Hence

²⁷ It is important to notice that the idea of proceduralisation is not just elaborated in Kant's practical philosophy dealing with the moral, ethical and legal realms of society and with the different modes of self-determination in concrete but also in his theoretical philosophy mainly dealing with epistemological reflections. In the chapter on the differences between '*Opining, knowing, and believing*' in the '*Critique of pure reason*', he elaborates procedural modes of solving epistemological questions. The basic assumption is that agreement and consensus is the best possible appropriation of fulfilling 'truth-conditions'. The motive for proceduralising epistemological questions is threefold: Firstly, there is a constitutive mismatch or discrepancy between the ideal truth-conditions and their realisation. Secondly, we have to take into account the necessarily subjective structure of 'holding a thing to be true' and thirdly, individual judgements are vulnerable to deception and illusion; cf. Kant, 1956a: 687.

it follows that a person is properly subject to no other laws than those he lays down for himself, either alone or in conjunction with others' (Kant, 1956d: 329).

By way of unfolding the idea of the law of freedom within a framework of social cooperation, the positive characteristics of law as a legal order can be derived, by the same token it can be argued that any kind of institutional order is internally linked to the formal inclination of reason and law. The law is then the 'embodiment [Inbegriff]' of those conditions enabling citizens to be united by a universal law of freedom respecting the free will of all and the common will.²⁸ In this context, Kant is quite empathetic and extensive with respect to spheres of social cooperation implying a duty to inaugurate a *status civilis*. In order to avoid arbitrary and hegemonic structures, social cooperation has to be legally embedded and law-bound. This perspective has institutional consequences: 'Be a person bound by the idea of law [Sei ein rechtlicher Mensch]' (Kant, 1956d: 344),²⁹ i. e., 'act to treat yourself not merely as a means to others but aim to be an end for them [mach dich anderen nicht zum bloßen Mittel, sondern sei für sie zugleich Zweck]' (Kant, 1956d: 344) is a regulative idea with two implications: On the one hand, the normative expectation that citizens of a *res publica* should understand themselves as both, authors and addressees of the law, is raised. On the other hand, public institutions are expected to ameliorate and realise the conditions of freedom and self-determination. This duty of institutional engineering (cf. Hitzel-Cassagnes, 2005 and

²⁸ In the original it reads: 'Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkür des einen mit der Willkür des anderen nach einem allgemeinen Gesetze der Freiheit zusammen vereinigt werden kann', Kant, 1956d: 337.

²⁹ Elsewhere he specifies the duties following from this requirement: 'For all rational beings come under the law that each of them must treat itself and all others never merely as means, but in every case at the same time as ends in themselves. Hence results a systematic union of rational being by common objective laws, i. e., a kingdom which may be called a kingdom of ends, since what these laws have in view is just the relation of these beings to one another as ends and means. It is certainly *only* an ideal', Kant, 1956b: 66, emphasis added. To my mind, the phrasing 'it is only an ideal' should be interpreted as a hint to the regulative nature of the ideal, not as a redemption of the claim that the ideal is categorically justified and morally grounded. That Kant's version of the Hobbesian command *exeundum esse e statu naturali* is not prudentially or pragmatically founded is also well elaborated in his essay 'Perpetual Peace: A Philosophical Sketch', where he states f. i., 'that reason, from its throne of supreme moral legislating authority, absolutely condemns war as a legal recourse and makes a state of peace a direct duty', Kant, 1964d: 211, cf. also Kant, 1964a, 1964c, 1957, 1957b and 1956d; 422 ff.

2007) is backed up by procedural and organisational principles of which the most important ones structure ‘democratic’ jurisgeneration and the system of institutional checks and balances (the system of separation of powers). To highlight and qualify the separation of powers principle within an institutional order of *civitas* is important because it specifies one condition for realising laws of freedom and self-determination, i. e. reflexivity. Within a framework of checks and balances *nemo iudex in causa propria* is the structuring principle for establishing a mutual system of self-restraint and for guaranteeing reflexivity.

Apart from this procedural jurisgeneric aspect supposed to guarantee the democratic production of law and the congruency between subjects of the law, the legal and institutional order is in another way responsive to claims of self-determination embedded in *civitas* – by way of the public use of reason *civitas* has the potential to legitimise as well as delegitimise and challenge public institutions. Considering the idea of a public use of reason as a procedure of testing institutional performances with regard to the realisation of (the conditions of) freedom advances the claim that the institutional order of a *res publica* necessarily embodies reflexive and provisional structures. For Kant, the freedom of public reasoning and judgement is the base and the main source of approaching the idea of autonomy and self-determination; but it is also the base and the main source of ameliorating democracy enhancing and enforcing institutions and of establishing legal principles and norms apt to guarantee freedom. He is quite explicit in this regard, among others in elaborating the constitutive status of the principle of free speech and public will-formation:

‘This freedom will, among other things, permit of our openly stating the difficulties and doubts which we are ourselves unable to solve, without being decried on that account as turbulent and dangerous citizens. This privilege forms part of the native rights of human reason, which recognises no other judge than the universal reason of humanity; and as this [freedom] is the source of all progress and improvement’ (Kant, 1956a: 640, emphasis added).

To conclude the argument: The public use of reason is potentially leading to changes in the *status civilis* itself and in the institutional structure of *res publica* – which is after all desirable because it might be a way of closing legitimacy-gaps, of diminishing democratic deficits and of strengthening

reflexivity and responsiveness. This perfectionist but hypothetical and regulative ideal is directed at the factual imperfections of institutional and legal orders imposing a kind of reflexive awareness and responsiveness. To my mind, a Kantian notion of a basically formal structure of reflexive institutions can also inspire a conceptualisation of law, democracy and constitutionalisation within the EU. If this formal structure is elaborated as a normative, not just functional one, the universalist, equality-securing and inclusive potentials of formalism can be explicated. Beyond that background, the formal structure of law and institutions can be qualified in a twofold way, on the one hand it is embedded in a broader conception of proceduralisation – in particular democratic jurisgeneration, public justification, mutual self-restraint and reflexivity –, and on the other hand institutional orders and legal systems are provisional in nature so as to preserve the idea of progress (under reserve with regard to a better state, cf. Kant, 1956d: 463). The Kantian idea of the provisional is very well equipped to conceptualise constitutionalisation as a meta-scheme of cooperation, reciprocity and reflexivity replacing partiality and arbitrariness of jurisgeneration and conflict-resolution. If constitutionalisation is in this light seen as a systematic articulation of a procedural ideal directed at establishing an inclusive system of jurisgeneration and jurisdictional practices that are responsive towards different agents of justice, it entails an organisational ideal of a system of checks and balances directed at establishing an institutional system of mutual self-restraint and equal respect.

Even if it might in practical terms be a problem to analytically distinguish an institutional scheme of mutual closure and negligence from a (idealised) scheme of mutual self-restraint, the hope is that a principled elaboration of provisionality can figure out procedural remedies that are in normative terms more responsive and inclusive. Beyond that background, one can argue that it is not so much the notion of sovereignty or supremacy that keeps in mind law's inherent promise (autonomy and self-determination), but open, accessible and revisable procedures. In this regard there would be no need to worry about the permeability or withering away of sovereignty because law as a *proviso* will take the edge off the expectation that it is possible to justify supremacy-premises (except in the above mentioned version of a universalist aspiration). Claiming supremacy or sovereignty would, in justificatory terms, be rather counter-productive; it would deny the idea of reciprocal recognition of agents of justice as equals as well as the idea of mutual self-restraint. If law is

understood as a reflexive medium of social cooperation, it has to proceduralise supremacy-conflicts, i. e. sovereignty could only be attributed to (constitutional) processes, to second-order procedures securing autonomy and self-determination.

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Neil MacCormick's Legal Reconstruction of the European Community — Sovereignty and Legal Pluralism

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I. INTRODUCTION

The great mystery of European Community Law: It is, we are told, original and supreme, but we are also told that the Community derives its powers from the Member States. Five decades after the treaties of the communities were signed and ratified, the precise legal relationship between the European Community (EC)² and its Member States remains unclear and contested. Neil MacCormick's theory of post-sovereignty represents the most sophisticated attempt to date to explain the 'pluralistic' nature of EC law, overcoming the simple confrontation of the 'European view' and the 'national view' of the EC.

¹ I wish to thank my colleague Stanley L. Paulson for valuable advice.

² One could extend this to the question of the relationship between the European Union (EU) and its Member States, which would include the narrower question mentioned in the text. This article is devoted, however, primarily to the analysis of the phenomenon that I might term 'classic first-pillar supranationality'; the structure and nature of the second and third pillar will not be taken up in what follows.

1. Two Conflicting Views and the Dilemma

There are two views on the legal reconstruction of the EC, the European view and the national view.

A) The European View

In its case law, the European Court of Justice (ECJ) has developed the European view step by step. To mention only four well-known milestones, the court stated in *van Gend en Loos* that the founding treaty “has created its own legal system”, and that EC law cannot ‘be overridden by domestic legal provisions, however framed’.³ This was reaffirmed in *Costa v ENEL*, where the Court emphasized the “original nature” of EC law.⁴ In applying this doctrine of supremacy of EC law, it held in *Internationale Handelsgesellschaft* that “the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure”.⁵ In *Simmenthal*, one reads that provisions of directly applicable EC law ‘not only by their entry into force render automatically inapplicable any conflicting provision of current national law but ... preclude the valid adoption of new national legislative measures’ of such nature.⁶ This approach of EC law has been reaffirmed in many decisions.⁷ The unconditional supremacy of EC law⁸ is complemented by judicial

³ Case 26/62, *Van Gend en Loos* [1963] ECR 1.

⁴ Case 6/64, *Costa v ENEL* [1964] 12 CMLR 425.

⁵ Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, para 3.

⁶ Case 106/77, *Simmenthal* [1978] ECR 629, para 17.

⁷ See, in particular, Joined Cases C-13/91 and C-113/91, *Debus* [1992] ECR I-03617, para 32; Case C-158/91, *Levy* [1993] ECR I-04287, para 9; Case C-347/96, *Solred v Administración General de Estado* [1998] ECR I-00937, para 30; Joined Cases C-10/97 to C-22/97, *Ministero della Finanze v IN.CO.GE'90 Srl et al* [1998] ECR I-06307, para 20.

⁸ The practical effects of unconditional supremacy of EC law according to the European view are mitigated by the fact that EC law considers, in certain important constellations, national law as relevant for the interpretation of EC law. In particular, national law is granted the power to limit to a certain extent the market freedoms. To be sure, from the ‘European point of view’ this does not put formal supremacy of EC law into perspective. The limitation is possible only if and to the extent that the limiting clause – be it written or unwritten – in formally supreme EC law allows for a limitation by formally inferior national law. On a comprehensive reconstruction of limiting clauses, see M Borowski, ‘Limiting

supremacy of the ECJ. According to the view of the ECJ, it is solely the ECJ itself, standing over and above the supremacy of EC law, that is empowered to invalidate or to forbear from applying EC law.⁹

B) The National View

According to the national view, the Member States are the source of all sovereign rights in the EC. The EC has only those powers that the Member States have transferred to the EC, and it has them subject to the conditions of derivation in the constitutions of the Member States. For this national view, the case law of the German Federal Constitutional Court (FCC) is paradigmatic. The FCC held in *Solange I* that it would continue to review EC law by the means of yardstick of German constitutional rights 'as long as' no comparable protection of fundamental human rights in EC law is forthcoming.¹⁰ Twelve years later, the FCC held in *Solange II* that a comparable standard of protection of fundamental human rights had been established in the interim by the case law of the ECJ. It declared that it would suspend review of EC law 'as long as' this standard is upheld.¹¹ This does not count as an acceptance of the European view; rather, it is a statement to the effect that the conditions for review by the FCC – based on the national view – are not currently being fulfilled. This mere suspension for the time being has been confirmed in later decisions.¹² What is more, passages in later decisions have been interpreted to mean that German public authority is empowered simply to

Clauses' (2007) 1 *Legisprudence* 205-12, on limiting clauses in the market freedoms see *ibid*, 223-4.

⁹ Cases 7/56 and 3/57 to 7/57, *Algera et al* [1957] ECR 39. This presumption of validity of EC law, to be rebutted only by withdrawing the legal act in question or by a ruling of the ECJ, is also expressed in Art. 230, 231, 234, and 241 EC, see C Koenig, M Pechstein, and C Sander, *EU-/EG-Prozeßrecht*, Mohr Siebeck: Tübingen, 2nd ed, 2002, 163. See also Case 314/85, *Foto Frost* [1987] ECR 04199, para 17.

¹⁰ BVerfGE 37, 271 (285). English: *Internationale Handelsgesellschaft* [1974] 2 CMLR 540. In a decision five years later, the Court left expressly open the question of whether a comparable standard had been established in the meantime, BVerfGE 52, 187 (202).

¹¹ BVerfGE 73, 339 (378-81). English: *Wünsche Handelsgesellschaft* [1987] 3 CMLR 225.

¹² BVerfGE 89, 155 (210). English: *Brunner* [1994] 1 CMLR 57. In the *Brunner* decision the FCC described the relationship between the ECJ and itself in the protection of fundamental rights along the lines as explained as a 'relationship of cooperation' (*Kooperationsverhältnis*), *ibid*, 175. In the *Bananas Market* decision the Court reaffirmed explicitly the *Solange II* ruling, BVerfGE 102, 147 (167).

disregard EC law that, in its issuance, has transgressed attributed competences.¹³ This position of the German FCC, reserving the competence to enforce national law against EU law under certain conditions, has attracted the support of the highest courts of other Member States.¹⁴

C) The Dilemma and Its Importance

Both of these mutually exclusive views seem to have compelling arguments. The national view is correct in insisting that the national constitutions are the starting points of the derivation of the sovereign rights of the EC. To be sure, the European view emphasizes correctly the sheer need of supremacy of EC law. One has to accept, at least on principle, the supremacy of EC law and the proposition that the power to review EC law has to be left to the ECJ, lest a uniform application of EC law should remain an illusion. Community law would increasingly fragment and the EC, in the end, would legally disintegrate.¹⁵

Still, both views have serious problems in explaining the current practice in EC law to grant to EC law, on principle, supremacy. How can the European view, apparently presupposing both the original sovereignty and the supremacy of the EC, be reconciled with the merely derived nature of the sovereign rights of the EC? How can the national view, insisting on

¹³ Beyond the field of fundamental rights, the FCC has stated in the *Brunner* decision, where the compatibility of the Maastricht Treaty with the German Basic Law was at stake, that Germany were not bound by an 'interpretation' of attributed competences by EC institutions that would amount to an amendment of the treaties. See also the passages on the limits of the jurisdiction of the ECJ by Laws J in *R v MAFF ex parte First City Trading* [1997] 1 CMLR 250, at 268.

¹⁴ See Case 12/94 *Ecole Européenne*, CA. 3 February 1994, B6 for Belgium; *Carlsen v Rasmussen* [1999] 3 CMLR 854 for Denmark; *Frontini v Ministero della Finanze* [1974] CMLR 386 for Italy; *Marks & Spencer v CCE* [1999] 1 CMLR 1152 for the United Kingdom. On more recent decisions of the Czech Constitutional Court, the Hungarian Constitutional Court and the Polish Constitutional Tribunal see W Sadurski, 'Solange, Chapter 3': Constitutional Courts in Central Europe – Democracy – European Union, EUI Working Papers, Law 2006 No. 40, 6-26.

¹⁵ This need of supremacy for the success of European integration is emphasized in *Costa*: '[T]he law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question' (Case 6/64, *Costa v ENEL* [1964] 12 CMLR 425. See also Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, para 3.

national law as the starting point of all legal power of the EC, allow for the supremacy of EC law at all?

For the time being, the dilemma has been left unresolved. The pragmatic solution consists in treating EC law and its interpretation by the ECJ as, in principle, supreme – this in the hope that the limits of this supremacy will not be put seriously to the test. Thus, one has to grant that the greater part of the everyday application of the law in Europe is not actually affected by this controversy. To be sure, the question of whether the supremacy of EC law and the exclusive power of the ECJ to review EC law will prevail without any exception is, without doubt, an important question for the proper understanding of the entity ‘EC’ as the most prominent part of the EU. Given this importance, it strikes one as well nigh astonishing that little effort has been made to enquire thoroughly into the legal relationship between the EC and the Member States.¹⁶ It may well be that political implications bedevil the legal analysis here, for political supporters of European integration may feel strongly tempted to support the European view, regardless of whether they find convincing legal arguments. And, the other way round, Eurosceptics may in a comparable way feel compelled to take the national view. Still, even those who are tempted to dismiss the question of the precise reconstruction of the legal relationship between the EC and its Member States as small-minded ought not to underestimate the importance of a convincing reconstruction, looking here to the success of the project of European integration.¹⁷ Thus, there can be little doubt that – in Neil MacCormick’s words – ‘deeper thought needs to be given to the question how we are to understand systems and linkages or interrelationships between them’.¹⁸

¹⁶ See on this phenomenon N MacCormick, *Questioning Sovereignty – Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 105.

¹⁷ It is understood that excessive claims to sovereignty on the part of the Member States threaten the European project. The other side of the coin is, however, that excessive claims to supremacy on the part of the Community will inevitably trigger resistance on the part of the Member States. Those who politically support the European integration are well advised not to try to maximise the Community’s supremacy at any cost. Rather, they ought to seek a reasonable course that secures the necessary degree of supremacy for the functioning of the Community but does not unnecessarily go beyond that.

¹⁸ MacCormick, *Questioning Sovereignty* (n 16), 106.

2. Neil MacCormick's Theory

Inviting attention here to only the three most important of MacCormick's writings on the theory he has developed on post-sovereignty, there is an early statement of core ideas in the article 'Beyond the Sovereign State', published in 1993.¹⁹ The most comprehensive version of his theory is presented in his monograph *Questioning Sovereignty*, published in 1999.²⁰ Finally, key ideas from *Questioning Sovereignty* are reworked in the review essay 'Questioning Post-Sovereignty', published in 2004.²¹ According to MacCormick, the Member States of the EC are no longer sovereign. What is more, this is a welcome development.²² 'Universal sovereign statehood' has had a bloody history and was responsible for two world wars in the twentieth century.²³ Based on his 'institutional theory of law', MacCormick proposes that neither the Member States nor the Community has the final word. Rather, both meet on an equal footing. Both lay claim to an area in which they have supremacy, both claim to be originally empowered, that is, without thereby being empowered by some higher source of power. In the jargon of systems theory, national law and Community law are described as self-referential systems that find no superior authority outside themselves.²⁴ MacCormick emphatically rejects the idea that national law and EC law might be ordered hierarchically, such that one form of law would be rendered a subsystem of the other.²⁵ The result is juridical or legal pluralism, the EC law and the law of the Member States being 'distinct but interacting'.²⁶ This theory is certainly by far the most sophisticated attempt to overcome the simple confrontation of the European and the national view and to establish a middle way that takes account of all legitimate interests.

Critical analysis can demonstrate, however, that MacCormick's pluralist reconstruction of the EC is less than convincing. His understanding of

¹⁹ N MacCormick, 'Beyond the Sovereign State' [1993] 56 *Modern Law Review* 1.

²⁰ MacCormick, *Questioning Sovereignty* (n 16).

²¹ N MacCormick, 'Questioning Post-Sovereignty' [2004] 29 *European Law Review* 852.

²² MacCormick, 'Beyond the Sovereign State' (n 19), 16-7; MacCormick, *Questioning Sovereignty* (n 16), 132-5 et passim.

²³ MacCormick, 'Beyond the Sovereign State' (n 19), 17; see also MacCormick, *Questioning Sovereignty* (n 16), 126, 142.

²⁴ See MacCormick, *Questioning Sovereignty* (n 16), 7, 109, 141.

²⁵ Ibid, 116-7 et passim.

²⁶ Ibid, 118.

pluralism does not allow for legal decisions of conflicts between and among different legal systems. In addition, to assume that the EC and the Member States meet on an equal footing presupposes that the EC boasts of original sovereignty, a presupposition that cannot be reconciled with the EC's nature as derived from the Member States. In order to highlight certain features of MacCormick's theory and to illustrate aspects of my criticism, I shall sketch at the end of this article a legal reconstruction of the EC according to which EC law counts as a subsystem of the law of the Member States and, no less for that, enjoys nearly unconditional supremacy.

II. NEIL MACCORMICK'S THEORY OF POST-SOVEREIGNTY

Neil MacCormick's legal reconstruction of the relationship between the EC and its Member States rests on two pillars. The first pillar is the analysis of sovereignty, the second is his conception of legal pluralism.

1. MacCormick's Analysis of Sovereignty

Discussions on the legal reconstruction of the EC often suffer from an unclear use of 'sovereignty', blurring several different legal and non-legal meanings. Given the fact that 'sovereignty' is seen as a crucial concept not only in the law, but also in the theory of the state, political philosophy and sociology, it comes as no surprise that the concept exhibits a variety of facets and complexities.²⁷ MacCormick takes on the challenge of making the concept fruitful in European law and legal theory. To be sure, it will become apparent that its use there creates more problems than it solves.

²⁷ See MacCormick, 'Questioning Post-Sovereignty' (n 21), 852: 'cluster concept', 'contested [concept]', and 854: 'a concept so multifaceted as sovereignty'. This multifaceted meaning of sovereignty is missed where it is simply equated with supremacy: 'Sovereignty concerns the authority enjoyed by EU law over the law, including the constitutional law, of the Member States', D Chalmers, C Hadjiemmanuil, G Monti, and A Tomkins, *European Union Law* (Cambridge: Cambridge University Press, 2006), 182. Literally identical in D Chalmers and A Tomkins, *European Union Public Law* (Cambridge: Cambridge University Press, 2006), 182.

A) Sovereignty as Absolute Power

The leading motif in *Questioning Sovereignty* is sovereignty defined as absolute power. MacCormick begins his analysis of this concept historically, with philosophers and thinkers in political theory who characterize sovereignty as unlimited or absolute power. Here it will suffice to mention Hobbes and his successors, in constitutional law most prominently A.V. Dicey.²⁸ After having analysed the distinction between the legal and the political dimension of sovereignty,²⁹ MacCormick differentiates internal from external sovereignty. The former requires that there be a 'person who enjoys power without higher power internally to the state', whereas it is decisive for the latter that the 'totality of legal or political powers exercised' within the state be 'in fact subject to no higher power exercised from without'.³⁰ For those who are used to a constitutional system with separation of powers, the idea of internal sovereignty seems surprising. Against the backdrop of the doctrine of 'parliamentary sovereignty' in the United Kingdom, it seems, however, clear that the internal dimension has to be included in a comprehensive conception of sovereignty. According to MacCormick, external sovereignty suffices for the reconstruction of popular sovereignty – if a state is externally sovereign, 'this sovereignty belongs to the whole people of the state'.³¹

The passages on the history and on important facets of sovereignty are, to be sure, instructive. It seems, however, that MacCormick in his use of 'sovereignty' does not explicitly and properly distinguish between two different readings of the concept, even though these distinct readings are present in his writings.

²⁸ MacCormick, *Questioning Sovereignty* (n 16), 123-7. Beyond the Anglo-Saxon world – on which MacCormick focuses – Jean Bodin, widely regarded a pioneer on state sovereignty, surely deserved to be mentioned. See J Bodin, *Les Six Livres de la République* (Paris: Du Puys, 1576).

²⁹ MacCormick, *Questioning Sovereignty* (n 16), 68 and 127-33; see also MacCormick, 'Beyond the Sovereign State' (n 19), 11.

³⁰ MacCormick, *Questioning Sovereignty* (n 16), 129.

³¹ MacCormick, *Questioning Sovereignty* (n 16), 130. See also MacCormick, 'Questioning Post-Sovereignty' (n. 21), p 858.

a) Concept of Sovereignty: the All-or-Nothing-Reading

The first reading of the concept of sovereignty is in an all-or-nothing fashion. On this reading, an entity is either sovereign or it is not. Sovereignty becomes a matter of 'black and white'. This reading is presupposed where sovereignty is identified with competence-competence or omnicompetence.³² One who has competence-competence or omnicompetence necessarily has absolute legal power; everything turns alone on whether or not to exercise this competence. The all-or-nothing reading is also presupposed where sovereignty is expressly characterized as absolute power.³³

The doctrine of competence-competence ought not, however, to be confused with competence to interpret a competence, where it is understood that the competence to be interpreted cannot be extended, as the interpreter might wish, by exercising an unlimited interpretive competence. The wording of the provision granting the competence to be interpreted may well reflect an open texture, granting discretion to the interpreter. Open texture and discretion are, however, limited. There are plain cases in which the interpretation (the exercise of the interpretive competence) demonstrates that there is no competence.³⁴ In this case there

³² MacCormick, *Questioning Sovereignty* (n 16), 100, 109, 132.

³³ Ibid, 124, 127, 187; see also MacCormick, 'Beyond the Sovereign State' (n 19), 14.

³⁴ The classic model of open texture distinguishes between the 'core of certainty' and the 'penumbra of doubt' (see H L A Hart, *The Concept of Law*, 2nd ed (Oxford: Clarendon Press, 1994), 123). This model can, however, be developed further. The core of certainty covers the 'plain cases', which are, in the Hartian model, understood to be cases to which the rule applies (see *ibid*, 127). The penumbra of doubt covers 'hard cases', which are semantically neutral – the rule may or may not apply. To be sure, there are 'plain cases' in a negative sense, too, where it is clear that the case is definitely beyond the penumbra of doubt and the rule certainly does not apply. Based on Hart's example of the rule that vehicles are not permitted in the park, a motor car counts as a plain case, whereas a bicycle counts as a hard case (*ibid*, 126). An umbrella is neither a plain case in this sense nor a hard case; it is a plain case in a negative sense. It proves to be very useful to distinguish in legal interpretation such negative plain cases from hard cases. Thus, an interpretation model should make it possible to differentiate among positive plain cases, hard cases, and negative plain cases. See, on such a model, W Jellinek, *Gesetz, Gesetzesanwendung und Zweckmäßigkeitserwägung* (Tübingen: Mohr Siebeck, 1913), 37; H-J Koch and H Rüßmann, *Juristische Begründungslehre* (Munich: Beck, 1982), 195. The plain case referred to in the text is a negative plain case.

is, on the whole, a vague but limited competence, not a competence-competence *qua* unlimited competence.³⁵

This classificatory reading of sovereignty renders possible a loss of sovereignty on the part of a Member State without the EC thereby gaining sovereignty, a phenomenon to which MacCormick invites attention at several points.³⁶ Legal power is now shared, such that both the EC and the Member States enjoy supremacy in their respective spheres. No entity has absolute legal power, so there is no sovereign entity.

The classificatory reading does indeed reflect sovereignty as understood in a great many writings in political philosophy and in work on the theory of the state, and it reflects the rhetorical claims of politicians, too. Still, the question arises of whether the notion of the absolute power of the state has ever amounted to anything more than an ideal.³⁷ Owing to the binary structure of sovereignty on this understanding, every limit on legal power, quite apart from its extent and nature, stands in the way of claiming sovereignty on the part of the state. For example, the acceptance of *ius cogens* in international law,³⁸ however modest in content, serves to deny absolute legal power on the part of the state. No state can be considered sovereign. Thus, sovereignty according to the classificatory or all-or-

³⁵ See MacCormick, *Questioning Sovereignty* (n 16), 117, where he distinguishes the interpretive competence from the competence-competence.

³⁶ Ibid, vi, 126, 141; MacCormick, 'Beyond the Sovereign State' (n 19), 16.

³⁷ MacCormick dates sovereignty rightly back to 'the form of post-reformation kingdoms that emerged ... into the light of day end of the Thirty Years War', MacCormick, *Questioning Sovereignty* (n 16), 125. One might add that this sovereignty inside the German *Reich* (the major parties of the Peace of Westphalia, the German *Reich* itself, France, and Sweden, saw no need to declare their own sovereignty explicitly) was provided for in Art. VIII, § 1 Instrumentum Pacis Osnabrugensis – one of the two major peace treaties that form the Peace of Westphalia. This provision granted the *libero iuris territorialis tam in ecclesiasticis quam politicis exercitio*, the power of the king or prince to decide in his territory all ecclesiastical and secular matters. This is heralded as the beginning of the 'Westphalian state', marking at the same time the beginning of modern international law. Against the backdrop of claims to in every respect unlimited secular and ecclesiastical power of states it ought, however, to be mentioned that the sovereignty explicitly mentioned in the Peace of Westphalia was, in fact, not unlimited – it was sovereignty in the framework of the German *Reich*. In particular, no power was granted to form alliances with states outside the *Reich* if these alliances were directed against the Emperor or the *Reich*, Art. VIII § 2 section 2 Instrumentum Pacis Osnabrugensis.

³⁸ On *ius cogens* see L Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki: Lakimiesliiton Kustannus, 1988); A Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006).

nothing reading is so demanding that it leads to the conclusion that the states are not sovereign. In particular, since states are not sovereign anyway, the changes brought about by European integration – a further diminishing of legal power – cannot be adequately depicted by employing a concept of sovereignty that is read in this way.

b) Gradations of Sovereignty: A Second Reading

Even if sovereignty *qua* absolute power is the leitmotif in *Questioning Sovereignty*, a second reading of the concept can be found there, too. This second reading is presupposed where MacCormick speaks of 'absolute sovereignty'³⁹ or employs such expressions as 'fully sovereign'⁴⁰ or 'not fully sovereign'.⁴¹ To qualify something as 'absolute' or 'full' makes no sense where what is being qualified is binary. To illustrate the point, one can employ MacCormick's own metaphor for sovereignty, namely virginity⁴²: The talk of 'absolute virginity' makes no sense; one is either a virgin or is not a virgin. 'Relatively virginal' or the like may, however, have rhetorical force. One understands straight away that the person in question is not a virgin. Rather, qualifications such as 'absolute' or 'full' refer to a gradable property. In the case of sovereignty, it is obvious that the property to which reference is implicitly made is legal power. Being able to express, beyond the classificatory meaning of sovereignty, the extent to which legal power can or cannot be attributed to an entity is certainly useful. The degree of sovereignty then depends on the degree of legal power attributable to the entity in question – the greater its legal power, the greater its degree of sovereignty. Using sovereignty as a gradable property, one is able to say, for example, that owing to a transfer of additional sovereign rights (legal power) to the EC in a treaty revision, the Member States are now, so to speak, less sovereign than they were.

c) Divided Sovereignty

MacCormick's use of the idea of 'divided sovereignty' is based on the dichotomy between parts and wholes, and in two different contexts. The

³⁹ MacCormick, *Questioning Sovereignty* (n 16), 132, 142, 187, 191.

⁴⁰ Ibid, 132.

⁴¹ Ibid, 142.

⁴² Ibid, 126; MacCormick, 'Beyond the Sovereign State' (n 19), 16.

first context is the state: ‘A state that is sovereign in the external sense may have a constitution under which no full sovereign power is possessed by any organ of state’.⁴³ Non-sovereign organs of the state complement each other, yielding a sovereign whole, a sovereign state. Later in the book, he transfers this notion to the relationship between Member States and the EC. After having emphasized – based on the classificatory or all-or-nothing understanding of sovereignty – that the Member States have lost their sovereignty without its being the case that the EC has gained it, he introduces ‘divided sovereignty’:

In one highly important sense, sovereignty has not been lost in this process ... no state or other entity outside the Union has any greater power over member states individually or jointly than before Thus there is a kind of compendious legal external sovereignty towards the rest of the world.⁴⁴

This idea of divided sovereignty stands, Janus-faced, between the two readings of sovereignty adumbrated above. That sovereignty is attributed alone to the whole – the state in the first context, the complex formed of the EC and Member States in the second – points in the direction of the classificatory reading. The parts, in and of themselves, are not sovereign, but they can complement each other, yielding a sovereign whole. This suggests that a gradable property underlies sovereignty, for non-absolute legal powers add up to absolute legal power.

B) Sovereignty as Non-Delegated and Original Power

In MacCormick’s most recent article on sovereignty the focus changes. Instead of absolute power one finds sovereignty characterized as a non-delegated and original power:

That which is sovereign or claims sovereignty is, or claims to be, independent of other similar entities, as distinct from exercising power by virtue of some act of delegation or with some form of permission from any such entity.⁴⁵

⁴³ MacCormick, *Questioning Sovereignty* (n 16), 130.

⁴⁴ MacCormick, *Questioning Sovereignty* (n 16), 132-3.

⁴⁵ MacCormick, ‘Questioning Post-Sovereignty’ (n 21), 852-3. See also *ibid*, 860-1.

The question arises of whether MacCormick wants to add the property of being a non-delegated power to his characterization of sovereignty as absolute power. In this case, absolute and non-delegated power are characteristic of sovereignty. This direction is clear where MacCormick writes, immediately after emphasizing that sovereignty is an independent power, that '[s]overeign persons hold ultimate power or authority, and hence there is a necessary unity of sovereign power'.⁴⁶ In *Questioning Sovereignty*, we find the phrase 'absolute and unitary sovereignty', and the context suggests that 'unitary' serves as a synonym for 'absolute'.⁴⁷ On this reading, what has been said about sovereignty *qua* absolute power continues to apply.

A different reading, however, would stem from understanding 'non-delegated' as not simply an additional criterion. MacCormick himself emphasizes in his essay that he is 'reworking' ideas from *Questioning Sovereignty*,⁴⁸ and this may well indicate a more significant change. The change in question might consist in a characterization of sovereignty according to which non-delegated power is crucial, while absolute power continues to function as the regulative idea of sovereignty but being a necessary property. According to this reading, an entity exhibiting non-delegated power can be sovereign even if its power is not absolute.

This reading makes possible an understanding according to which, for example, *ius cogens* in international law does not stand in the way of a state's being understood as sovereign, for if a state's power is limited by international law, it nevertheless remains non-delegated and original. To be sure, according to this new characterization it is only independence from 'similar entities' that leads to sovereignty. MacCormick probably has in mind that a state is sovereign if it does not derive its power from other states; a remark later in his article suggests as much.⁴⁹ This means, according to his new understanding, that Member States of the EC count as sovereign – as per the title of the article, 'Questioning Post-Sovereignty'. Even though MacCormick does not apply the new definition of sovereignty

⁴⁶ Ibid, 861.

⁴⁷ MacCormick, *Questioning Sovereignty* (n 16), 132. This reading is strengthened by the fact that the index also refers for 'absolute, unitary sovereignty' (208) to 191, where 'unitary' is not used at all. Instead, absolute sovereignty is discussed.

⁴⁸ MacCormick, 'Questioning Post-Sovereignty' (n 21), 854.

⁴⁹ Ibid, 860-1.

explicitly to the EC,⁵⁰ it would be interesting to do so. According to the idea of legal pluralism, and according to the claim of the EC to original power, the EC's power is original – is, in other words, not derived from something else. This means that the EC had to count as sovereign – an entity that does not derive its power from anything else does not, then, derive it from similar entities either.

Even accepting the notion that the EC derives its power from the Member States, it remains sovereign so long as the Member States do not count as 'similar entities' comparable to the EC. Given the character of the EC as an unprecedented supranational organisation without the quality of a state, there is much to be said for this. Thus, on this reading both the Member States and the EC count as sovereign. To attribute sovereignty to the EC is, at the least, unusual, and one may note that MacCormick, in *Questioning Sovereignty*, emphasized that the EC is not sovereign.⁵¹

Which is of these readings is a correct reconstruction of MacCormick's most recent article on sovereignty? In the penultimate paragraph we read that the Member States of the EC 'retain crucial attributes of sovereignty'.⁵² We know that the power that remains is non-delegated power, and we know that this power is not absolute. Thus, one finds 'non-delegated power' among the 'crucial attributes', whereas this does not apply to absolute power. To be sure, 'crucial attributes' do not necessarily exhaust the elements of sovereignty. This may well indicate that 'full sovereignty', 'sovereignty in its pure form' or the like may still presuppose absolute power, rendering the latter a regulative idea of the concept of sovereignty.

Finally, MacCormick distinguishes between the 'old' and 'new' sovereignty of the Member States: They 'have a new sovereignty that is old sovereignty restricted as to the topics of its possible or permissible exercise'.⁵³ This distinction makes explicit what the analysis has shown: Different readings of sovereignty are being used. Against the backdrop of his theory in *Questioning Sovereignty* it is clear that 'old sovereignty' is absolute power, and 'Questioning Post-Sovereignty' emphasizes the notion that it has to be non-delegated power. 'New' sovereignty is not absolute.

⁵⁰ We read only: 'Not being a state, the Union is necessarily not a sovereign state', *ibid.*, 862.

⁵¹ See, for example, MacCormick, *Questioning Sovereignty* (n 16), 126, 132, 142. See furthermore MacCormick, 'Beyond the Sovereign State' (n 19), 16.

⁵² MacCormick, 'Questioning Post-Sovereignty' (n 21), 863.

⁵³ *Ibid.*

Rather, it is non-delegated power, to be exercised within 'political limits and legal ones'.⁵⁴

C) The Concept of Sovereignty in Legal Analysis

The analysis thus far has shown that there are quite different readings of the concept of sovereignty: the absolute character of legal power, legal power as a gradable property, and original or non-delegated power are in fact the most important. Instead of blurring these differences into a 'multifaceted' concept of sovereignty, it is preferable to distinguish them clearly as different readings of 'sovereignty'. To be sure, given that there is such a variety of different readings of this concept on the question, of whether it can be rendered fruitful in legal analysis remains doubtful. This sheds light on the second pillar of MacCormick's analysis of the legal reconstruction of the EC, legal pluralism.

2. MacCormick's Conception of Legal Pluralism

The latest move in MacCormick's theory on sovereignty, to emphasize non-delegated legal power instead of absolute legal power as the core of the meaning of sovereignty, brings the two pillars of his legal reconstruction of the EC, the analysis of sovereignty and legal pluralism, closer together. Legal pluralism claims that EC law and the law of the Member States meet on an equal footing. This means that neither the legal systems of the Member States represent subsystems of EC law, nor does EC law represent a subsystem of the legal systems of the Member States. Legal Pluralism in the EC counts as an application of MacCormick's general theory of legal pluralism, based on his 'institutional theory of law'.

A) MacCormick's General Theory of Legal Pluralism

According to legal pluralism, different legal orders can exist independently in one territory. Two legal orders are independent if the one does not derive power from the other, which, if it did, would render the one order a mere subsystem of the other.⁵⁵ MacCormick's legal pluralism presupposes

⁵⁴ Ibid.

⁵⁵ MacCormick, *Questioning Sovereignty* (n 16), 75 et passim.

a specific concept of law. The crucial problem of this theory lies in the question of whether a convincing reconstruction of the decision of conflicts between different normative orders is available.

a) Legal Pluralism and the Concept of Law

According to MacCormick's 'institutional theory of law', law is an institutional normative order. Characteristic was the effort to realize a certain kind of order: 'The will directed towards realizing a practicable, rationally coherent and humanly satisfactory ideal order constitutes it as normative order'.⁵⁶ This normative order has to be institutionalized to be law.⁵⁷ Of course, it would be difficult to find a legal philosopher who is prepared to deny that the law is at its core a consistent and coherent system of institutionalized norms. It is worth noting, however, that different understandings of 'institutionalization' are possible.

MacCormick is very generous. According to him, the 'tendency to take for granted the equation of "law" with "state-law"' has had 'serious distorting effects for legal theory'.⁵⁸ He emphasizes at several points that state law is not the only form of law,⁵⁹ and on his list of organizations creating law beyond the state one finds 'churches, sporting organizations, commercial guilds, and leagues, international organizations, and agencies'.⁶⁰ To be sure, the idea of law beyond and apart from state law is by no means an innovation. Scholars focusing on sociological aspects of the law, to mention only Eugen Ehrlich,⁶¹ Max Weber,⁶² and Hermann

⁵⁶ Ibid, 4. To be sure, a thorough enquiry into MacCormick's most recent statement on law as an institutional normative order, Neil MacCormick, *Institutions of Law* (Oxford: Oxford University Press, 2007), lies beyond the scope of this article.

⁵⁷ MacCormick, *Questioning Sovereignty* (n 16), 6-7, 13.

⁵⁸ MacCormick, *Questioning Sovereignty* (n 16), 9.

⁵⁹ Ibid, 9, 15, 17, 20-1, 75-8, 102; see also MacCormick, *Institutions of Law* (n 56), 288 et passim.

⁶⁰ MacCormick, *Questioning Sovereignty* (n 16), 7. See also ibid, 20: 'law merchant', 'canon law'. On church law, see furthermore ibid, 104 et passim. Pluralism is also illustrated, with a variety of examples, in K I Winston (ed), *The Principles of Social Order: Selected Essays of Lon L. Fuller*, 2nd ed (Oxford: Hart, 2001).

⁶¹ According to Ehrlich, 'living law', the law which is effective in governing the different associations in society, has to be distinguished from 'norms for decision', the legal norms courts use for deciding conflicts. The third form of law is, according to Ehrlich, 'state law', the law which – beyond 'living law' and 'norms for decision' – owes its existence specifically to the state. On 'living law', see E Ehrlich, *Fundamental Principles of the*

Kantorowicz,⁶³ have emphasized that phenomenon. Such a broad understanding of 'law' presupposes an equation of institutionalization with mere social efficacy of norms, that is, obedience to norms and sanctions imposed for their violation.⁶⁴ Corresponding to these two elements, different conceptions of social efficacy are imaginable. To be sure, all conceptions have in common the notion that the existence and validity of law become a matter of sheer facticity. For example, if church law is obeyed and sanctions are imposed for its violation, church law counts as law. The question of the authority to issue law plays no role at all.

It is by no means obvious, however, that law is sheer facticity. On the contrary, many would argue that this misses the essence of law, its specific normativity, completely.⁶⁵ The third element of characterizations of the concept of law, beyond social efficacy and moral correctness, is authoritative issuance. A norm is authoritatively issued if it has been 'issued in a duly prescribed way by a duly authorized organ and does not violate higher-ranking law.'⁶⁶ This leads to a narrower understanding of institutionalization, according to which only authoritatively issued and socially effective norms are law.⁶⁷ To illustrate the point: It may seem obvious that a church is entitled to regulate its own internal matters, but 'church law' may well extend far beyond that. To use a drastic example, church law could impose the death penalty for apostasy. Do the clergymen have the authority to issue such a decree as law? According to Hart's theory, one would have to ask whether the apostasy rule is identified as law by the rule of recognition. If the apostasy rule is not treated as valid law by

Sociology of Law, transl W L Moll (Cambridge, Mass.: Harvard University Press, 1936), 39-41, on 'norms for decision' 121-32, on 'state law' 132.

⁶² M Weber, *On Law in Economy and Society*, transl by E Shils and M Rheinstein (Harvard University Press, 1954), 65-97.

⁶³ H Kantorowicz, *The Definition of Law* (Cambridge: Cambridge University Press, 1958), 15, 82-89.

⁶⁴ However, Kantorowicz's approach is complex. Although he endorses the thesis of the existence of law beyond state law with vigour, he has argued powerfully against the American Legal Realists' exaggerated reduction of the law to concatenations of fact, see H Kantorowicz, 'Some Rationalism about Realism' (1933-34) 43 *Yale Law Journal* 1240-1253.

⁶⁵ And one does not have to appeal to classical natural law theory to make the point, see, eg, H Kelsen, *Introduction to the Problems of Legal Theory*, transl B Litschewski Paulson and S L Paulson (Oxford: Clarendon, 1992), 33-5.

⁶⁶ R Alexy, *The Argument from Injustice* (Oxford: Clarendon Press, 2002), 87.

⁶⁷ Non-positivistic concepts of law require, in addition, a certain connection between law and morality as necessary.

state officials, particularly where it conflicts with state law, then, following the state's rule of recognition, it does not count as law at all. This means, however, only that the decree is not state law. Can we understand the clergymen as officials of a self-standing legal system, accepting a church's rule of recognition from the internal point of view, according to which the apostasy rule does count as law? When Hart speaks of 'revolution', 'enemy occupation', the 'simple breakdown of ordered legal control', and a colony cutting the cord to the colonial power, it is understood that the co-existence of two distinct legal orders in one territory is not the normal state of affairs.⁶⁸ The same applies to Kelsen, for whom the creation of law requires the empowerment by the state constitution. If, however, the church were empowered by the state constitution to create law, church law would be rendered a subsystem of state law, depriving church law of its independent status vis-à-vis state law.

For MacCormick, by contrast,⁶⁹ the plurality of legal orders in one territory is not an exceptional or problematic state of affairs:

The theory of law as institutional normative order has built into it an inherently pluralistic conception of legal system. Distinct systems can co-exist without any one having to deny either the independence or the normative character of another ... [T]he present theory can fully endorse the normative quality of law while allowing for a radical pluralism such that objectively valid normative orders may give conflicting answers to the same point.⁷⁰

Owing to of MacCormick's thesis of the existence of non-state law, the relationship between the state and law is 'imperfect identity, overlap without complete identity'.⁷¹

⁶⁸ Hart, *The Concept of Law* (n 34), 118-21.

⁶⁹ One hastens to add, however, that MacCormick claims with reference to one article of Hart's that his writings were sympathetic to a pluralist understanding of the law, see MacCormick, *Questioning Sovereignty* (n 16), 76, footnote 35.

⁷⁰ MacCormick, *Questioning Sovereignty* (n 16), 75.

⁷¹ *Ibid*, 25.

b) Decision of Conflicts between Norms in Independent Legal Orders

To take socially established systems of rules seriously rather than insisting on a monolithic and hierarchical understanding of law strikes one as both realistic and tolerant. The important question, however, is how to resolve conflicts between and among norms in different legal orders. MacCormick distinguishes two perspectives. The first is the perspective of the officials of the respective system:

As a question within a self-referential system, such a question is of course self-answering, for the system's agencies can never say other than that the system's norm ought to prevail.⁷²

An agency within the system is first and foremost, if not only, committed to the norms of its legal system. MacCormick does not add, however, that norms of a legal system can – explicitly or implicitly – refer to norms of other systems. By reasons of such a reference these norms can give rise to legal consequences in the former legal system. Intersystemic conflicts can acquire, thereby, an intrasystemic nature or dimension.

The second perspective is that of a person who experiences conflicting claims:

As a question for a person confronted by competing judgments of substantially the same question in practically different senses, the issue is which to respect, on grounds external to the self-referential answer provided by rival normative orders.⁷³

Are there legal criteria determining which system's answer ought to prevail? In setting out his general theory of legal pluralism, MacCormick is quite clear that this does not have to be the case.

[T]here will not be necessarily be any specifically legal method for eliminating the conflict – it is perfectly possible that conflicts will simply go unresolved, or that the solution may be a matter for political rather than legal processes.⁷⁴

⁷² Ibid, 8.

⁷³ Ibid, 8-9.

⁷⁴ Ibid, 75.

Rather, '[t]here are both prudential and moral elements in any reasonable answer to the question, "Which to respect?"'.⁷⁵ In the context of his analysis of the relationship of the legal system of the EC and municipal law MacCormick speaks of a 'superfluity of legal answers' that are 'not logically embarrassing, because strictly the answers are from the point of view of different systems'.⁷⁶ Even if one is willing to grant that such conflicts are not 'logically embarrassing', there remains the problem that this is – as MacCormick explicitly concedes – 'practically embarrassing'.⁷⁷

MacCormick's solution to the problem of intersystemic conflicts of norms is pragmatic in nature: Resolution or avoidance is 'a matter for circumspection and for political as much as legal judgment'.⁷⁸ The political rather than legal nature of the task in solving intersystemic conflicts is emphasized in what follows:

If conflicts ... come into being through judicial decision-making and interpretation, there will be necessarily have to be some political action to produce a solution.⁷⁹

To be sure, states, as everyone knows, tend to monopolize law, subjecting rival – in MacCormick's words – normative orders to their legal system. In *Questioning Sovereignty* one reads:

States can, but do not have to, establish a monopoly on institutional normative order, purporting to make 'law properly so-called' fully and exclusively co-extensive with state-law.⁸⁰

Again one is left without any criteria. On what does the state's decision to establish a monopoly depend? Is it simply a matter of policy? According to a passage in MacCormick's most recent book, *Institutions of Law*, '[s]tates may indeed claim primacy over such organizations (eg, churches, international sporting associations)',⁸¹ which again leaves one with the question on what that depends. What is more, he hastens to add:

⁷⁵ Ibid, 9.

⁷⁶ Ibid, 119.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid, 120.

⁸⁰ Ibid, 25.

⁸¹ MacCormick, *Institutions of Law* (n 56), 288.

[B]ut the organizations need not in turn, and sometimes do not, acknowledge that primacy in the form in which it is asserted by one or another state.⁸²

If these organizations are not supposed to acknowledge such primacy in whatever form it may take, is it a matter of policy for them, too? If one understands the law as 'a determinate guide to conduct',⁸³ and if states are free to take political decision to subject non-state law, what sense does it make to term normative orders beyond state law 'law' at all? And how can one say that different legal orders meet on an equal footing?

If one is inclined to agree that possible solutions of intersystemic norm conflicts have to be political in nature, the political bargaining position will depend very much on whether the association in question is large and politically powerful or merely something on the fringe. The former will be able to coerce the state to undertake far more favourable compromises than the latter, which will be entirely subject to state law. Substantive legitimacy and equality among associations play a role only to the extent that policy or prudence requires; they do not, as such, count as criteria.

The result is that the law dissolves into rival claims. Which claim will prevail becomes simply a question of politics and power. The outcome is hard to predict, a matter which ought to be taken seriously. There can be no legal certainty where a variety of legal answers lurk behind every question, with no established criteria for determining which of the answers is to be chosen. In the absence of legal certainty, law is scarcely in a position to fulfil its central task mentioned above, that of serving as a determinate guide to conduct.

Pluralism is also questionable from a substantive point of view. In liberal democracies the state guarantees democratic procedures and the fundamental rights of the individual. To call this into question through conflicting normative orders that may not be democratic and may not respect fundamental rights at all, and resolve conflicts simply by appeal to political power does not seem to be an attractive solution.

⁸² Ibid.

⁸³ See MacCormick, *Questioning Sovereignty* (n 16), 102.

c) An Example: The 'Crime' of Apostasy

The consequences of legal pluralism may be illustrated by the example of church law. According to 'the law' of certain religious communities, 'church law', 'apostasy' can be forbidden on penalty by death. The judgment is taken by a designated court of the church; the penalty may be carried out by the faithful whenever and wherever they get hold of the 'apostate'. Assuming that the deviant is declared to be an 'apostate' by the responsible authority of the church and subsequently killed by a fellow believer, what does the law require? The pluralist's question would be: Is it required that the person who killed the 'apostate' be punished as a murderer, according to state law, or is it required instead that he be honoured for the exemplary execution of 'the law', this according to 'church law'?

aa) The Pluralist's Solution

For a pluralist, the resolution to this conflict between state law and non-state law is a matter of politics, with all the problems adumbrated above. The only way out is to deny that one of the conflicting norms is valid law, thereby denying that there is any conflict at all. On the basis of a non-positivistic concept of law, one could claim that where law that does not respect fundamental rights, it does not deserve to be called law properly-so-called. This would mean that the 'church law', imposing the sanction of death penalty for 'apostasy', would not be law owing to the violation of religious freedom on the part of believers of that church. MacCormick seems to move somewhat in that direction. There remain, however, serious problems.

First, MacCormick explicitly acknowledges the importance of fundamental rights as constraints on state power;⁸⁴ this applies, however, not to organizations of non-state-law and their power. After having emphasized the importance of fundamental rights, he writes:

Governmental systems which fail in these regards fall short of some of the essential virtues of legal order, even if they

⁸⁴ MacCormick, *Questioning Sovereignty* (n 16), 24. See also MacCormick, *Institutions of Law* (n 56), 190-1, 201, 273-4. See also *ibid*, 201.

succeed to in sustaining some form of institutional order, and to this extent of law.⁸⁵

Why do fundamental rights count as constraints only for state law, and not for non-state-law? If one accepts the pluralistic reconstruction, legal authority beyond state authority can indeed seriously endanger and violate fundamental rights of individuals. A gap in the protection of these fundamental rights can only be avoided if this authority is (1) itself bound by fundamental rights (direct commitment) or (2) subjected to state law, which itself is bound by fundamental rights (indirect commitment, *mittelbare Drittwirkung*).

Second, MacCormick does not establish a clear connection between a violation of fundamental rights and the loss of the legal character of a norm. If one looks, for example, at the quotation above, fundamental rights are among the 'essential virtues of a legal order'. What is the import of this where they are absent?

Third, if MacCormick were to establish a clear connection between the legal character of a norm and the respect for fundamental rights, this would count as a strikingly thick conception of natural law. The precise content of fundamental rights is hotly contested even in liberal democracies. A natural law conception could only draw the outermost limits of the law.⁸⁶ It could not cover comprehensively the values in liberal democracies and protect them against conflicting normative orders.

bb) The Integration Model

From an historical point of view, it counts as an achievement of the modern constitutional state that churches and believers are subject to state

⁸⁵ MacCormick, *Institutions of Law* (n 56), 201 (emphasis added). Where fundamental rights are mentioned elsewhere in MacCormick's texts, limits of state power are at stake, too: 'some catalogue of fundamental rights that states have to respect' (MacCormick, *Questioning Sovereignty* (n 16), 24); 'Perhaps we need also some substantive limits as well as purely formal limits to state power? Recognition of fundamental rights is one candidate for providing such limit' (MacCormick, *Institutions of Law* (n 56), 190); fundamental rights cause 'a loss of absolute sovereign autonomy of states' (ibid, 274).

⁸⁶ See, for example, MacCormick, *Institutions of Law* (n 56), 270: 'The duties of justice (according to some reasonable conception of justice) can properly be exacted under sanctions of law. Beyond that, law may not go without degenerating towards tyranny.' 'Some reasonable conception of justice' does not exclude much.

law.⁸⁷ Many people would argue that the example of the killings of 'apostates' simply has one talking about murder, whatever the 'judgments' of church courts may say. This implies that church law, at least beyond purely internal matters of the religious community, is indeed subject to state law. This view is based on the integration model, according to which norms count as law only if they are integrated into the state legal order. Against the backdrop of the analysis of legal pluralism thus far, three aspects of the integration model ought to be emphasized.

First, it should be apparent that to insist on the law as a consistent and coherent system of norms is by no means merely an end in itself or a utopian exercise in the logic of the law, it is rather a means of the protection of substantive values embodied in the constitution, in particular fundamental human rights of the individual along with democracy. From this standpoint it is fairly obvious that religious freedom does not give churches the definitive right to kill people whom it regards as 'apostates'.

Second, to understand church law or other kinds of systems as integrated into state law does not mean that from a substantive standpoint they are not taken seriously. Integration – or, to put a sharp edge on it, formal subjection – does not necessarily mean undermining of substantive import. In particular, integrated norms can be balanced against state law. To the extent that claims of respect for norms beyond state law are legitimate, state law ought to respect these norms in state law. This is exactly what happens in modern liberal democracies, which grant freedom of religion. Church law regulating internal matters will deserve, as a rule, protection by means of special guarantees of the constitution or through the greater dimension of religious freedom. Thus, in subjecting all other kinds of social system or law to state law, the state as the general compulsory association of all citizens can provide a neutral framework for reconciling all legitimate interests. This framework establishes authorities,

⁸⁷ See M Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes* (Tübingen: Mohr Siebeck, 2006), 491-5. In Germany, serious attention to the idea that church and state meet on an equal footing arose most recently in the special historic situation of the immediate post-World War II period. Picking up the thread of the medieval doctrine of the 'two swords' – as a metaphor for the distinction between secular and ecclesiastical power – (see W Levison, *Die mittelalterliche Lehre von den zwei Schwertern* (1952) 9 *Deutsches Archiv zur Erforschung des Mittelalters* 14), the theory of 'coordination' between church and state received considerable attention. It has proved, however, to be impossible to determine the respective spheres of the church and the state, and this theory was abandoned (see Borowski, above, 271-2).

state courts, whose decisions count as final. In balancing the rights of groups and individuals, all legitimate claims can be considered with due attention to their respective merits.

Third, the possibility of integration or incorporation of norms into state law shows that the 'origin' of norms is ambiguous. This can be illustrated by a quotation from Kantorowicz, one of the early pluralists. The idea of incorporation struck him as absurd:

It is true that church-made and customary law have been 'tolerated', though by no means always, by the State, as the adherents of the State theory point out, but this observation needs no discussion – it would be equally reasonable to argue that every language spoken or every melody sung in the British Commonwealth originates from Whitehall or Westminster.⁸⁸

'Origin' or 'originate' can refer to the social context of the genesis of norms. To use the example of church law again, it emerges socially in the religious community. It does not come as a surprise that an approach emphasizing 'sociological realism'⁸⁹ prefers this reading. 'Origin', however, can also refer to the formal relationship of being conditioned by higher law.⁹⁰ If state law incorporates church law by reference in a constitution or a parliamentary statute, church law becomes formally a part of state law.⁹¹ This is not to say that church law originates in state legislation – this applies only to the norm incorporating church law, not to church law itself or its content. The distinction between the social context of the genesis and the formal relationship of being conditioned demonstrates that Kantorowicz's metaphor is mistaken – 'language' and 'melodies' do not exhibit the formal relationship of being conditioned by higher entities, whereas this is indeed characteristic of the law.

⁸⁸ Kantorowicz, *The Definition of Law* (n 63), 15 (footnote omitted).

⁸⁹ MacCormick, *Questioning Sovereignty* (n 16), 117. See also *ibid.*, 78, where he claims for his theory 'a certain persuasiveness as a descriptive account'.

⁹⁰ See also III. A. i.

⁹¹ To be sure, the incorporation of church law into state law may well change the content of church law to a certain extent – even if only in so far as it is applied by state institutions and courts. In particular, unjustifiable infringements on fundamental rights and unjustifiable discriminations will not be allowed to form a part of the legal system of the state.

Even these brief remarks suggest that the integration model – which will be taken up in a section below – is far more sophisticated and convincing than the pluralists would have us believe.

B) Legal Pluralism in the EC

From the summary of MacCormick's general theory of legal pluralism it ought to be clear that it must have seemed tempting for him to reconstruct EC law along these lines. The EC, so it is said, boasts of its own legal system. Primary Community law creates the institutions and procedures for legislation, administration and adjudication and the institutions create secondary law. This seems indeed to be a clear example of non-state law.⁹² The idea that the Community legal system is conditioned upon the validity of any particular state's constitution is dismissed quickly,⁹³ and MacCormick points out correctly that the Member States' constitutions do not owe their validity to EC law.⁹⁴ He characterizes the relationship between the EC and the Member States as 'interactive rather than hierarchical' and 'distinct but interacting'.⁹⁵

a) The Decision of Conflicts between EC Law and Member States' Law

The analysis of MacCormick's general theory of legal pluralism has shown that a crucial problem lies in the fact that there are no legal criteria for conflicts between norms of different systems. This applies, on principle, to a reconstruction of the EC, too – there are no legal criteria for conflicts

⁹² However, on closer examination the EC is far from being paradigm for legal pluralism. Typical for MacCormick's examples for his general theory of legal pluralism – 'churches, sporting organizations, commercial guilds, and leagues, international organizations, and agencies' (MacCormick, *Questioning Sovereignty* (n 16), 7) – is that the entity in question has a certain claim to original power beyond the state. On the contrary, the EC can only exercise sovereign rights that originate with the state.

⁹³ MacCormick, *Questioning Sovereignty* (n 16), 118. Because, however, the Community derives its powers from the Member States, the Community's legal order is certainly dependent on the validity of at least two Member States. Above this threshold the question is not whether the Community exists at all, rather, the question is directed to its territorial extension. It does not extend to a state that does not boast of a valid constitution (or a valid constitution that does not transfer sovereign powers to the EC), for it has to derive powers from a valid constitution.

⁹⁴ Ibid, 117.

⁹⁵ Ibid, 118.

between Member States' constitutions and EC law. One has to distinguish, however, between two conceptions, 'radical pluralism' and 'pluralism under international law'. MacCormick, initially a proponent of 'radical pluralism', now supports 'pluralism under international law'.⁹⁶

aa) Radical Pluralism

According to 'radical pluralism' there are no legal criteria at all for resolving conflicts. This means that the 'tragic solution' holds true:

It must then follow that the constitutional court of a member-state is committed to denying that its competence to interpret the constitution by which it was established can be restricted by decisions of a tribunal external to the system ... Conversely, the ECJ is by the same logic committed to denying that its competence to interpret its own constitutive treaties can be restricted by decisions of member-state tribunals.⁹⁷

The lack of legal criteria for the resolution of intersystemic conflicts means that one has to resort to 'political action'.⁹⁸

bb) Pluralism under International Law

MacCormick's most recent position, 'pluralism under international law', 'suggests that we need not run out of law (and into politics) quite as fast as suggested by radical pluralism'.⁹⁹ The difference vis-à-vis radical pluralism is that legal pluralism among the EC and its Member States is embedded, he argues, into "monism" in Kelsen's sense,¹⁰⁰ into a monistic system of international law.¹⁰¹ The first and most obvious question is whether this can be reconciled with his general theory of legal pluralism or whether this general theory requires a pluralistic understanding with respect to all legal systems, which leads inevitably to radical pluralism. Be that as it may, the

⁹⁶ Ibid, 118, 120-1.

⁹⁷ Ibid, 119. See also *ibid*, 95.

⁹⁸ Ibid, 120.

⁹⁹ Ibid.

¹⁰⁰ Ibid, 121.

¹⁰¹ Ibid, 120-1.

following analysis focuses on the question of whether 'pluralism under international law' represents a convincing conception for the decision of constitutional conflicts between the EC and Member States. In contrast to his general theory of legal pluralism and 'radical pluralism' among the EC and its Member States, 'pluralism under international law' provides legal criteria for the decision of conflicts between EC law and Member States law:

The potential conflicts and collisions of systems that can in principle occur as between Community and member-states do not occur in a legal vacuum, but in a space in which international law is also relevant. Indeed, it is decisively relevant, given the origin of the Community in Treaties and the continuing normative significance of *pacta sunt servanda*, to say nothing of the fact that in respect of their Community membership and otherwise the states owe each other obligations under international law.¹⁰²

As a matter of last resort, even an international court could settle disputes:

[I]n the event of an apparently irresolvable conflict arising between one or more national courts and the ECJ, there would always on this thesis be a possibility of recourse to international arbitration or adjudication to resolve the matter.¹⁰³

Thus, a third system and a third court are available to settle conflicts between two conflicting systems and courts. However, is MacCormick really referring to a third system? *Pacta sunt servanda* is perhaps the most important principle of international law, for treaty obligations are of utmost importance in international law. This principle is, however, a general legal principle with relevance in any legal system or field of law. It counts, too, as a principle of the law of the Member States and of EC law. To fulfil obligations arising from the EC Treaty is, first and foremost, an obligation in EC law. If one distinguishes international law from supranational law (and if one emphasizes that international law is a different system vis-à-vis EC law and Member States law, one is using this

¹⁰² Ibid, 120.

¹⁰³ Ibid, 121.

narrower meaning), then *pacta sunt servanda* in international law refers to international treaties, not supranational treaties. One can, however, use a broader meaning of 'international law', embracing also supranational law, but in this case international law does not count as a 'third system'. Thus, it seems that MacCormick is in fact proposing that conflicts between EC law and Member States' law be decided by the yardstick of EC law. This would hardly be an expression of meeting on an equal footing.

Finally, the question of which international court should resolve the conflict between EC law and Member States' law remains. Since the conflict can be solved only by the interpretation of EC law and Member States' law, it is difficult to see which international court should be in a position to claim jurisdiction.

b) Failing to Reconstruct the Derivative Nature of the EC

With his reconstruction of the EC as holding non-delegated powers along the lines of his general theory of legal pluralism,¹⁰⁴ MacCormick inevitably becomes a victim of the paradox of EC law. The paradox consists in the fact that the ECJ and many scholars treat the EC as an original source of legal power, at least on an equal footing with the Member States – although the EC is a creation of the Member States and derives all powers from them. To be sure, from the sociological point of view the EC is certainly an entity distinct from the Member States. It is, however, hard to deny that the EC has been created by a treaty among the Member States and subsequent accession treaties. It boasts only of the sovereign rights that have been transferred to it, and it has them only because they were transferred to or conferred upon it. According to Art. 5 EC '[t]he Community shall act within the limits of the powers conferred upon it by this Treaty', the treaty was agreed by the Member States. Even in *Costa*, the ECJ concedes that in founding the Community, a 'transfer of powers from the States to the Community' had taken place.¹⁰⁵ This derivative nature cannot be depicted by a conception that understands the entities concerned as equally holding non-delegated powers.

¹⁰⁴ A pluralistic reconstruction of orders presupposes that the orders do not derive power from each other.

¹⁰⁵ Case 6/64, *Costa v ENEL* [1964] 12 CMLR 425. Also MacCormick explicitly mentions the transfer of sovereign rights from the Member States to the Community, MacCormick, *Questioning Sovereignty* (n 16), 107.

To put a sharp edge on it, for legal pluralism the relationship between the EC and the Member States would in principle be the same if the EC had not been established by a treaty of the Member States and subsequent accession treaties but had been created in the mid-twentieth century by means of the coercion of an extra-European force that had grown weary of being called upon to help to settle wars that began in Europe and then spread to the whole world. We could think of this as a thought-experiment. The sovereign rights are not transferred by treaties among the Member States; rather, they are usurped by the institutions (comparable to the institutions the EC has now) created by the extra-European force. Of course, there is a psychological difference between a voluntary transfer of sovereign rights and someone usurping sovereign rights. It need not, however, be unrealistic to assume that such a form of paternalism might be successful. It could well be the case that the acceptance of EC law in the thought-experiment reaches an extent that one experiences nowadays on the basis of voluntary agreements. To be sure, such a thought-experiment might strike one as curious. It shows, however, that legal pluralism proper would see no decisive difference. The legal system of the EU would be existent, socially effective, and would lay claim to original power. Owing to its mere existence and the fact that it would be capable of restraining the Member States' law, one would have to state that there is a plurality of legal systems. Thus, for 'legal pluralism' the difference between voluntarily transferred powers and usurped powers is not a decisive one. Such a conception cannot grasp the specific nature of EC as derived.

MacCormick's turn towards 'pluralism under international law', even if, for the reasons mentioned above, it is hardly convincing, can be read as an attempt to go beyond the mere facticity of 'radical pluralism' – in the end, as an attempt to bring the treaty creating the EC more into play than 'radical pluralism' provides for. To be sure, as long as the legal originality of EC law is taken as an unquestionable and unconditional starting point of the analysis, there will be no way adequately to reconstruct the EC with its derivative nature.

III. THE NON-PLURALISTIC ALTERNATIVE: EC LAW DERIVED FROM MEMBER STATES LAW

The distinctive features of MacCormick's legal pluralism will become clearer if one contrasts it with the fundamental alternative, a reconstruction of EC law based on the integration model.¹⁰⁶ MacCormick himself opposes his conception of legal pluralism to a conception according to which, in his words, 'every normative order must be a part of a dynamically integrated whole'.¹⁰⁷ This conception, thus characterized, is attributed to Kelsen. According to this model, the law derives its validity from state law, in particular from the state constitution. Authoritative issuance¹⁰⁸ plays an important role, for it prevents merely socially effective norms from becoming 'law' without an incorporation or integration by authoritatively issued norms. A comprehensive enquiry into the reconstruction of EC law based on the integration model goes well beyond the scope of this article. Still, an outline of the model will offer a first impression.

The particular challenge of a reconstruction of EC law on the basis of the integration model is that state law had to integrate EC law, which is said to be supreme. This supremacy seems to be the main issue, rather than 'originality'. Originality, it appears, is not claimed to be an end in itself, rather, it is claimed to back up supremacy. If EC law is not original, it is necessarily derived, and derived law – this at any rate is the intuition – is necessarily inferior to the law from which it is derived. The idea of the necessary inferiority of derived law seems too obvious to require explanation. MacCormick shares this view: 'For the constitution, however skeletal, is always "above" the powers it confers'.¹⁰⁹ That the idea of the necessary inferiority of derived law is taken to be obvious has stood in the way of according a serious reception to the integration model in the context of EC law. Taking the integration model seriously, however, gives rise to altogether new perspectives.

Granting that none of the attempts to justify original power or sovereignty of the EC has proved to be convincing, not MacCormick's

¹⁰⁶ This model has already been sketched, see above, II. B. i. c) bb).

¹⁰⁷ MacCormick, *Questioning Sovereignty* (n 16), 75.

¹⁰⁸ See above, II. B. i. a).

¹⁰⁹ MacCormick, *Questioning Sovereignty* (n 16), 103.

legal pluralism either, the EC inevitably derives its powers from the Member States. The supremacy that is accorded to EC law in the integration model can be unconditional or conditional. Without any doubt EC law prevails over national law in the vast majority of cases. Does it, however, prevail in every case, unconditionally?

1. Derived and Unconditionally Supreme EC Law

Even in the integration model EC law can be unconditionally supreme. 'Unconditionally supreme' means that EC law prevails *qua* form over national law.¹¹⁰ There are two ways to argue that the EC has acquired unconditional supremacy. The first way claims that the Member States have transferred unlimited supremacy in the treaties, according to the second the Member States have accepted unconditional supremacy in the practice of EC law and its application.

A) The Transfer of Unconditional Supremacy in the Treaties

The first question is whether states can transfer sovereign rights to an entity to the effect that the law of this entity then enjoys unconditional supremacy over the state's law. It is often assumed that the hierarchy of the legal system provides only for a delegation of power to lower levels of the hierarchy of the legal system, not to higher levels. My thesis is that the theory of the hierarchical structure of the legal system does indeed provide for a delegation of powers to higher levels in the hierarchy, to the effect that delegated law counts as formally superior. A comprehensive and thorough enquiry into this theory, however, lies well beyond the scope of this article. Supposing that this theory does not rule out to transfer powers to institutions outside of and standing over a national state, the Member States of the European Union would be in a position to merge into a European super-state whenever they wished.¹¹¹ To be sure, the question is

¹¹⁰ This means that there is no balancing of EC law and national law as such. To be sure, from the standpoint of unconditionally supreme EC law national interests can be balanced against EC interests, if EC law provides for this. See above n 8.

¹¹¹ This complete transfer of sovereign rights by the dissolution of all Member States as independent and sovereign states would be immediately possible. This is not to be confused with the political development of slowly merging the European peoples into one European people, thereby creating the substantive foundations of a European Superstate.

whether such a reconstruction of EC law as it currently stands is convincing. In particular, the question is of whether the Member States intended to transfer the highest competence to create and change norms to an entity outside of and standing over their legal systems. This would mean that they would cease to exist as independent entities, for they would be altogether subject to decisions outside their own legal system.¹¹² Their legal system would become a mere subsystem of a new system – formally inferior to the highest levels in the new system.

There is a test question here, to determine, namely, whether the unconditional supremacy of EC law and the unconditional judicial supremacy of the ECJ qualify as correct characterizations of the current legal situation. If the ECJ were to decide, either explicitly or implicitly, that there are no limits to its jurisdiction, that in other words it is not committed to any legal constraints, would this count, the question of political prudence aside, as being *legally correct*? Does EC law boast of the competence-competence or omnicompetence? Just a quick look at the European Treaties shows, however, that the answer has to be 'no'. The principle of attributed competences in Art. 5(1) EC Treaty sets limits to the EC's powers. Of course, the ECJ is empowered to interpret primary law; this interpretive competence is not, however, without limits. One may quarrel about where the interpretive discretion of the ECJ ends; it is clear, however, that there is an end.¹¹³ Decisions of the ECJ beyond this discretion are *legally defective*. In particular, the ECJ is not empowered to amend treaties as it wishes.

To sum up: The understanding of Community law as 'derived' and unconditionally supreme was, from the point of view of legal theory, possible. This meant that one has to understand the European Treaties and the constitutional amendments made by the Member States in the course of the European Integration as transferring the unlimited power to derogate from any provision of the law of the Member States, and the ECJ had the final say regarding the validity of such law. One cannot interpret

The former process would be a rather formal genesis, the latter a substantive genesis of a European Superstate.

¹¹² Strictly speaking, the transfer of the highest competence to create and change norms to an entity outside the own legal system 'extends' the old legal system. The result of this extension is a more complex legal system, integrating the old legal system and the 'entity' referred to above into a new, more complex legal system.

¹¹³ It is noteworthy that MacCormick distinguishes explicitly interpretive competence from competence-competence, see MacCormick, *Questioning Sovereignty* (n 16), 117.

the EC Treaty, as it stands, however, to read that Member States have subjected themselves legally to the most serious misinterpretations of the EC Treaty.

B) Acceptance of Unconditional Supremacy by the Member States?

If unconditional supremacy has not been transferred by the treaties, one could argue that the Member States have simply accepted it. This would raise the question of how political practice ought to be transformed into Community law. To be sure, the acceptance of unconditional supremacy is, as a matter of fact, out of the question. Telling is the fate of Art. I-6 of the Treaty Establishing a Constitution for Europe (TCE),¹¹⁴ which was set to positivize the case law of the ECJ on the basis of the supremacy or primacy of Community law.¹¹⁵ Of course, one might argue that the simple fact of transforming case law into a treaty provision does not change anything. This misses a decisive point, however, seen against the backdrop of Continental law. In short, in Continental law the primary source of law is the statute. Precedents do not count as a source of law at all.¹¹⁶ This means that the Continental Member States, following their tradition, assume that 'wrong' decisions of the ECJ – for example exaggerated claims to supremacy made by the ECJ – do not mark a change in EC law at all. There is no real need to react to the claim of supremacy as made by the ECJ. It is, however, different where supremacy has been set down in a treaty provision. Thus, to positivize the case law on supremacy changes that situation somewhat.¹¹⁷

¹¹⁴ 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.'

¹¹⁵ See Declarations annexed to the Treaty Establishing a Constitution for Europe, Declaration (No 1) on Art. I-6: 'The Conference notes that Article I-6 reflects existing case-law of the Court of Justice of the European Communities and of the Court of First Instance,' OJ 2004/C 310/420.

¹¹⁶ See, eg, K Larenz, *Methodenlehre der Rechtswissenschaft*, 5th ed (Berlin et al: Springer, 1983) 413-5.

¹¹⁷ See also M Kumm and V Ferreres, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union' (2005) 3 *International Journal of Constitutional Law* 477 with a general argument: 'Substantive decisions explicitly made by the electorally accountable constitutional legislators have, all other things being equal, greater legitimacy and authority than interpretative decisions made by courts'. Even if Art. I-6 TCE had become effective, it would have left room for the review of EC law by national courts, *ibid*, 478-80.

It is not without a reason that a provision comparable to Art. I-6 TCE was omitted in the Treaty of Lisbon at the Intergovernmental Conference at the European Council in Brussels in June 2007. In turn, the Council Legal Service felt bound to publish an opinion contending that this omission does not mean that the principle of primacy and the existing case law of the ECJ are changed in any way.¹¹⁸ This opinion was included into a declaration annexed to the Treaty of Lisbon, stating that 'the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law'.¹¹⁹ The declaration is not, however, legally binding, which is to say that one is still left with the case law of the ECJ.

In conclusion, unconditional supremacy has neither been transformed into a binding treaty provision nor tacitly accepted by the Member States.

2. Derived and Nearly Unconditionally Supreme EC Law

That the Member States have not transferred the power to derogate from their constitutions unconditionally does not mean that they can derogate from Community law as they wish. Rather, derogations are limited to extreme circumstances – where fidelity to EC law becomes unacceptable to the Member State. This is a very high threshold for derogation, and whether the threshold has been crossed is determined by balancing. This means that the supremacy of EC law is not formal superiority, it is rather created by deference to EC law's claim to supremacy whose extent has to be determined by balancing.¹²⁰

¹¹⁸ Opinion of the Council Legal Service, European Council in Brussels, 22 June 2007, 11197/07, JUR 260.

¹¹⁹ Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, Declaration (No 17) Concerning Primacy, OJ 2007/C 315/344.

¹²⁰ Balancing presupposes the validity of the norms to be balanced despite the fact that these norms conflict (M Borowski, *Grundrechte als Prinzipien* (Baden-Baden: Nomos, 2nd ed, 2007), 80, 100). Norms to be balanced have to be on the same level in the hierarchy of the legal system. If they are not on the same level, the norm on the higher level prevails unconditionally – that means: without balancing – according to the maxim *lex superior derogat legi inferiori*. This is only different if and when the norm on the higher level, be it explicitly or implicitly, provides for balancing with norms on lower levels.

A) The Legal Foundation of the EC in the Constitutions of the Member States

The appropriate starting point of this balancing model is the fact that the popular sovereignty of the peoples of the Member States is still the last point of attribution for the highest level of law. MacCormick is correct in emphasizing that the Member States retain ‘crucial attributes of sovereignty’,¹²¹ their legal power is non-delegated. In exercising power provided in their constitutions they created the EC and transferred sovereign rights. This renders EC law inevitably derivative. To be sure, EC law – primary and secondary law – is formally backed up by provisions of constitutions of the Member States. They have jointly embarked on the enterprise of creating the EC, and the aim of European integration is expressed in constitutional provisions (eg, Art. 23(1) of the German Basic Law). These ‘European integration provisions’ are on the same level in the hierarchy of legal norms as are all other constitutional provisions. This means that Community interests, strictly speaking, are in a certain sense always national interests, too – the EC is an undertaking of the Member States, and the Member States are seriously interested in a functioning Community. This fact is often obscured by the simple confrontation of national interests and Community interests. It deserves to be emphasized that the ‘European integration provisions’ in national constitutions serve as the legal foundation of the Community. They undergird the whole of Community law, and with it the supremacy of EC law and judicial supremacy of the ECJ.

B) Balancing EC Law against National Law: The Formal Principle

There can be no doubt that the EC, from a sociological and a political point of view, acts autonomously and independently of the Member States. From the legal point of view, it does so, however, within a very wide framework created by the law of the Member States. The key to understanding the nearly unconditional supremacy of EC law and nearly unconditionally supreme jurisdiction of the ECJ, granted by the Member States’ constitutions, is the formal principle that figures in balancing national law against EC law. Substantive principles require the optimal

¹²¹ MacCormick, ‘Questioning Post-Sovereignty’ (n 21), 863.

realization of certain fixed content, eg freedom of religion. Characteristic of formal principles is their requirement of the optimal realization of the results of a procedure.¹²² The consideration of a formal principle in balancing substantive principles creates a margin, in which no conflicting substantive principle overrides any of the other.¹²³ Paradigmatic is the democratic process – whatever the outcome of the democratic process, it counts as important simply *because* it is the outcome of the democratic process. Community law as a whole is the result of processes, too. Primary law is the result of negotiating and agreeing upon treaty provisions, secondary law is the result of EC legislation as established by primary law, and the judgments of the ECJ are the result of judicial processes as defined in the treaties and inferior EC law.

The abstract weight of 'European integration' as a constitutional aim is very high, and this integration requires nearly unconditional supremacy. That the EC cannot function without sufficient supremacy of its law is the empirical thesis from *Costa v ENEL*, and it is impossible to deny. In particular, respect of Community law is a mutual obligation of the Member States. Since every derogation from Community law on grounds of national law serves as a precedent for other Member States to claim derogations with an eye to their national interests, the fragmentation of Community law is a real and serious danger, threatening the project of European integration. This suggests that there is only a thin red line between a justified derogation from EC law where it has become unacceptable for Member States to be subjected to certain aspects of EC law and a fatal erosion of respect for EC law.

C) Derogations from EC Law as the Exception

To make exceptions from the supremacy of Community law and the supremacy of the jurisdiction of the ECJ by national courts will be the exception where vital interests of a Member State are seriously infringed upon and Community law provides no plausible solution. The *Solange*

¹²² Borowski, *Grundrechte als Prinzipien* (n 120), 88, 127-30. See also R Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002) 414-25.

¹²³ On margins as a result of the consideration of formal principles in balancing, see Borowski, *Grundrechte als Prinzipien* (n 120), 128-9; Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes* (n 87), 213-5.

saga¹²⁴ provides a good example. The EC's power to infringe on individual liberties without granting sufficient protection of fundamental rights is certainly such a serious case. The ECJ did not ignore the FCC's ruling in *Solange I*, insisting on the unconditional supremacy of its rulings. Rather, it developed its jurisprudence on the protection of fundamental rights to get back to the point where EC law and the ECJ enjoy supremacy. Following a common categorization, areas of serious conflicts between national law and Community law beyond fundamental rights are *ultra vires* acts and particular provisions in national constitutions,¹²⁵ for example, the protection of unborn life in Art. 40(3)(3) of the Irish constitution. To take up here only the *ultra vires* constellation, the German FCC has claimed in the *Brunner* decision that it would be empowered to review the question of whether legal acts of the EC go beyond attributed competences.¹²⁶ Taken literally, this sounds like a rather brusque denial of the supremacy of EC law and the ECJ's supreme jurisdiction. Against the backdrop of the model developed here, it ought to be clear that this could be only the last resort. A decision of the ECJ had to be sought beforehand, and only if the ECJ did not redress the conflict and if the national interest is so serious that it overrides substantive Community interests plus the very weighty formal principle of supremacy of Community law, then national courts could set aside EC law. This will be the extraordinary exception. As a result, Community law enjoys nearly unconditional supremacy.

D) Is Nearly Unconditional Supremacy of Community Law Enough?

The integration model sketched above can explain how the constitutions of the Member States can remain, formally, the highest source of law, while Community law enjoys in nearly every case supremacy. Strictly speaking, EC law does not enjoy formal superiority; rather, it boasts of nearly unconditional supremacy, created by a huge margin in balancing EC law and national constitutional law. At the end of the day, this comes close to formal superiority, it ought not, however, to be mistaken for it.

¹²⁴ See above, I. B)

¹²⁵ See only M Kumm, 'The Jurisprudence of Constitutional Conflict – Constitutional Supremacy in Europe Before and After the Constitutional Treaty' (2005) 11 *European Law Journal* 264-7.

¹²⁶ See above, I. B)

Does this nearly unconditional supremacy suffice? One ought not to forget that it is nothing less than the existence of the Community that is at stake if derogations from Community law are allowed. Of course, everything turns on the reading of 'nearly unconditional'. The Community would be seriously endangered if derogations from Community law were not limited to very exceptional circumstances. To declare that even the mere possibility of a derogation of Community law in extreme circumstances reaches to the very root of Community life and to respond with a call for unconditional supremacy strikes one as extreme. A radical solution of this nature might have seemed necessary in the early years of the Community, when the phenomenon of supranationality had not yet been clearly developed, let alone commonly accepted. One ought always to be careful, however, when an 'all or nothing'-argument is said to outweigh every possible counterargument. Community law, now a prominent part of the European Union, has developed into a firmly established institution. That Community law is supreme on principle is not seriously challenged. A slight qualification of this supremacy, limited to extreme cases where it is apparent that it becomes unacceptable for a Member State to subject itself to certain parts of Community law, would nowadays not strike at the very root of the European integration.

What is more, the tendency of convergence of national constitutional law and EC law is unmistakable. It is important to see that it is not simply a matter of national interests upheld by national institutions colliding with Community interests upheld by Community institutions. Both the Member States and the Community have internalized the interests of the other: national constitutional law requires that Community interests be considered and Community law, in particular Art. 10 EC, requires that Member States' interests be considered.¹²⁷ Thus, both legal systems depict conflicts of national interests and Community interests from their own point of view. This leads to a far-reaching congruence between the legal

¹²⁷ The wording of Art. 10 EC requires only the Member States' fidelity to the Community. If one left it at that, the matter would be quite one-sided. Thus, according to the prevailing opinion and the jurisdiction of the ECJ, this provision requires the Community's fidelity to the Member States, too. See Case 230/81, *Grand Duchy of Luxembourg v European Parliament* [1983] ECR 00255, paragraph 37: 'the rule imposing on Member States and the Community institutions mutual duties of sincere cooperation, as embodied in particular in article 5 of the EEC Treaty'. See also Case 2/88, *JJ Zwartveld et al* [1990] ECR I-03365, paragraph 17; Case C-350/93, *Commission v Italian Republic* [1995] ECR I-00699, paragraph 16.

systems. To be sure, because the points of view of the Community and of the Member States are not identical, and different institutions and different people are called upon to evaluate the matter, this congruence is unlikely to be perfect. However, if the EC does take national interests seriously, it is unlikely that a case will fall outside the margin of supremacy of EC law. In other words, it is largely up to the EC itself to determine whether national courts are empowered to deny the supremacy of EC law in exceptional cases.

E) The EC as a Mere Bundle of Overlapping Laws?

It has become apparent that according to the approach developed here EC law is, strictly speaking, a legal extension of the law of the Member States. MacCormick dismisses such a conception quickly:

[T]he Community's legal order is neither conditional upon the validity of any particular state's constitution, nor upon the sum of the conditions that the states might impose, for that would be no Community at all. It would amount to no more than a bundle of overlapping laws to the extent that each state chose to acknowledge 'Community' laws and obligations.¹²⁸

Even if the formulation may sound a bit contemptuous, Community law is, indeed, technically backed up by nothing more than a 'bundle of overlapping laws'. This construction is the inevitable consequence if one takes the derivative nature of the Community seriously, accepting the notion that the Member States' constitutions alone serve as sources of non-delegated legal power. It should have become apparent that this construction does not mean that the Member States can derogate from EC law as they wish. This would seriously endanger the project of European integration. The need for mutual respect for the Community in the form that has been agreed upon serves as a very strong unifying force. This explains why EC law as a 'bundle of overlapping laws' remains, as if by magic, nearly perfectly congruent.

¹²⁸ MacCormick, *Questioning Sovereignty* (n 16), 118.

IV. CONCLUSION

The non-pluralistic alternative fits nicely with most aspects of MacCormick's analysis of sovereignty. The Member States retain the crucial attribute of sovereignty, thereby remaining the source of non-delegated legal power. In joining the Community, they have limited their legal power by subjecting to the nearly unconditional supremacy of EC law. Thus, the Member States no longer possess absolute legal power. To be sure, it has been shown that legal pluralism is not convincing, either as a general theory or as the basis of the reconstruction of EC law. It fails to reconstruct the derivative nature of EC law and cannot provide an adequate framework for the decision of conflicts between EC law and national constitutional law. However, MacCormick's contribution to tackle the difficult and complex problem of the reconstruction of EC law remains invaluable.





Is European Union law a pluralist legal order?

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I. THE INTRIGUING NATURE OF THE EUROPEAN UNION AND OF ITS LEGAL SYSTEM

§1. European integration has resulted in major transformations of the European political and legal orders. To paraphrase a famous British judge,¹ the European Union has been like the incoming constitutional tide. New institutions and law-making processes have been created at the supranational but also at the national levels; in turn, this has unavoidably led to profound changes in existing institutions and law-making processes, which have been deeply “Europeanised”.² While most Europeans keep on

¹ In *H.P. Bulmer Ltd v J. Bollinger SA* [1974] Ch 401 at 418. Lord Denning said: “[W]hen we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute” The metaphor may have some not so hidden intention, as certainly tides not only raise, but also go out. Indeed, Denning became a declared Euro-sceptic in his later years. In a pamphlet published by the Bruges group, he stated that: “No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses- to the dismay of all” in *Introduction to The European Court of Justice: Judges or Policy Makers?*, London: Bruges Group, 1990.

² See Johan P.Olsen, ‘The Many Faces of Europeanization’, 40 (2002) *Journal of Common Market Studies*, pp. 921-952 and *Europe in search of a political order*, Oxford: Oxford University Press, 2006.

identifying their national parliaments as the source of the laws which they have to comply with as citizens or permanent residents, this is no longer true. For several years now, the annual output of Community regulations and directives has far exceeded that of national statutes.³ And as time has passed, more of the said regulations and directives have invited themselves to the “kitchen table” around which citizens discuss what they perceive as their real and immediate problems, from the interest rates of their mortgage loans to the working hours and pay of their jobs, passing through the quality of the meat they eat or the water they drink.

§2. Such transformations have created new intricate practical legal problems. The most glamorous and well-known are perhaps those settled by national constitutional courts and by the European Court of Justice when solving potential or actual conflicts between what are said to be national and European constitutional norms. On the one hand, every new round of amendments to the founding Treaties of the Communities, either on account of an agreement in an Intergovernmental Conference or of the accession of a new Member State, results in a wave of rulings of national constitutional courts reconsidering the *national constitutionality* of the prospective Treaty provisions (or of the Treaty as a whole in candidate member states). This renders unavoidable to consider the terms of the relationship between the (allegedly) two legal orders. On the other hand, critical political and economic situations tend to push the European Court of Justice to rule on the *rapport* between Community and national fundamental norms, usually reaffirming that integration is closely dependent on the exception-less observance of the common law embodied in Community norms, even if this requires setting aside national norms, even national constitutional norms. In less spectacular terms, law-makers and ordinary courts have to solve equally difficult questions when taking rather mundane decisions on which safety regulations apply to the production of a given merchandise, whether a certain person is entitled to abode in the country, or whether a certain conduct is or is not to be characterised as tax evasion, and thus the actor heavily punished or simply reprimanded. The fact that the problems keep on coming back reveals the

³ Roman Herzog and Lüder Gerken reproduce the study of the German Ministry of Justice according to which 84% of the legislation originated in the Union between 1998 and 2004. See ‘Revise the European Constitution to Protect National Parliamentary Democracy’, (2007) *European Constitutional Law Review*, pp. 209-218, at p.210.

unsatisfactory character of the answers. Both supranational and national decisions may settle the case at hand, but are far from establishing a stable and sound precedent, anchored to a satisfactory theory of European legal integration. Indeed, the constitutional (and some would even say meta-constitutional) character of the said practical problems forces us to reconsider not only the way we argue concrete cases, but also the background theories of law and democracy which underpin our practical legal reasoning. Or to quote MacCormick:

“It is not only our theories of law, but also our theories of democracy, that are challenged by the new forms that are evolving among us in Europe”.⁴

Which is quite the same as saying that no satisfactory pragmatic solution to concrete cases can be found without finding fitting answers to what are only apparently abstract questions, such as what is law in general, what makes it binding and why legal orders are stable over time.

§3. In concrete terms, legal integration poses three related riddles:

What is the relationship in which national and Community legal norms stand to each other? (hereafter labelled “the primacy riddle”). As was already said, European integration has resulted in the establishment of a set of institutional structures and law-making processes which seem *prima facie* to be autonomous from national ones, but whose breadth and scope of application essentially overlaps with national ones. But if that is so, what is the relationship between the normative outcome of national and supranational law making processes, or in shorthand, between national and Community laws? What should we do if the said norms seem to prescribe different normative solutions in concrete cases? Which norm should prevail? Answering this question requires clarifying according to which criteria we should decide. Are the relevant conflict rules part and parcel of the national order? Or are they to be found in the Community order? Or should we invoke some kind of meta-norm external to both the national and the Community legal systems? Social legal practices are contrasting in this regard. But it is far from obvious which one should be regarded as more promising. If we grant primacy to national norms, we run the risk of undermining the effectiveness of Community law, and thus, not only legal

⁴ *Questioning Sovereignty*, Oxford: Oxford University Press, 1999, p. 135.

integration as such, but also the equality of all Europeans before their common law. But if we give primacy to supranational norms (which seems to be frequently done), we will set aside what seem *prima facie* the norms invested with a higher democratic legitimacy in favour of those with a lesser one? Should we rethink the democratic rationale on the basis of which national constitutional norms are supposed to prevail over Community ones? Or should we draw some solution from the very fact that social practices are plural and contrasting?

How did the present supranational institutional set up and decision-making procedures come about? (hereafter labelled “the genesis riddle”). The *primacy* riddle assumes that Community law is a constitutional legal order, and indeed, that there is a Community system of sources of law which resembles very closely that of national constitutional orders playing the role of statutory instruments. But that is by itself something which requires an explanation. The three original Communities established in 1951 and 1957 were established by means of three international treaties, and thus were constituted as a trio of classical international organisations.⁵ This could be expected to have resulted in the creation of a new legal order of public international law. From the perspective of national legal orders, the Treaties would probably be acknowledged the rank and status of statutes (although with a higher passive force within their scope), and the eventual secondary norms produced by Community institutions would be regarded as statutory instruments or administrative acts. But in present constitutional practice (even national constitutional practice) the Treaties are constructed as if the constitution of the European Union, while regulations and directives are constructed as if they were statutes. But how could such transformation have taken place if the only “constituting” act of the European Union has been the ratification of the founding treaties and the later amending ones? How could such a big constitutional change (the “constitutionalisation” of the Treaties and the “legalisation” of regulations and directives) take place without an explicit constitutional reform?

How can it be that European integration and the resulting supranational institutional setup and decision-making procedures have proved remarkably

⁵ They were partially consolidated into a single institutional structure through the 1965 Merger Treaty; structure which was reconfigured in the 1992 Treaty of Maastricht and in successive amending Treaties.

stable even if the institutional structure of the Union is rather incomplete or even defective when compared to national and federal ones? (hereafter labelled “the stability riddle”) Leaving aside the question of what type of polity the European Union is, it seems beyond doubt that the institutions of the European Union do not have at its direct disposal any means of direct enforcement and coercion with the help of which could reinforce the will of European citizens and national legal actors to comply with the obligations imposed by Community law; similarly, the institutions of the Union have very limited material resources at its disposal; not only the budget of the Union is miniscule in comparison to that of Member States, but Member States retain control over the flow of resources that accrues to the Union.⁶ This leaves the existence and effectiveness of the Union literally at the mercy of national institutions, the very same institutions which have seen their powers either transferred to or framed by the European Union. And still, the Union has not only proven to be a stable institutional creation, but has acquired new competences and resources over time. How could that be? How could the Union not only be remarkably effective in the use of its powers, but increase them when the institutional actors losing powers had the power to block the process?

§4. Most legal theories of integration have pretended that the practical challenges posed by the European Union do not call into question the soundness of the theories of statehood, sovereignty and law which underlie “classical” constitutional law and public international law.⁷ Indeed, the debate used to revolve around the question whether the three riddles were solved more satisfactorily if the Union was characterised as a classical international organisation or, alternatively, as an emergent nation-state.

⁶ Agustín José Menéndez, ‘Taxing Europe’, 10 (2004) *Columbia Journal of European Law*, pp. 297-338.

⁷ If one leaves aside the very insightful contributions around the law of the League of Nations (Hans Kelsen, ‘Les rapports de système entre le droit interne et le droit internationale public’ 14 (1926) *Recueil des Cours*, pp.227-331; Joseph Gabriel Starke, ‘Monism and Dualism in the Theory of International Law’, 17 (1936) *British Yearbook of International Law*, pp. 66-81; Boris Mirkin-Guetzévitch, ‘Droit International et droit constitutionnel’, 38 (1938) *Recueil des Cours*, pp. 311-463; Umberto Campagnolo, *Nations et Droit*. Paris: Felix Alcan, 1938; on the Briand proposal of a European Union, see the documents compiled in Boris Mirkin-Guetzévitch and Georges Scelle (eds.). *L’Union Européenne*, Paris: Librairie Delagrave, 1931) and the law of the United Nations (very especially, Kelsen’s outstanding work and also Ross’), most if not all the theorizing on the law of the European Union does indeed fall under the previous description.

National lawyers and political actors (led by national constitutional courts) basically claimed that the European Union was but a peculiar form of international organisation, and consequently, Community law should be constructed as a special type of public international law. "Supranational" lawyers and political actors had on the contrary come very close to upholding the view that the Union had become a federal state but in name, as a result, Community law was to be regarded as the new higher law of the land. That entailed that the new supranational constitutional order would have absorbed the previously autonomous national legal orders. Despite their contrary practical implications, both theories shared the view that accounting for European integration did not require much theoretical innovation; or what is the same, that European law and politics could be described and reconstructed with the help of the concepts and categories which have been legal tender in the last two hundred years.

This may be applauded as an effort to avoid the proliferation of theories (after all, every organisation and polity is in some *sui generis*, but that does not immediately entail that pre-existing theories cannot be applied to it). But the problem is that the characterisation of the Union as a classical international organisation or as an emergent nation-state is problematic not only from a theoretical perspective (as standard theories fail to explain how the Union has acquired its present institutional setup and level of competences without any "constitutive" act, or how it can boast a remarkable degree of stability while its institutions have no direct resort to financial or means of coercion, but also (and perhaps more importantly) but also from a practical perspective. In particular, mainstream theories do not succeed in offering proper theoretical guidance when key practical problems are involved, when it comes the time to solve constitutional conflicts between supranational and national constitutional norms.⁸ The mechanic affirmation of the primacy of either national or Community norms which derives from the "classical" theories does either fail to account for actual practice (in which Community norms always prevail, at least for the time being), or does not come hand in hand with a solvent normative explanation of the actual of primacy Community norms (the democratic legitimacy of which seems to be poorer than that of national norms, and as such, would point to the opposite solution). Both theories

⁸ A conflict that, as will be claimed in §§40 and 63, usually entails a horizontal conflict between national constitutional norms).

fail to provide a plausible reconstruction of European constitutional law which is normatively grounded. While we will deal with these questions in more detail in Section II, suffice now to say that such shortcomings made fertile ground for further theoretical reflection on the law and politics of European integration.

§5. It was on such a ground that Neil MacCormick planted his magnificent *Beyond the Sovereign State* in 1993. The piece was immediately regarded as a masterful theoretical assault on the virtual duopoly of legal theories of the European Union. As we will see in more detail in Section III, the Scottish legal philosopher affirmed that the theoretical and practical flaws of both the international and national characterisations of the Union mostly derived from their common assumption that the whole set of European norms could and should be reconstructed from a single and final standpoint (that of the *grundnorm* of the legal order, whether located at the national or the supranational level). MacCormick invited legal and political actors to recognise that European law is premised on the peaceful and fruitful co-existence of at least two of such *grundnorms* (the European and the national ones),⁹ and consequently, that there are (at least) two equally valid standpoints from which law can and actually is reconstructed in Europe. This pluralistic account of Community law was said to be capable of making justice to the features of Union law which remained unexplained by mainstream monistic theories; and very especially, it was affirmed to provide the key to solve conflicts between supranational, national and regional norms. Not only pluralism comes closer to actual European practice by recognising the persistence of different views on how the conflict should be solved, but de-dramatises the consequences of such plurality by means of highlighting the integrative capacities of formal and informal legal procedures, and, very especially, of political mediation and negotiation. Indeed, MacCormick was of the view that the most precious feature of European integration was indeed its endorsement of legal pluralism,

MacCormick's assault opened theoretical and practical vistas, at the same time that suggested the contours of a new research agenda. In addition, it may be added that his theory was extremely congenial to the

⁹ Of perhaps three, if it is claimed (as perhaps MacCormick himself would be inclined to do) that the regional legal order also has a relevant *grundnorm*.

very “spirit” of European integration.¹⁰ By claiming that a new and distinct legal theory (legal pluralism) was needed to explain European integration; and that indeed such a theory should also be used to revise the way in which we reconstruct national legal orders, MacCormick clearly uplifted the theoretical relevance of the European Union as an object of study and research.

For all those reasons, it is not surprising that the *Modern Law Review* piece and its follow-ups, most of which have found their way into *Questioning Sovereignty*, became a scholarly sensation and established themselves very rapidly as *must reads*, part and parcel to this day of the compulsory reading list of graduate and undergraduate courses on European Studies, Community law and general political philosophy.¹¹ Legal pluralism has managed to offer a theoretical account that captures essential parts of European constitutional practice, more closely anchored to the institutional and decision-making setup of the Union than “classical” theories. In particular, it highlights the way in which law and politics interact, and eventually reinforce their social integrative capacities. It is thus no surprise that legal pluralism is developed and applied by a growing number of scholars, and that several newly appointed European and national judges have expressed at one point or the other their endorsement of the pluralistic conception of Community law.

§6. And still, fifteen years after *Beyond the Sovereign State*, the search for a legal theory of European integration is far from over. The persistence of international and national theories of Community law, which retain their status as “in-house” theories of national constitutional courts and of the European Court of Justice, is indicative of the fact that legal pluralism has

¹⁰ And thus perfectly fitting to the cosmopolitan spirit of the age prevalent in the mid-nineties. In what now many look back as the interlude between the end of the Cold War and the beginning of the so-called “war on terror”).

¹¹ MacCormick’s theory may be said to have imposed itself as the standard theory of Community law among *European* scholars (although, as it could be expected, not among *national* scholars studying European law). And even if it is improbable that the Court of Justice and the national constitutional courts will endorse it, given that their authority is closely dependent on affirming a monist understanding of law, individual justices seem to have come to endorse pluralism in their academic writings, at the same time that pluralist scholars have become judges. Moreover, the implicit understanding of the relationships between courts seems to have come to be inspired by some form of pluralism; this is clearly reflected in the constantly repeated claim that European courts do not stand in a hierarchical relationship, but indeed do dialogue (or bargain) with each other.

failed to fully override them. Moreover, as is also noticed by Martin Borowski in chapter 8 of this report, MacCormick himself seems to have qualified the pluralistic nature of his theory, branding it now as “pluralism under international law”. This partial rephrasing of the theory seems to be closely related to the failure of “radical pluralism” to guide actual legal argumentation, despite its enlightening character as a political and sociological theory.

The aim of this chapter is to both offer an account of the three competing theories of Community law (contained in Sections II, devoted to the “classical” theories and III, devoted to MacCormick’s pluralist theory), in particular by means of reconstructing in a sympathetic way their claims, and determining on what they advance our understanding of Union law, and which are their shortcomings; and to put forward an alternative theory of Community law (which for lack of a better name I will refer as the “synthetic theory of Community law”). The theory claims that European integration must be conceptualized as a process of progressive but (at least for the time being) incomplete synthesis of the national constitutional orders of the Member States into a new and encompassing supranational constitutional order. The material constitution of this new legal order is neither the product of an explicit act of constitution-making nor the outcome of the evolutionary “*rapprochement*” of the national constitutions; but it is constituted by the constitutional norms common to the Member States, which progressively become synthesised into a single set of common constitutional norms. Such a theory builds on MacCormick’s key contributions, and in particular claims that as long as integration is not complete, as long as it has not resulted in the creation of a federal supranational polity, Community law does indeed positivise legal pluralism to a limited extent, in particular given that no institution has the final word on the actual content of the synthetic constitution. But it comes closer to a monistic theory of law by claiming that both democratic legitimacy and stability call for the transformation of the European legal order into a federal one, and consequently, the abandonment of institutionalized pluralism. The last section holds the conclusions.

II. THE “CLASSICAL” LEGAL THEORIES OF EUROPEAN INTEGRATION

§7. As was already said in the introduction, mainstream theoretical accounts of Community law used to be underpinned by the assumption that the European Union was either a classical international organisation (and thus Community law should be depicted as a peculiar breed of public international law), or a new nation-state, in which Member States would have “melted” (and accordingly, Community law should be reconstructed according to the template of national constitutional law). In this section, I will proceed to:

- reconstruct each of the theories, by means of “decomposing” them into the specific claims it makes about Community law, and very specifically, about the three riddles mentioned in §3;
- analyse how they have evolved over time; that is, whether some of the premises have changed to accommodate the apparent incongruence of the theory with European constitutional practice;
- assess their contributions to the theoretical understanding of community law, and in particular, whether the specific answer to the just mentioned three riddles are convincing enough.

1. The international theory of Community law

§8. The international theory of Community law claims that the foundation of the three original European Communities created a new legal order in the template of public international law. Thus, Community law is said to be a separate and distinct legal order, in the same way that the law of the United Nations is a separate and distinct legal order from that of each of its Member States (thus the thesis of the two legal orders, which I consider in more detail in §§12-14). But the apparent equal dignity of both legal orders is coupled with the affirmation of the ultimate primacy of the national norms when in conflict with Community ones, and this for two main reasons: one “historical” or “genetic (the validity of each and every Community legal norm is to be ultimately grounded on the national constitutional norm which authorised the ratification of the founding or accession Treaties of the Communities) and the “procedural” primacy of national constitutional law (stemming from the higher democratic legitimacy of the procedures through which national law, both the

constitution and ordinary statutes, is produced when compared with European law), considered in §14 On such a basis, the international theory of Community law sustains that the national constitution remains the higher law of each land, and consequently, is the norm to which the *grundnorm* of the legal system is bound to refer.

§9. Before considering in detail the components of the international theory of Community law, it is important to notice that its scope has been considerably altered through the years; to be more precise, the breadth of theory has shrunk considerably, moving from the claim of absolute primacy to limited and qualified primacy. Originally it was assumed that both the constitution and parliamentary statutes prevailed over conflicting Community norms (which were regarded by some observers as being materially equivalent to national statutory instruments or executive regulations, with a legal force inferior to parliamentary statutes). This understanding of the relationship between Community and national norms is reflected in the *Barley*¹² ruling of the German Constitutional Court or the *Costa* judgment of the Italian Constitutional Court.¹³ It can also be said to be at work in the recent judgments on the relationships between Community and national constitutional law issued by the Polish Constitutional Court.¹⁴ In recent years, the international theory of

¹² *Barley*, 2 BvL 29/63, [English version at] [1967] C.M.L.R. 302], at pp. 312ff of the English version.

¹³ Judgment 14/64 of the Italian Constitutional Court, *Gazz Uff* of 14 March 1964, [English version available at [1964] C.M.L.R. 425, 232/89]. See also Judgment *Fragd*, *Gazz Uff* 3 May 1989, par 4 [English version available at [1985] ECR 1605], par 4. See also the opinions submitted by the Dutch government in Case 26/62 *Van Gend en Loos* [1963] ECR 1 and of the Italian government in Case 6/64 *Costa*, [1964] ECR 585. See also the conclusions of Advocate General Lagrange in *Costa*.

¹⁴ Judgment on the constitutionality of the law transposing the framework decision on the arrest warrant, 27 of April of 2005 (P 1/05), available at en http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_full_G_B.pdf. Cf. Adam Lazowski, 1 (2005) *European Constitutional Law Review*, pp. 569-81; Krystyna Kowalik-Bañczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law', 6 (2005) *German Law Journal*, pp. 1355-66; Dorota Leczykiewicz, 43 (2006) *Common Market Law Review*, pp. 1181-91. A comparative analysis in Zdeněk Kühn, 'Constitutional Monologues, Constitutional Dialogues or Constitutional Cacophony? European Arrest Warrant Saga in Germany, Poland and the Czech Republic', workshop "Integration or Absorption? Legal discourses in the enlarged Union?", Hannover, 28 to 30 September 2006; Wojciech Sadurski, "Solange, chapter 3": Constitutional Courts in Central Europe', *Working Paper 40/2006 of the Law Department of the European*

§10. It is also pertinent to add that this transformation has not been the product of changes in the *literal tenor* of national constitutions, but of shifts in national practice, resulting from political decisions taken by representative institutions and from the adjudication of constitutional cases by high national courts. In particular, the new rendering of the international theory of Community law assumes that the founding Treaties and the rest of the primary law of the Union must be read in a constitutional key, and no longer considered as *ordinary* constitutional Treaties. This comes hand in hand with the companion “upgrading” of regulations and directives, now to be regarded as materially if not formally equal to parliamentary statutes.¹⁶ This major shift in the characterisation of supranational law indeed forces a revision of the terms of the relationship between national and Community norms, and in particular, renders unavoidable the abandonment of the thesis of the absolute primacy of national norms (for the very simple reason that some Community norms are to be acknowledged the hierarchical status proper of constitutional norms, and regulations and directives may have a *prima facie* claim to prevail over conflicting parliamentary statutes if only on the basis of their *special* character: *lex specialis derogat lex generalis*). Thus the qualification of national primacy as limited and qualified, and the insistence on the

fact that Community law tends to prevail in practice. This can be read between the lines in *Granital*, par 3: “L’assetto dei rapporti fra diritto comunitario e diritto interno, oggetto di varie pronunzie rese in precedenza da questo Collegio, è venuto evolvendosi, ed è ormai ordinato sul principio secondo cui il regolamento della CEE prevale rispetto alle confliggenti statuizioni del legislatore interno”; and similarly in par. 5: “Il risultato cui è pervenuta la precedente giurisprudenza va, quindi, ridefinito, in relazione al punto di vista, sottinteso anche nelle precedenti pronunzie, ma non condotto alle ultime conseguenze, sotto il quale la fonte comunitaria è presa in considerazione nel nostro ordinamento”. Such shifts may be effective in public relations terms, but do result in a coherent legal doctrine, as pointed by Francisco Rubio Llorente in “El constitucionalismo de los estados integrados de Europa”, 16 (1996) *Revista Española de Derecho Constitucional*, núm 48, pp. 9-33, p. 27; and Grainne De Búrca, ‘Sovereignty and the Supremacy Doctrine of the ECJ’, in Neil Walker (ed.), *Sovereignty in Transition*, Oxford: Hart Publishers, 2003, pp. 449-460, especially in p. 460.

¹⁶ The founding Treaties were formally speaking standard international treaties. This would have entailed their assimilation with ordinary statutes in most national systems. Community regulations, which enter into force in all Member States by virtue of their publication in the Official Journal of the Communities (now Union) were first characterised as *reglements or statutory instruments*, in line with the conceptualisation of the High Authority of the ECSC and the Commission of the EEC and the Euroatom as a specialised supranational administrative body. Community directives were not regarded as sources of law, as they did not become binding law until transposed into the national legal order.

separation of the two legal orders. On the one hand, it is claimed that the limited and qualified primacy of Community law is mandated by the national constitution itself. This is grounded on the new claim that there are two relevant national constitutional mandates governing the relationship between national and Community norms; to the primacy of the national constitution as the embodiment of the most democratic political decisions, the advocates of the international theory of Community law add now the constitutional mandate to create supranational institutions, to be found in the proto-European or European constitutional clauses, and on the basis of which the ratification of the founding Treaties of the Communities proceeded.¹⁷ The mandate of supranational integration rules out the absolute and substantive primacy of national constitutional law, as that would render integration simply impossible. Moreover, constitutional integration clauses must be constructed as requiring a limited constitutional primacy, to be defined by reference to the elucidation of the core national constitutional identity, which necessarily include the procedures of formation of a constitutional will through which national constitutions can be amended, the constitutional principles which underlie the catalogue of fundamental rights and the norms which draw the division of competences between the state and the European Union. On the other hand, the international theory of Community law insists upon the neat separation of the two legal orders, now more than ever claimed to be formally independent from each other. By means of shifting the focus from the effects of concrete Community norms to the effect of Community law *en bloc*, the international theory of Community law seems to avoid having to account for each and every peculiar feature of Community law which would be hard to explain within the national constitutional paradigm; in particular, it seems to render unnecessary to explain why norms with a lesser democratic legitimacy (for example, the regulations and directives produced through committee committees) can prevail over national parliamentary statutes.

¹⁷ On European constitutional clauses, see Monica Claes, 'Constitutionalising Europe at its source', 24 (2005) *Yearbook of European Law*, pp. 81-125; Anneli Albi, 'Europe' Articles in the Constitutions of Central and Eastern European Countries', 42 (2005) *Common Market Law Review*, pp. 399-423 and Christopher Grabenwarter, 'National Constitutional Law Relating to the European Union', in Armin von Bogdandy and Jürgen Bast (eds.), *Constitutional Law of the European Union*, Oxford: Hart Publishers, 2006, pp. 95-144.

A) What the international theory of Community law entails: its answers to the three riddles

§11. The contents of the international theory of Community law can be rendered clearer by means of considering the key premises that its advocates uphold, and which constitute answers to the three key riddles of European legal integration. In particular, (a) the thesis of the two legal orders as a solution to the genesis riddle; (b) the theses of the historical, formal and substantive primacy of national constitutional law as a solution to the primacy riddle; (c) the thesis of the stabilising force of national primacy as a solution to the stability riddle

a) The genesis riddle and the thesis of the two legal orders

§12. The first component of the international theory of Community law is the “thesis of the two legal orders”. It affirms that the ratification of the founding Treaties of the European Communities (together with the partial merger of the three Communities in 1965 and the creation of the Union in 1991) resulted in the creation of an autonomous legal order, now widely known as European Community law. Such an order is analytically distinct from each national constitutional order, to the point that the normative framework that any of the national legal orders and Community law set down in concrete situations could be divergent. This is so because the validity of the norms of each legal order is exclusively dependent on “internal” criteria, and independent of “external” criteria.¹⁸ That is, the

¹⁸ In comparative terms, this entails that Community law and national law stand in the same relationship as national law does vis-à-vis an international legal order created by a multilateral international treaties, such as the Treaty by means of which the Universal Postal Union was established in 1874, or the Charter of the United Nations, which gave birth to the latter institution in 1945. The German Constitutional Court offered an explicit formulation in *Solange I*, BVerfGE 37, 271 [English version available at [1974] 2 C.M.L.R. 540], par. 20: “the two legal spheres stand independent and side by side one another in validity”. See also *Solange II*, *supra*, fn 15, par. 31; *Brunner*, BVerfGE 89, 155 [English version available at [1994] 1 C.M.L.R. 57], par 55a; and *Bananas*, BVerfGE 102 [English version available at <http://www.ecln.net/documents/Decisions-Germany/2000-06-07-bananas-english.pdf>], par. 35. On the Italian Constitutional Court, see Judgment 98/65, of 16 December 1965, *Acciairie San Michele di Torino*, *Gazz Uff* 31 December 1965, par 2. See also Judgment 183/73, of 18 December 1973, *Frontini*, *Gazz Uff* 2 January 1974, par 5; *Granital*, *supra*, fn 15. On the Spanish Constitutional Court, see Declaration 1/2004, *supra*, fn 15, pars. 2 and 4. See also the

validity of national legal norms derives from a national constitutional norm, while the validity of Community legal norms derives from a Community constitutional norm.¹⁹ As a consequence, two autonomous and overlapping legal orders will be simultaneously applicable in the territory of each Member State.

§13. The “thesis of the two legal orders” leads its advocates to sustain that there is no riddle involved neither in the genesis of Community law, nor in the ways through which it has acquired its present features. What has created and shaped the Community is nothing mysterious, but the will of the Member States, expressed in accordance with the relevant national constitutional requirements in the founding Treaties of Communities and in the successive accession Treaties by means which new Member States have joined the Union. If Union law is distinct and autonomous from each national constitutional order, is because national constitutions authorised the expression of the national political will which, in coordination with that of other Member States, created the Union.

§14. It could be counter-claimed that there is some tension lingering between the claim that the two legal orders are autonomous, and that there is no genesis riddle, because the distinct and autonomous supranational legal order results from a set of concurrent wills, properly formed in accordance with each national legal order. The difficulty here is but a variety of the puzzle concerning the self-limitation of sovereign powers. How can the will to form an autonomous Community legal order be properly formed within a national legal order, all of which affirm the unconditional supremacy of the national constitution, if the creation of the

judgment of the Irish Supreme Court in *Crotty v. An Taoiseach*, 12 February 1987, [1987] IEHC 1, par. 72.

¹⁹ A Kelsenian *translation* of such claims would state that the *grundnorm* refers to the first historical national or Community constitution, from which the validity of all other legal norms flows. It seems to me that Kelsen would have been inclined to sustain the Community primacy thesis; indeed, had he lived longer, he would probably have been very interested in the constitutional developments in the European Union. See for example Hans Kelsen, ‘Law as a specific social technique’, 9 (1941) *University of Chicago Law Review*, pp. 75-97: “To the extent that the direct obligating and authorizing of individuals and centralization increases in international law, the boundary between national and international law tends to disappear, and the legal organization of mankind approaches the idea of a World-State”.

Community may lead to the eventual questioning of the supremacy of the fundamental law? After all, if the autonomy of the Community legal order means something, it means that it could eventually prescribe a course of action in contradiction with that required by one or several of the national legal orders, and thus eventually contradict one or several of the national constitutions.

The international theory of Community law does not so much offer a complete answer as avoid it, basically thanks to the very different institutional properties of the European Union and of its Member States. While all national state functions are discharged by institutions created and maintained by national law, Community state functions are to a good extent in the hands, or depend on, national institutions. In concrete, the key law-making institution of the Union is composed of representatives of national governments, and its decision-making process is still geared towards the mere aggregation of national general wills. In addition, the authoritative and coercive application of Community legal norms to concrete cases is in the hands of national institutions. National administrators and judges *act* as Community institutions but this rarely results in their leaving behind their national institutional identity. This is so to the extent that it is national law that vests public authority upon them and that it is the national exchequer who not only covers the costs of the material resources at their disposal, but also pays their salaries. Under such circumstances, national institutions perceive that their assumption of the role of European administrators or judges resulted from a mandate issued by national law.²⁰ Under such circumstances, the autonomy of Community

²⁰ The process of European integration has resulted the Europeanisation of the identity of some national authorities, and even to the internalisation of such European identity. On socialisation on the European identity, see Chris Shore, *Building Europe: The Cultural Politics of European Integration*, London: Routledge, 2000; and 'Government without statehood. Anthropological perspectives on governance and sovereignty in the European Union', 12 (2006) *European Law Journal*, pp. 709-24). But that is only likely to happen when the role as "European" institutions becomes the dominant if not exclusive one, and even then, further conditions must be fulfilled for the shift in institutional loyalty to take place (On the socialisation of the members of the committee of permanent representatives, which in fact is the 'core' of the Council of Ministers, see Jan Beyers, 'Multiple Embeddedness and Socialization in Europe: The Case of Council Officials', 59 (2005) *Internacional Organization*, pp. 899-936). This explains why the degree of Europeanisation of the institutional identity of national judges is still rather low. After all, national judges keep on applying national norms to local problems most of their time. Even when they apply Community norms, they tend to so in a mediated way, through the implementing

law is not coupled with the autonomy of the institutional setup of the Union, and consequently, the actual resolution of normative conflicts between Community and national norms remains safely in the hands of national institutions. And this helps hiding the tension underlying the coupling of theses of the two legal orders and the primacy of Community law, if only because the spokesmen of the *other* legal order are confined to expressing their theoretical disagreement, and can, so to speak, shed no legal blood. Thus, it seems pretty *safe* to acknowledge a formal equal status to Community law, because no Community institution can actually affirm the primacy of Community over national law in concrete cases.²¹

And still, the generalised primacy accorded by national institutions to Community law has forced the acrobatic redrafting of the thesis of the two legal orders. While national constitutional courts keep on defending the claim that the two legal orders are distinct and autonomous, they have progressively accepted that integration has somehow blurred the line of separation between the two legal orders²² (as indeed, the acceptance of the

national norms, or through the leading cases decided by higher national courts on the matter. A similar argument can be made regarding members of the civil service. But the rotatory Presidency of the Council clearly contributes to “Europeanise” national administrations. A general introduction to the issue in Keith Middlemas, *Orchestrating Europe*. London: Fontana Press, 1995; a more detailed analysis in Anna-Carin Svensson, *In the Service of the European Union*. Uppsala: Acta Universitatis Uppsaliensis, 2000). Even in so-called *monistic* states civil servants and judges will keep on identifying themselves as first and foremost *national* legal actors, and thus assessing the validity of Community legal norms by reference to the *national constitutional yardstick*.

²¹ The incomplete institutional structure of the European Union implies that the actual enforcement of Community law critically depends on the decision of an institution which perceives itself as a national institution, and consequently, is likely to decide conflicts according to the national conflict rule, and in case of doubt, is probable that would prefer to err on the side of affirming the primacy of national norms over Community ones. Moreover, the determination of what the *independence* of the two legal orders really means is left to be determined in concrete cases by national judges, because only they are formally entitled to apply law to specific cases; the number of rulings in which the ECJ is formally entitled to do so is very limited. Even if we take into account the fact that the ECJ acts as a *de facto* European constitutional court, the number of cases decided by the ECJ is ridiculous when compared to those decided by national courts.

²² See *Solange II*, *supra*, fn 15, par 31; *Granital*, *supra*, fn 15, par 4; *Declatation 1/2004*, *supra*, fn 15, par 4; See also *Crotty*, *supra*, fn 18, par. 77, where the “opening” clause of the Irish constitution is constructed as a license “to join a living dynamic Community of the kind described by the defendants” (repeating an argument made by the defendants).

acknowledgment of the direct and unmediated effect of Treaty provisions, regulations and even directives in national legal orders entails).²³

b) The primacy riddle and the theses of the historical and procedural primacy of Community law

§15. The second component of the international theory of Community law is the two-fold case for the primacy of national law over conflicting Community norms. Because the two legal orders are distinct and autonomous, it is indeed possible that the normative solutions upheld by each of them may contradict each other in concrete cases. The international theory of Community law claims that in such cases, national judges should make national law prevail, unless there is a national norm which prescribes the primacy of the conflicting Community norms. Three are the closely interwoven reasons on which this conclusion is grounded.

First, the primacy of national law is logically required by its *historical primacy*. The constitution, amendment and enlargement of the European Union was rendered legally possible by the set of national constitutional provisions which empowered national actors to sign and ratify the founding Treaties of the Communities and all the successive amending ones. On such a basis, national constitutional is not only *prior* to European Union law in historical terms; moreover, in the absence of any “revolutionary act”, historical primacy logically require normative primacy because the chain of validity of any Community norm will lead us to the national norm by means of which the founding Treaties of the Communities (or in the case of non-founding Member States, the accession Treaties) were ratified. If that is so, behind every Community norm there is unavoidably a national norm. Or what is the same, even if we were to give priority to a Community over a national conflicting norm in a concrete case, we would in reality be giving priority to the national constitutional norm which underpins the validity of the prevailing Community norm.²⁴ So

²³ Sooner or later, national constitutional courts will also be called to square the primacy of the national constitution with the fact that Union law conditions membership to the Union to the observance of supranational constitutional standards, as derives from the joint reading of Articles 7 and 49 of the TEU.

²⁴ In addition, historical primacy comes a long way to explain the fact that the assumption of an autonomous national legal order is a necessary logical precondition for the reconstruction of Community law, while the reverse is not true. Firstly, the definition of

there is no “independent” primacy of Community norms; if a Community norm prevails is because a national norm requires it.²⁵

Second, national law should prevail over conflicting Community norms because national norms have been approved through procedures which instil a higher degree of democratic legitimacy on the norms approved through them than what is the case with Community law-making procedures (*procedural primacy*). The democratic legitimacy of national constitutional law stems either,²⁶ in its *republican* version, from the structural features of the constitution-making processes through which national fundamental laws have been enacted (to the extent that such procedures allow the consistent testing of the breadth and scope of the general will supporting the ensuing fundamental norms), or, in its *evolutionary version*, from the repeated endorsement of national constitutional norms, no matter how they were actually enacted, repeatedly

each and every Community institution presupposes concepts and procedures that are only defined in national law (for example, who must be regarded as a national president and thus entitled to assist to the meetings of the European Council - see Article 4, section 2 of the Treaty of European Union). Secondly, the very substantive contents of Community law make constant reference back to the national legal order (from the definition of who is a citizen - article 17.1 of the Treaty of European Union - to the general principle of protection of fundamental rights- see judgment of the ECJ in Case 11/70, *Internationale*, [1970] ECR 1125, par. 4: “In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the court of justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the community. It must therefore be ascertained (...) whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the community legal system”).

²⁵ Still, historical priority is not conclusive by itself. There could be a relevant, normatively grounded break with the historical chain which alters the picture. Whether such a break could have been implicit in the very act of foundation of the European Communities leads to the very old Rossian theme of whether the constitutional law can be amended in application of its own amending clause. See Vid. José María Sauca, *Cuestiones lógicas en la derogación de las normas*, México: Fontamara, 2001; y ‘La reforma de la Reforma de la constitución. El puzzle constitucional de Alf Ross’, en Francisco Laporta (ed), *Constitución: problemas filosóficos*, Madrid: Centro de Estudios Políticos y Constitucionales, 2003, pp. 281-326.

²⁶ This is not the proper place to offer a thorough defence of the relationship between higher democratic legitimacy and normative primacy. But it may not be either redundant or cumbersome to underline that both national and European constitutional law assume that such a relationship exists, and is a key one. On what concerns Community law, it may suffice to refer back to Article 6 of the Treaty of European Union.

proven and put to the test during critical moments.²⁷ It is far from obvious that Community constitutional law can claim either a higher or even a similar degree of democratic legitimacy. It is simply not the case that Europe has undergone a “constitutional moment” worth such a name in normative terms. None of the different rounds of Treaty amendment could be seriously described as a popular exercise of constitution-making power (even if such reform processes have become step by step less dissimilar from constitution-making process).²⁸ It is even more doubtful that in a crisis situation citizens will show their unrelenting support to Community institutions and decision-making processes, so it is very hard to conclude that Community law has acquired a high democratic legitimacy through its slow but steady endorsement by citizens.²⁹

²⁷ The republican model also comprises (indeed it may be its standard manifestation in historical terms) *non-conventional constitution-making*, i.e. change in the content of the constitution through reform procedures which are not contemplated in the fundamental law itself. The reference there is no other than Bruce Ackerman, *We the People*, Cambridge, Massachusetts: Harvard University Press, 1991 and 1997; the third volume is synthesised in ‘The Living Constitution’, 120 (2007) *Harvard Law Review*, pp. 1737-1812. Perhaps the paradigmatic examples of “evolutionary” democratic constitutionalism are those of the German Basic Law of 1949 and the ‘living’ British constitution.

²⁸ John Erik Fossum and Agustín José Menéndez, ‘The Constitution’s Gift’, 11 (2005) *European Law Journal*, 380-410.

²⁹ The claim that the rule of conflict should be a national one, and the claim that constitutional legal norms should prevail over contrary Community legal norms are almost undistinguishable. However, they are not fully equivalent. Firstly, it is not impossible that the national rule of conflict establishes that Community law should prevail. Indeed, not only that is said to be the case at least on what regards ordinary or infra-constitutional European conflicts, but it could also be the case regarding constitutional conflicts. The national rule of conflict could grant qualified primacy to European law (as the Dutch constitution assumed to establish since 1953) or even absolute and unqualified primacy). Secondly, it is very likely that the national rule of conflict will assign qualified primacy to national law. As is noticed in §§9-10, the systematic reconstruction of the case-law of national constitutional courts as it stands now leads one to the conclusion that primacy is limited to the core, essential contents of the national constitution, which are said to defined the “national constitutional identity”; constitutional norms which are not regarded as being part and parcel of this hard constitutional core can be left aside when in conflict with Community norms. All that notwithstanding, in the following I will assume that the two claims can be regarded as equivalent for the purposes of our present discussion, if, as will be done here, one is careful enough to describe in sufficient detail the primacy of national law thesis.

c) The stability riddle and the stabilising properties of primacy based on democratic legitimacy

§16. The international theory of Community law affirms that the stability of Community law is closely connected to the foundational role played by national constitutional law. In particular, the fact that conflicts between national and Community norms are governed by national conflict rules ensures that the European legal order is constructed in democratically consistent ways, to the extent that primacy is finally assigned to the legal order with the highest democratic dignity, i.e. the national constitutional order. This *national constitutional* reading of Community law is guaranteed by the power of national political and judicial institutions to review the national constitutionality of Community law, and to either declare the unconstitutionality of specific norms (the central task of judges, and very especially, of constitutional judges) or to put into question the continued validity of the whole Community legal order in the member state in question (the ultimate and exceptional power to secede from the Union said to be in the hands of national political actors).

§17. The international theory of Community law claims that the rather imperfect direct democratic legitimacy of Community law needs to be supplemented by the *transfer* of such democratic legitimacy from national constitutional orders. The very insufficient direct democratic legitimacy of Community law results from the lack of proper democratic legitimacy basis of the material constitution of the Union -which has been distilled from the founding Treaties and the common constitutional traditions by courts, and paramountly, by the European Court of Justice, but which has never been endorsed by European citizens through a democratic exercise of their constitution-making power- and from the many democratic shortcomings of the ordinary Community law-making process, and outstandingly, the *executive* dominance resulting from the power of national executives to pass the most substantive pieces of legislation without the participation of neither the European nor the national direct representatives of citizens. The *transfer* of democratic legitimacy is brought about through different institutional configurations and procedures. But on that complex equation, one component is essential, namely the assignment of primacy to the national legal order over the Community one; and in particular, it is essential that a national rule of conflict governs collisions between Community and national norms. Only then the primacy of each national

constitution (those are the norms with the highest legitimacy from the standpoint of a democratic theory of law) is ensured, and consequently, there is a guarantee that it will be “radiated” to all the norms appertaining to the legal system. If the national constitution is highly legitimate in democratic terms, and all Community norms are constructed in such a way as to be compatible with the guiding principles of the national constitution, then all Community norms will be indirectly legitimised by their fitness with the national constitution.

If this is so, the stability riddle is easy to solve. The European Union has proven to be a stable polity precisely because it has not been designed as a fully autonomous federal union, but remains an international organisation, even if a peculiar one, whose democratic legitimacy is guaranteed by the transfers of democratic legitimacy from the national constitutional orders to the Community one.

§18. The primacy of national constitutional norms is guaranteed in ordinary circumstances by the exercise of the power of constitutional review of Community legal norms in the hands of national courts (in most cases, constitutional courts). According to the primacy of national constitutional law thesis, national constitutional courts (or the judicial or quasi-judicial organ or organs empowered to review the constitutionality of laws) must declare the unconstitutionality of the Community norm or norms that collide with national constitutional norms. The terms and scope of the national review of constitutionality of European laws have experienced a transformation parallel to the definition of the rule of conflict. The balancing of the primacy of the constitution with the mandate to create supranational institutions is said to require that compliance with core national constitutional standards upon which depends the validity of Community law is not to be assessed in each and every case by reference to those standards, but by reference to normative patterns observable throughout time. The power to review the “national” constitutionality of Community norms is thus only to be exerted by national institutions if conflict becomes endemic, or if there are clear indications of an involution of the level of protection of fundamental constitutional values in Community law.³⁰ This entails that the primacy of national law is no longer

³⁰ Solange II, *supra*, fn 15, par. 48: “In view of those developments it must be held that, so long as the European Communities, and in particular in the case law of the European Court,

aimed at enforcing individual fundamental rights so as much as the *identity* of the national legal order as a constitutional order.

§19. To the “ordinary” (if expected to be sparsely used) judicial power of constitutional review of Community legislation, the international theory of Community law adds the unilateral right to secede. It is said that each Member State retains the power to decide in a fully autonomous way whether or not to keep on being a Member of the Union. Indeed, both the German (*Brunner*), the Spanish (*Opinion 1/2004*) and the Polish (*European Arrest Warrant*) Constitutional Courts established a direct link between the right to secede and the primacy of national constitutional law. Secession was defined as the *guarantee of last resort* of the the primacy of national constitutional law, and consequently, of the international theory of Community law.³¹

generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution; references to the Court under Article 100(1) for that purpose are therefore inadmissible”; see also *Bananas*, par. 38. See also Judgment 2004-505 of 19 November 2004 of the French Conseil Constitutionnel, JO of 24 November 2004, pp.362-7 [official version available in English at <http://www.conseil-constitutionnel.fr/decision/2004/2004505/eng.htm>], especially par. 14-22, in which it is said that the provisions of the Constitutional Treaty are fully sound from a French constitutional perspective *if* they are constructed in a precise way [that is, the Court undertakes an interpretative review of constitutionality]. See also number 18 of *Cahiers du Conseil Constitutionnel*, available at <http://www.conseil-constitutionnel.fr/cahiers/cc18/jurisp505.htm>. And Guy Carcassone, 1 (2005) *European Constitutional Law Review*, pp. 293-301. A similar statement in *Declaration 1/2004*, *supra*, fn 15, par 4.

³¹ *Brunner*, *supra*, fn 18, par. 55: “Germany is one of the 'Masters of the Treaties', which have established their adherence to the Union Treaty concluded 'for an unlimited period' (Article Q) with the intention of long-term membership, but could also ultimately revoke that adherence by a contrary act. The validity and application of European law in Germany depend on the application-of-law instruction of the Accession Act. Germany thus preserves the quality of a sovereign State in its own right and the status of sovereign equality with other States within the meaning of Article 2(1) of the United Nations Charter of 26 June 1945”; *Declaration 1/2004*, *supra*, fn 15, par 4; Accession judgment of the Polish Constitutional Court, at http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf, par 13.

B) Critical assessment

a) The main contributions of the international theory of Community law to the legal theory of Union law

§20. The international theory of Community law captures three key features of the European legal order. In particular, it rightly highlights both (a) that national constitutions play a major role in the process of European legal integration, to the extent that the Union was created by the concurrent will of the Member States, and in particular, by means of applying specific national constitutional provisions which authorised the ratification of international treaties aimed at supranational integration; (b) that the constitution and transformation of the European Communities cannot be grounded on an act of purposeful constitution-making of the new legal order; neither at the very foundation of the Union, nor at any later moment it is possible to distinguish a European “constitutional moment”; (c) that there should be a close connection in any democratic legal order between the democratic legitimacy stemming from the procedure through which a norm is decided and the legal force and hierarchical status assigned to the norms actually decided, which is the fundamental basis of the claim that national constitutional norms (at the very least, those which define the national constitutional identity) should prevail over conflicting Community norms. Let us consider both insights in more detail.

§21. As was said in §§12-14, the international theory of Community law solves the genesis riddle by postulating that European Community law and the present European constitutional practice are fully authorised by the founding acts which created the European Communities in 1951 and 1957. As was said, the validity of each and every Community norm, be it part of the primary, secondary or tertiary law of the Union, can be traced back to the national constitutional norm in application of which the founding or accession Treaties were ratified. This entails the logical primacy of national constitutional law, and reinforces the claim to substantive primacy made on the basis of the higher democratic legitimacy of national constitutional law. But leaving aside for a moment the question whether the conclusions drawn are fully correct, the historical primacy of national constitutional law over Community constitutional law rightly reminds us of two essential

components of the European constitutional practice. The first is the central role played by national constitutions, and in particular, by the constitutional provisions on the basis of which the founding or accession Treaties have been signed and ratified, and which keep on being resorted to when assessing the constitutional soundness of successive changes in the primary law of the Union by national political and legal actors. The second is that the European legal order has not been constituted through an explicit act of constitution-making. Indeed, it is because no act in the history of European integration³² qualifies as an act of purposeful constitution-making (not even as an unconventional or even implicit act of constitution-making) that the logical “priority” of Community law is said to entail a substantive primacy.³³ That stands in stark contrast with what is the case in other complex or post-national polities, such as the United States or Canada.³⁴ Whether or not this entails that national constitutional

³² Not even the eventual (and by now unlikely) ratification of the Constitutional Treaty could have had such effects, given that its entry into force was still conditioned the unanimous ratification of all Member States *according to the procedure mandated by its own national constitutional law*.

³³ Having said that, the meticulous formal application of constitutional norms may be used as a cover of a substantial break with the constitutional chain of validity. The systemic interpretation of the Treaties could lead us to the conclusion that ratification required a previous constitutional reform. Cf. the judgment of the Danish Supreme Court in *Carlsen v Rasmussen*, [English version available at [1999] 3 CMLR 854], where such a possibility is hypothetically considered. Even if the Court denies this was the case, it pauses to consider whether Community competences could be expanded unconstitutionally through Article 318 TEC (ex 235). See par 9.4: “The issue, therefore, is not whether any transgression of the powers conferred may have taken place during the time prior to the amendment of the Treaty through certain legislative acts, etc., adopted in pursuance of Article 235”.

³⁴ As is very well-known, the 1787 Constitution was ratified according to the procedure foreseen in its own text, which was very different from that prescribed in the Articles of Confederation of 1781. This was tantamount to a clear-cut break in the chain of validity, which was “normatively justified” by means of using the same procedure which state constitutions foresaw for their own reform. See Ackerman, *supra*, fn X; and Akhil Reed Amar, *America’s Constitution: A Biography*, New York: Random House, 2005. In the Canadian case, the simultaneous passing of the Canada Act by the British parliament and the Constitution Act (which includes the Charter of Fundamental Rights, see at http://laws.justice.gc.ca/en/const/annex_e.html) by the Canadian Parliament resulted in the formal recognition by both the metropolis and the dominion that the chain of validity of the Canadian legal order had been broken. See section 2 of the Canada Act: “No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law”. Cf. on the theoretical aspects of the patriation of the constitution: Rainer Knopff, ‘Legal Theory and the “Patriation” Debate’, 7 (1981) *Queen’s Law Journal*, pp. 41–65; Lawrence L. Herman, ‘International Aspects of Patriation’, 31 (1982) *University of New Brunswick Law Journal*, 69–86; James Ross Hurley, *Amending Canada’s*

norms should prevail over conflicting Community norms, it surely means that the legal theory of Union law cannot be modelled in the “republican” constitutional template, nor even the “evolutionary” alternative, as there is no act or set of events which can be reconstructed as causing a clear break in the chain of validity of legal norms.

§22. The international theory of Community law claims that national constitutional norms (and at the very least, those which shape the national constitutional identity, a phrase which necessarily includes the most fundamental provisions of the national constitution) should prevail over conflicting Community norms, given their higher democratic legitimacy. Whether one agrees or disagrees with the latter conclusion, the international theory strikes a right chord when it establish a close connection between the democratic legitimacy stemming from the procedure through which a norm is decided and the legal force and hierarchical status assigned to the norms actually decided, which is the fundamental basis of the claim that national constitutional norms. And if that is so, there is also a strong *prima facie* case for considering that national constitutional norms have a very strong claim to primacy. After all, the dignity of national constitutions stems from the fact that citizens tend to consciously or unconsciously recognise themselves as authors of national constitutional norms (either because they were their actual authors, or because they think they could have been given such an opportunity). They do not regard constitutional norms as *heteronomous*, but as *autonomous*, as norms that either they have given to themselves, or could have given to themselves if they had had the opportunity. To the extent that any other characterisation of the relationship between national and Community norms may put into question the *democratic dignity of national constitutional law*, the latter must be disregarded. In the absence of a persuasive alternative explanation, is it not wise to conclude that this may be the case if instead of the primacy of national constitutional law we affirm the primacy of Community constitutional law when both come into conflict? After all, how could it be that norms the democratic legitimacy of which has not been put to a public test would prevail over those which have passed such a test?

b) The key shortcomings of the international theory of Community law

§23. The four major shortcomings of the international theory of Community law are to be traced back to (1) the untenability of the two legal order thesis (§13), which plays an essential role in ensuring the compatibility of the international theory with European constitutional practice, and indeed in solving the stability riddle (§24); (2) the ungrounded character of the claims it makes on the relationship between national and Community norms; it is not only openly contradicted by European constitutional practice; but if put into practice, it is likely to lead to the undermining of the very constitutional principles which are said to support it (§25); (3) the unappealing explanation it provides of the stability of European integration, as it fails to answer the critical questions and ignores some of the key sources of political and legal stability (§26).

§24. The first major shortcoming of the international theory of Community law derives from the untenable character of the two legal orders thesis which plays an essential role in the claim that the theory accounts for actual European constitutional practice.

The “two legal order thesis” is openly contradicted once it is acknowledged that Treaty provisions, regulations and even, under given circumstances, directives have direct and immediate effect in each and every national legal order whether or not there is a “national” act, general or particular, which acknowledges such legal effects to Community norms. The Community doctrine of direct effect does not merely entail (as is the case in international public law) that Community law governs the effects of its own legal norms within its own “province”, so to say, but actually that the norm which determines the legal effects of Community norms is a Community norm, not a national norm; consequently, actually, the doctrine of Community direct effect entails that Community law is competent to determine the legal effects that Community norms (Treaty provisions, regulations and when applicable directives) have *in each and every national legal order*.³⁵ But if that is so, the wall that the two legal orders claims separates national from Community law is tore down (if ever existed) once we accept the Community doctrine of direct effect, because

³⁵ Bruno de Witte, ‘Retour à «Costa» -La primauté du droit communautaire à la lumière du droit international’, in 20 (1984) *Revue trimestrielle de droit européen* pp. 425-454.

there must be at the very least a set of common norms, in concrete, the norms that specify the legal effects of Community norms both in Community law, and also in each national legal order. Indeed, the clear cut distinction between one Community legal order and twenty seven national legal orders is blurred, and as we will see, create the conditions under which the national theory of Community law becomes plausible, even if not fully convincing to all.

Once the two legal orders thesis is questioned, the theoretical acrobatics in which the international theory of Community law incurs to reconcile its theoretical claims to actual European constitutional practice become rather questionable. Indeed, as was already said in §13, the two legal order thesis plays a key role in isolating potential problems which could question the capacity of the international theory of Community law to account for European constitutional practice. But once it is discarded, the said problems are bound to come back with a vengeance.

§25. The second major shortcoming consists in the incapacity of the thesis of the primacy of national constitutional law over conflicting Community norms to both account for actual European constitutional practice and to offer a normatively appealing characterisation of the relationships between national and Community norms.

On what concerns the capacity of the theory to account for actual European legal practice, neither in its original and absolute version, nor in the present limited and qualified variant it seems capable of explaining what actually happens. The original variant of the theory, which affirmed an absolute primacy of national law over Community law, was abandoned over time because it could not account for European constitutional practice. As more and more legal and political actors constructed the Treaties as if they contained constitutional norms, and regulations and directives as statutes in substance if not in form, it became obvious that the relationship between Community and national norms was bound to be more complex than what the absolute primacy thesis implied, based as it was in the characterisation of the secondary law of the Union as infra-statutory legal norms. But not even the present defence of a limited and qualified primacy of national constitutional norms over conflicting Community norms is satisfactory, for the following three related reasons. First, it fails to account for European constitutional practice despite the dramatic reduction of the scope of national norms which are said to enjoy primacy. Not only national constitutional courts have left rather open the

question of which norms are part of the hard national constitutional core (or, for that purpose, they have failed to explained concrete criteria according to which such norms are to be singled out from among all those enjoying formal constitutional status), but they have failed to offer a complete theory, capable of accounting for the cases in which Community norms prevail over conflicting national constitutional norms which would be extremely hard to exclude from any plausible definition of the national constitutional hard core. This is for example the case of the Community norm which empowers national ordinary national judges to set aside national statutes if they are found to be in conflict with Community constitutional standards (such as the principle of non-discrimination on the basis of nationality, or any of the fundamental economic which used to be regarded as specifications of the said principle).³⁶ The national constitutional law of most member states is based on the premise that ordinary judges simply cannot proceed to set aside statutes even if they are persuaded of their unconstitutionality. In some (but increasingly few) member states no judge can ever do that, the judicial review of legislation being fully ruled out. In most member states, constitutional review of legislation is indeed foreseen, but the power is assigned exclusively to the Constitutional Court, (the majority of the members of which tend not to be career judges) to whom ordinary judges must request a binding opinion if in doubt of the constitutionality of an ordinary law. On the contrary, Community law has been interpreted by the European Court of Justice as requiring that ordinary national courts leave aside national statutes when they are clearly and without doubt *unconstitutional in a European sense*, or what is the same, when they are in conflict with the constitutional principles of European Community law (for example, the principle of non-discrimination on the basis of nationality, or of one of the four basic economic freedoms).³⁷ Now it is the case that not only judges, but also citizens and civil servants, have basically accepted that the ECJ is right.³⁸ But if this is so, the bar which the national constitution imposes on ordinary judges, prohibiting them to review the constitutionality of parliamentary statutes, has to be left without effect when Community law is relevant to the case at hand (and given its exponential growth in breadth

³⁶ But not so obviously since Case 120/78, *Cassis de Dijon*, 1979 [ECR] 649.

³⁷ Case 106/77, *Simmenthal II*, [1978] ECR 269.

³⁸ Cf. Victor Ferreres Comella, 'Integración europea y crisis del modelo centralizado de justicia constitucional', 65 (2003) *Revista Vasca de Administración Pública*, pp. 73-122.

and scope, it is hard to think of a case where European law *could not be said* to be part and parcel of the solution to the actual dispute). Given that this prohibition is an essential part of the institutional set up of most Member States, and that is a key part of the specific conceptualisation of the democratic principle enshrined in national constitutions, it is difficult to escape the conclusion that it is part of the hard core of the national constitution. And still, it must be left aside when conflicting with the requirements of Community law. How can this be accounted for by the international theory of Community law? And quite similarly, how can it account for the judgments of the Court of Justice (accepted and followed in national practice) in which it has established that community law prevails over specific national constitutional provisions of considerable importance, as was the case in the judgments on Greek state aid and the Luxembourgish constitutional clause?³⁹

On what concerns the normative foundations of the relationship between national and Community norms, the limited and qualified primacy of national constitutional norms results in a high nominal level of protection of fundamental rights (in the very name of which Community law may be set aside), but may lead to their actual infringement, given the limited number of circumstances in which the primacy of national constitutional law is supposed to have actual legal bite. Once judicial review of European law becomes a guarantee of last resort, and is limited to *systemic* violations of national constitutional law, such review ceases to be an instrument at the service of subjective fundamental rights, and becomes exclusively a means of protecting the primacy of national law and national institutions (among which, surprise surprise, national courts). A less cynical interpretation is equally disheartening. If national constitutional courts do not limit themselves to a chauvinistic defence of the primacy of national law, but actually act on the basis of their commitment to the basic principles common to national and Community constitutional law, then they will become at the very same time the guardians of national constitutional identity and of European

³⁹ Case C-183/91, *Greek State Aid*, [1993] ECR 3131; Case C-473/93, *Luxembourgish constitutional clause* [1996] ECR I-3207. As is well-known, the Court is not formally competent to rule on the constitutionality of national norms when deciding preliminary questions. However, its judgments are most of the time so precise despite its abstract formulation that the national court has not much leeway but to set aside the national norm at play.

constitutional identity. By policing the national constitutionality of Community law, they will be contributing to the definition of the canon of European constitutionality. Indeed, most of the key judgments of the German constitutional court can be reconstructed from such a perspective. But even if this transformation of the actual role assigned to constitutional courts is fully legitimate, it is problematic if not fully and explicitly endorsed by national courts, to the extent that this can lead to an erratic oscillation between the two roles, to the detriment of the fundamental rights of citizens. It must also be said that the second alleged guarantee of the primacy of national constitutional law, the right of secession, is more nominal than real. In formal legal terms, the right to secede, the procedure to be followed, and the terms under which it must take place are *not* determined by national constitutional law; it would be rather interesting to discuss whether public international law or Community law governs the issue.⁴⁰ Be it as it may, national law has not much to say. But if that is so, the right to secede would be a guarantee of the primacy of national constitutional law, but the right could not be exercised but in accordance with non-national norms, no matter whether they would be part of the national or the Community legal order. This logically entails that the right to secede is not an absolute guarantee of the primacy of the national will (if a xenophobic political party would be elected with an ample majority in one Member States, it could decide to secede from the Union to avoid any challenge to their policy of open race discrimination, for example against peoples of Arab origin; it is extremely doubtful that the pretence to secede in such circumstances would be regarded as sound by either international or Community law; even if one applauds such outcome, one should acknowledge that it contradicts the absolute primacy of national constitutional law). To this it must be added that the actual feasibility of secession would very much depend on the attitude of Community institutions, and of the institutions and the citizenry of the other Member States.

§26. The third major shortcoming of the international theory of Community law is its unsatisfactory account of the stability of European integration as a political and legal process.

⁴⁰ Mattias Kumm, 'To be a European citizen? The Absence of Constitutional Patriotism and the Constitutional Treaty', 11 (2005) *Columbia Journal of European Law*, pp. 481-522, pp. 489ss.

First, it offers a rather artificial explanation of the stability of the European Union. By anchoring it to the *normative* primacy of national constitutional law, and very specifically, the core normative principles of each national fundamental law, the theory fails to come to terms with the progressive “Europeanisation” of national constitutional identities themselves. Most Member States have actually explicitly redefined their identity by means of the insertion of “European” constitutional clauses which not only facilitate and mandate supranational integration, but which define their constitutional as Member States of the European Union. The implications of such a redefinition had not escaped national constitutional judges.⁴¹ They are closely related to the explicit affirmation of the *conditionality* of accession and continued membership of the Union to compliance with a certain set of substantive principles which define the European constitutional identity in the Maastricht Treaty (cf. Articles 49 and 7 of the TEU). This consequently entails that being a Member State, as described in the very national constitution, is dependent on complying with constitutional requirements defined at the European constitutional level, something which clearly contradicts the international theory of European law. But if this is so, then it is simply wrong to claim that stability could be provided, and is to find its sources, exclusively on national constitutional law *as* an isolated and fully independent set of norms.

The overemphasis of the stabilising role of national constitutions *as* individual fundamental laws underplays the key stabilising role played by *national constitutions as a collective set of norms*, as part and parcel of a group of converging fundamental legal norms. It basically leaves unexplored the legal and political role played by what the European Court of Justice labels as the “common constitutional traditions” of the Member States, despite the fact that they are the “groundwork” constitution of the Union (them and not the founding Treaties, embody the complete set of core constitutional principles of the European Union) and despite the fact that they play a key role in the transfer of democratic legitimacy from the Member States to the European Union, as will be discussed at more length at §66. Similarly, the international theory of Community law is blind to the structural democratising effect of European legal integration, grounded on

⁴¹ Udo di Fabio, ‘Some Remarks on the allocation of competences between the European Union and its Member States’, 39 (2002) *Common Market Law Review*, pp. 1289-1301.

the fact that it rectifies the mismatch between the scope of application (and effects) of legal norms and the level of government at which such norms are decided. Community law ensures the formal equality of all those affected before the law, and creates the structural conditions under which such laws *could eventually be democratised*.⁴²

2. The national conception of Community law

§27. The national theory of Community law claims that Community law has become a legal order tailored in the template of national constitutional law. The leading cases of the European Court of Justice concerning the structural constitutional principles of the Union led the “constitutional mutation” from international to constitutional legal order;⁴³ this shift was later endorsed by national courts, and very decisively, tacitly accepted by national political actors, and does now underlie European constitutional practice. This grounds the further claim that the relationship between Community and national law is being reconfigured and reshaped; national legal orders are progressively merging into the European legal order; this entails that conflicts between European and national norms are governed by supranational conflict rules (key part of the emerging meta-constitutional framework), which may prescribe that Community norms defeat conflicting national norms, even constitutional ones. The stability of the ensuing legal and political system critically depends on the progressive Europeanisation of the institutional identity of national political and legal actors; and in particular, in the progressive internalisation of the duties that national courts and administrative bodies have to discharge as European institutions.

⁴² Even if national laws are produced through processes which ensure that those with a right to participate can influence the actual outcome, they are structurally incapable of including *all those affected* by the laws once such persons are *outside* the constitutional jurisdiction of that state. Indeed, the limits to the realisation of the democratic principle in isolated sovereign states explains why postwar constitutions included many integration clauses, which were expected to perform exactly that job.

⁴³ The utmost advocate of the theory is the ECJ. The systemic reconstruction of its case law is a necessary point of departure for any sophisticated theorisation of the primacy of Community law. But see also the dissenting opinion of Judges Rupp, Hirsh and Wand in *Solange I*, *supra*, fn 18, par. 55-63. In their view, the integration clause enshrined in Article 24 of the German Constitution authorises a transfer of sovereignty to supranational institutions which implies losing the power to review the national constitutionality of the legal norms of the supranational order. See especially par 56 of their opinion.

§28. The national theory of Community law has changed over time. In the first wave of cases in which the national theory was articulated, the rulings could be constructed as putting forward the characterisation of Community law as a special type of international legal order. Indeed the literal tenor of the ruling in *Costa*⁴⁴ (usually implied to have established once and for all the primacy of Community norms over conflicting national norms) was circumscribed to conflicts between supranational and *infraconstitutional* national norms,⁴⁵ and thus could have been reconciled with the reconstruction of Community law in the template of public international law, even if of a *sui generis* kind.⁴⁶ But with the passing of

⁴⁴ *Costa*, *supra*, fn 13: “The transfer, by member-States, from their national order, in favour of the Community order of the rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign right upon which a subsequent unilateral law, incompatible with the aims of the Community, cannot prevail”.

⁴⁵ AG Lagrange in *Costa*, *supra*, fn 13 characterised the founding Treaties as a framework statute and secondary Community law as implementing statutory instruments: “One can but counter that by saying that the Community regulations, even the most important ones, are not legislative acts nor, as is sometimes said, ‘quasi-legislative acts’, but rather acts emanating from an executive power (Council or Commission) which can only act within the framework of the delegated powers that it has been allowed by the Treaty and within the jurisdictional control of this Court of Justice. It is certainly true to say that the E.E.C. Treaty has, in a sense, the character of a genuine constitution, the constitution of the Community (and from this point of view it is completed by the protocols and the schedules having the same value as the Treaty itself and not that of regulation); but for the greater part, the Treaty has above all the character of what we call a ‘loi-cadre’; and this is a perfectly legitimate approach when one is dealing with a situation of an evolutionary nature such as the establishment of a Common Market in respect of which the objects to be attained and the conditions to be realised (rather than the manner of realisation) are defined in such a way that the generality of the provisions need not exclude precision: we are still far from the ‘blancseings’ (or free-hand) in which certain national parliaments indulge”.

⁴⁶ The literal tenor of some of the early judgments of the Court concerning the relationship between the two legal orders could mislead us into believing that the Court would be a partisan of the two legal orders thesis. However, such statements of the Court must be read in their proper context. Namely, in judgments such as *Van Gend en Loos* or *Costa*, the Court of Justice openly denied the soundness of the characterisation of Community law as an international legal order or as a set of statutory instruments enacted by a supranational administrative body. This led the Court to overemphasise the *sui generis* character of Community law, in the process of which some of the problematic passages slip into the judgments. But the Court simultaneously affirmed that Community law was the supranational body of law into which national legal orders integrated. Perhaps the most sophisticated formulation is to be found in the Conclusions of AG Lagrange in *Costa*, *supra*, fn 13: “But—and it is indeed a simple observation—the Treaty giving effect to the European Economic Community, as well as the other two so-called European Treaties,

time, the European Court of Justice has emboldened its case law, which has come to be underlined by the version of the national theory of Community law, in the terms just described. The Court did first put the final nail on the thesis of the two legal orders when it explicitly affirmed that the national constitutional traditions were an integral part of Community law, and indeed constituted the very foundation of the European legal edifice.⁴⁷ Next it affirmed in abstract and general terms that the relationship between Community and national norms was to be governed by Community norms, and that this implied that national courts should exercise a power of European constitutional review of national legislation (in actual defiance of the prohibition enshrined in most national constitutions)⁴⁸ and that Community norms should *prima facie* prevail over national ones.⁴⁹ Finally, the Court has further reinforced the national theory of Community law by affirming that national institutions should disregard any national norm which may be interpreted to be an obstacle to the systematic reconstruction of Community and national provisions⁵⁰ and

creates its own legal order which is separate from that of each of the member-States but which substitutes itself partially for those in accordance with rules precisely laid down in the Treaty itself and which consist in a *transfer of jurisdiction* to Community institutions”.

⁴⁷ *Internationale*, *supra*, fn 24, par 3: “The law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that state or the principles of a national constitutional structure”.

⁴⁸ *Simmenthal II*, *supra*, fn 37, par 22 “Accordingly, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law”.

⁴⁹ *Ibid*, par 21: “It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals, and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule” (*my italics*)”.

⁵⁰ Cases C-213/89, *Factortame*, [1991] ECR I-2433 and C-224/01, [2003] ECR I-10239. Such decisions require national judges to follow the procedures and to take the decisions that ensure the effectiveness of Community law, even if national law does not empower them to do so (that is perhaps the key finding of *Factortame*), or if some standard national

by explicitly stating that Community norms should prevail over conflicting national constitutional norms.⁵¹

A) Defining components

a) *The one legal order thesis and the genesis riddle*

§29. The national theory of Community law claims that the process of European integration has resulted in the creation of a new supranational legal order into which national legal orders are being progressively absorbed (“the one legal order thesis”). Absorption has both a structural dimension (as the relationships between national and Community law become governed by Community norms; thus the “twin” doctrines of direct effect and primacy of Community law, enunciated in the leading cases *Van Gend en Loos* and *Costa*⁵²) and a substantive dimension, which results both in the construction of national norms in accordance with Community principles (as required by the Court in *Internationale* and *Dassonville*)⁵³ and in the constant growth of the *acquis communautaire*, the set of secondary and tertiary Community norms which form the common law of Europe, before which all national citizens are equal and indeed become co-citizens of the European Union.

§30. This deep legal transformation has three sets of causes: the foundational acts of the three original Communities (which brought to life Community law as an autonomous international legal order), the “transformative” jurisprudence of the European Court of Justice in the abovementioned leading cases (*Van Gend en Loos*, *Costa*, *Internationale*, *Dassonville*), and finally and perhaps paramountly, in the explicit or tacit endorsement of the new structural and substantial constitution of the

principle of constitutional transcendence (*res judicata*) stays in the way of the integrity of the rights acknowledged by Community law (as argued in Köbler).

⁵¹ Rulings in the Greek aids and the Luxembourgish constitutional clause cases, the Court has put forward an interpretation of Community law which left no doubts on the obligation to set aside specific national constitutional norms. Even if the ECJ limited itself to its formal role of interpreting Community law, it left no doubt on the European unconstitutionality of these national constitutional provisions, or at least, of the interpretation given to them by national bodies authorised to interpret them.

⁵² *Van Gend en Loos* and *Costa*, *supra*, fn 13.

⁵³ *Internationale*, *supra*, fn 24 and Case 8/74, *Dassonville* [1974] ECR 837.

European legal order by national political and legal actors. Indeed, the national acceptance of the constitutional mutation implicit in the way in which the leading cases of the European Court of Justice constructed the founding Treaties requires a wide reconsideration of the terms of the relationship between national law and the emergent supranational legal order, as we will see in the next paragraph. Joseph Weiler claimed some years ago that “one of the great perceived truisms, or myths, of the European Union legal order is its alleged rupture with, or mutation from, public international law and its transformation into a *constitutional legal order*”.⁵⁴

The “genesis” riddle is dissolved once we acknowledge the “revolutionary” character of the referred set of ECJ rulings and of the political and judicial processes through which they were accepted in each and every Member State. Altogether they were akin to a major constitutional transformation in each and every national constitutional order.⁵⁵

b) The primacy of Community law and the primacy riddle

§31. The second component of the national theory of Community law concerns the terms of the relationship between Community and national norms. The national conception claims that Community law is progressively absorbing national constitutional orders (the “one legal order thesis”) and that, consequently, the relationship between Community and national norms is governed by Community norms. This entails that in case of a conflict between Community and national norms, the “meta-norm” or rule of conflict is a Community norm.

The second component of the national theory of Community law is founded on four grounds: (1) a legal-dogmatic argument (article 10 TEC); (2 and 3) two substantive normative arguments, related to the one legal order with Community primacy being a precondition for integration through law across European borders, and fostering the further realisation of the right to equality, by means of broadening the breadth and scope of the non-discrimination principle; (4) a procedural normative argument,

⁵⁴ Joseph Weiler, ‘The autonomy of the Community legal order’, now in Joseph Weiler, *The Constitution of Europe*, (Cambridge, Cambridge University Press, 1999), at p. 295.

⁵⁵ Alter, *supra*, fn 15.

based on the fact that a single European legal order creates the structural conditions under which the democratic shortcomings endemic to “closed” national legal orders can be overcome.

§32. The “one legal order thesis” and the “Community primacy” claims find formal support in article 10 TEC, which imposes on all Member States the obligation to be “loyal” towards the Union (a principle equivalent to that of “constitutional loyalty”⁵⁶ to be found in several other legal orders).⁵⁷ It can very well be argued that the only way in which all Member States can be equally loyal is in fact if Community law establishes the normative framework within which national norms integrate into Community law, and very specifically, establishes the criteria according to which conflicts between Community and national norms are to be solved. Otherwise, that is, if national norms govern the relationship between Community and national norms, it could very well be the case that the terms of the said relationship are different in each Member State, which would not only undermine the capacity of law to integrate European society but would also result in an unequal distribution of the burdens and benefits of membership across national lines. Thus, article 10 TEC points both to the absorption of national constitutional orders into the European one, and to the Community character of metaconstitutional norms of conflict.

§33. But beyond the formal argument, the national theory of Community law claims that there are three normative reasons why Community law should govern the relationships between Community and national norms. Two of those are substantive, and concern the very preconditions of integration through law across European borders and the role played by Community law in realising the right to equality, and specifically, the right to non-discrimination on the basis of nationality. The third normative

⁵⁶ Kamiel Mortelmans, ‘The Principle of Loyalty to the Community (Article 5EC) and the Obligations of the Community Institutions’, 5 (1998) *Maastricht Journal of European and Comparative Law*, pp. 67-88; Armin Hatje, *Loyalität als Rechtsprinzip in der Europäischen Union*. Baden-Baden, Nomos, 2001; Daniel Halberstam, ‘Of Power and Responsibility: The Political Morality of Federal Systems’, 90 (2004) *Virginia Law Review*, pp. 731-834.

⁵⁷ The article reads: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty”.

ground is procedural, and concerns the (potential) democratic surplus of Community law when compared to the “closed” legal orders of sovereign nation-states.

First, the establishment of the European Union and of Community law has created the conditions under which the social integration across the borders of Member States (and in particular, the solution of conflicts and the coordination of actions in view to achieve collective goals) is discharged by legal norms, and not by an odd and fluctuating combination of old-fashioned diplomacy and raw power. But given the peculiar institutional structure of the Union, the fact that supranational institutions lack direct access to either means of coercion or financial means with which to foster compliance and “reintegrate” the societal tissue in case lack of compliance reaches certain thresholds, the “stability” of the legal and political system is critically dependent on the spontaneous and exquisite compliance with Community law of national legal and political actors. But if this is so, it must be the case that the effectiveness of Community law (or, in the terminology of the Court, of guaranteeing its *effet utile*),⁵⁸ its actual capacity to discharge social integrative tasks, is dependent on the relationships between Community and national norms being governed by Community, not national, meta-norms. Otherwise, there is a very high risk of variations in the construction of the sets of rights and obligations stemming from Community law, which in its turn may quickly lead to selective default by some national actors, and in the short run, in the undermining of reciprocity.

Second, if Community law governs the relationships between Community and national norms, it becomes possible that the right to equality, and in concrete the principle of non-discrimination on the basis of nationality, is expanded beyond its actual breadth and scope under national constitutions. The said principle has been rightly said to constitute

⁵⁸ As is well-known, the *effet utile* doctrine has been widely used by the ECJ. Malcolm Ross, ‘Effectiveness in the EU legal order’, 31 (2006) *European Law Review*, pp. 476–98, at p. 480, claims that it is an “institutional mantra” whose purpose is to ensure that “the argumentative style of the ECJ is replicated by national courts”. In substantive terms, the ECJ has made use of the doctrine in most of the leading cases which have shaped the constitutional law of the Union. Thus, Koen Lenaerts and Kathleen Gutman, ‘Federal Common Law in the European Union: A Comparative Perspective’, 54 (2006) *American Journal of Comparative Law*, pp. 1–121, at p. 18 describe it as the “overarching principle that pervades every instance of the Court’s law-making”, in their. Be it as it may, one of the first questions where it was made use of was precisely the relationships between the Community and the national legal orders.

the most basic normative foundation of European integration;⁵⁹ but the very close instrumental relationship between economic integration and the active legal mobilisation of the principle of non-discrimination on the basis of nationality against allegedly infringing national norms has altered the very normative framework in which national legal orders operate, and contributed to render extremely suspicious in legal and political debates any discrimination on the basis of nationality.⁶⁰ A broader circle of beneficiaries of the right to equal treatment is to be regarded as normatively desirable in itself, insofar as it cannot but be regarded as further realising the normative program contained in the constitutions of all Member States. It also increases the democratic legitimacy of the political system and of the legal order, as it increases the chance that the voice and opinion of those affected by legal norms and political decisions is heard and taken into account, even if a part of those affected do not directly enjoy the right to vote.

Third, the establishment of supranational institutions and law- and decision-making processes creates the structural conditions under which the endemic democratic exclusion practised by European sovereign nation-states could be rectified, and the scope of those affected by the laws and those participating in the deliberation and decision-making of the said laws mostly overlap. Indeed, it has been insufficiently stressed that the constitution of the European Communities did not only hold *functional promise*, as it unleashed processes which increased the standard of living of the immense majority of Europeans, but also *normative promise*, as it could put an end to the mismatch between those called to decide in national democratic processes (national citizens) and those affected by national laws (a good deal of which were citizens or residents of other

⁵⁹ Joseph Weiler, 'Federalism and Constitutionalism: Europe's Sonderweg' in Kalypso Nicolaïdis and Robert Howse (eds.), *The Federal Vision*, Oxford: Oxford University Press, 2001, pp. 54-70.

⁶⁰ While it could rightly be argued that the migration policy of Member States has become increasingly discriminative against foreigners, and that disproportionate numbers of non-Community citizens suffer miserable working and pay conditions, the very phenomenon of European integration has rendered this problematic. It clearly was not so in the interwar period or the immediate aftermath of the Second World War, in which foreign labourers were subject to extremely discriminatory treatment without much legal or political ado. See Klaus Bade, *Europa en Movimiento*, Barcelona: Crítica, 2003, especially at p. 194; on identity cards, see John Torpey, *The Invention of the Passport*, Cambridge: Cambridge University Press, 2000).

Member States, and thus deprived of any political right in the deciding state).⁶¹

c) The preliminary request, the non-legal sources of stability of legal order and the stability riddle

§34. The national theory of Community law claims that the stability of the European legal order depends not only, and perhaps not fundamentally, on institutional structures or procedures internal to the said constitutional order, but rather on non-legal factors, such as the degree of internationalisation by legal actors of their institutional identity, and the judgment they pass on the empirical and normative consequences of their decisions. Indeed, the stability of the European Union is to be explained by reference to the internationalisation by political and legal leaders of the most basic achievement of the process, namely the integration of society by means of law, not raw power and old-fashioned diplomacy. While the institutional setup of the Union keeps Community law always close to the edge (vulnerable to any major disruption in spontaneous compliance with the duties it imposes on national institutional and “private” addressees),⁶² it

⁶¹ The social, economic and technological changes which took place in the XIXth and XXth centuries notably increased the degree of interdependence among Europeans. Quite paradoxically, the more this was the case, the more that decisions taken in one sovereign nation-states had effects across its borders, and the more that effective political decisions had as a precondition decisions adopted in other states, the more that the claim to economic, social and legal self-sufficiency of nation-states was reaffirmed. As a consequence, not only European citizens were increasingly affected by decisions over which they had no power or influence whatsoever (even if they were lucky to be citizens of a democratic state) but the actual efficiency of the decisions decreased, because the dogma of state sovereignty simply hid the impotency of public authorities. Indeed, the catastrophic collective experience of the first half of the XXth century widely proves that in the absence of supranational institutions, it is almost impossible to realise the core goals of a democratic constitution, and consequently, to stabilise democratic self-government. Once there are supranational common interests, democracy in one country is hardly a viable way to realise the democratic ideal.

⁶² It may be the case that to make some exceptions to the primacy of Community law in exceptional cases may not have negative consequences in the short run. But any exception, even if originally a limited and circumscribed one, would open the door to any further exception in the very name of ensuring the integrity of national constitutional norms. If we keep in mind that nothing prevents translating any ordinary European constitutional conflict into a conflict between the Community norm and the national constitutional norm which underpins the ordinary national law in conflict, once exceptions are made to the primacy of Community law, legal actors will have an incentive to undertake such translation

also reinforces the perception that prudence strongly supports compliance with all the obligations stemming from the process of integration.

This explains why the key institutional mechanism through which homogeneity is ensured within the Community legal order (the preliminary request through which ordinary courts can request the views of the European Court of Justice on the construction of any Community provision, and indirectly, on how conflicts between Community and national norms should be sorted out) is more a transmission belt of knowledge than a procedure through which disciplinary power is exercised by Community institutions. As is well-known, the European Court of Justice is neither a supreme court empowered to review the decisions of national courts, nor a constitutional court from which lower courts can request definitive rulings on the constitutionality of Community or national norms, or for that matter, from which citizens can ask the acknowledgment and protection of their fundamental rights in concrete cases. Its opinions have the mere force of an authoritative legal argument (although it must be said that even if the Court is formally expected to limit itself to offer abstract guidance, it tends to give concrete and detailed rulings, so concrete and detailed that *de facto* they contain rulings on the European constitutionality of specific national norms).⁶³ And *still*, they have been instrumental in persuading national courts of either the soundness of the national theory of Community law, or at the very least, of the need of

if that would be in their argumentative interest. But once that would be the case, there would be a very obvious risk that the ineffectiveness of Community law would be restricted to a limited and reduced number of cases, but that it could increase rather rapidly. At that point a process of legal, social and economic disintegration will be in full motion, fuelled by the breakdown of the integration function of Community law. As was already argued, the Community legal order is characterised by its institutional incompleteness.

⁶³ The ECJ has not only interpreted in very wide terms the circumstances under which national courts are entitled to request preliminary judgments, thus contributing to the increase in their numbers, by acknowledging them the power to set aside national statutes when in conflict with Community norms; a power which, as has already been said, did not stem from all national constitutions, and moreover was contrary to *most* of such constitutions. See Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 (1981) *American Journal of International Law*, pp. 1-27; Giuseppe Federico Mancini, 'The Making of a Constitution for Europe', 26 (1989) *Common Market Law Review*, pp. 595-614; Joseph H. H. Weiler, 'The Transformation of Europe' 100 (1991) *Yale Law Journal*, pp. 2403-2483; Alec Stone Sweet, *The Judicial Construction of Europe*, Oxford: Oxford University Press, 2004; Luis María Díez-Picazo, *Constitucionalismo de la Unión Europea*, Madrid: Civitas, 2002.

modifying the international theory of Community law so as to render it compatible with very similar practical consequences.

B) Critical assessment

a) What it contributes to the understanding of the European legal order

§35. The national theory of Community law makes three major contributions to our understanding of the European legal order; namely, it (1) advances a legal theory which is capable of offering a plausible account of actual constitutional practice (whether or not such an account is fully satisfactory, it clearly is less baroque and unnecessarily complex than that of the international theory of Community law); (2) it highlights the normative surpluses of Community law, both as a vehicle of democratisation and of protection of the substantive values which underpin both national constitutions and the founding Treaties of the Communities; (3) it focuses our attention on the non-legal foundations of stability of legal orders.

§36. The national theory of Community law strikes the right chord when it accepts that any plausible legal theory of European integration has to account for European constitutional practice, instead of engaging into theoretical acrobatics to avoid it, a charge which I have already made against the international theory of Community law (§§24-25). In that regard, and whether or not the theory is satisfactory or not in all its details, it must be granted that it offers a theoretical framework within which it is possible to explain some of the key features of the European legal order, and in particular, the material constitutional nature of the primary law of the Union, including its founding Treaties, the transformative role played by the jurisprudence of European and national courts, and also the practice of assigning primacy to Community norms over conflicting national norms.

By transcending a purely formalistic account of the European legal order, the national theory of Community law has at its disposal the theoretical resources with which to account for the constitutional construction of Community law followed in constitutional practice.

§37. Moreover, the national theory of Community law highlights the many normative surpluses of European integration when advocating the primacy of Community over conflicting national norms. It rightly stresses that the creation of a Community legal order did contribute to overcome the structural democratic shortcomings of the “closed” legal orders of sovereign nation-states, which unavoidable led to a mismatch between the circle of those affected by legal norms and those entitled to participate in the deliberation and decision-making over the said norms; it correctly emphasises the contribution that the Community principle of non-discrimination has made to the further realisation of the right to equality enshrined in national constitutions; and it accurately points to the major transformative effects of European integration in the nature of the means of social integration across borders.

§34. Finally, the national theory of Community law contributes to focus our attention on the non-legal sources of stability of legal orders. While the only obvious institutionalised mechanism which can be regarded as its conduit is the preliminary request mechanisms enshrined in the Treaties (and shaped into something close to a mechanism of review of the European constitutionality of national norms by the ECJ), it is still the case that the progressive internalisation of an European institutional identity has played a major role in transforming European constitutional practice.

b) The major shortcomings

§38. The national theory of Community law presents two major shortcomings. First, it is premised on an implausible explanation of the transformation of Community law from an international into a constitutional order; this is so because it presupposes the existence of a judicial *coup d'état* which renders the theory too far-fetched, and encourages the search of less fantastic alternatives. Second, it oversimplifies the relationship between Community and national norms, by claiming that national legal orders have been absorbed by the emerging supranational legal order and by affirming an unsophisticated primacy of Community over national norms; this fails to capture the complex intertwining of both legal orders, and in particular the key structural and substantive role played by national constitutional traditions in the European legal order.

§39. The first major shortcoming concerns the account the national theory of Community law offers of the transformation of Community law from an international legal order to a constitutional legal order in which national constitutions would be in the process of being absorbed. While the claim that there has been a structural transformation of the European legal order (with its roots in the ratification of the founding Treaties of the Communities, in the leading “structural” rulings of the European Court of Justice, and perhaps even more so, in the progressive acceptance of the new legal order by national political and legal orders) goes a long way to account for present European constitutional practice, it fails to provide a plausible reconstruction of the transformation in normative terms. As has already been said several times, it seems well-established that Community law is constructed as if it was a constitutional order, and that Community norms are given preference over conflicting national norms, even if the latter are part of the core of the national constitution. And still, can that be because a court-led transformation of the constitution of the European legal order has taken place? Can such a radical constitutional transformation have been decided besides any democratically relevant constitution-making process?

Indeed, if the ECJ and national courts were the actual agents of constitutional transformation, then they would have usurped democratic constitution-making powers, and consequently, the primacy of European community law will be the result of a constitutional *coup d'état*. But such explanation is not only normatively implausible, but also empirically implausible. It requires accepting that national citizens and its representative institutions tolerated such a flagrant usurpation of constitution-making powers, and in the case of some Member States, at the founding period and afterwards, precisely at times at which the *radical democratic* understanding of constitution-making was still fresh the minds of a good deal of the citizens of the founding Member States, given that they had recently exercised such a power when drafting the new national constitutions which put an end in Germany, France and Italy to a rather despicable period of fascist rule. Because the solution to the genesis riddle provided by the national theory of Community law requires us to accept that there had indeed been a judicial coup-d'état (even if a short-lived and benign one for that purpose), and because there are theoretical alternatives which do not require us to accept such a counter-intuitive premise, this counts as a very good reason to discard the national theory of Community law.

§40. The second major shortcoming concerns the characterisation of the relationship between Community and national norms; in concrete, it seems to me that the national theory of Community law offers a too formalistic analysis which oversimplifies the terms of the relationship. And this for the following two reasons.

First, the “one legal order thesis” oversimplifies the complexity of the process of European legal integration. The claim that national constitutional orders have been “absorbed” into the European constitutional order does not take sufficiently into account the extent to which the European legal order depends substantively and structurally on national constitutional orders, both in structural and substantive terms. Institutionally speaking, this is very clear when one considers the actual members of the European Council of Ministers in all its three formations (the Council proper, the COREPER where permanent representatives sit, and the working groups).⁶⁴ While the Council remains the key legislative actor in the Union, membership into the Council is gained after a purely national act of appointment; and even if members of the COREPER and of the working groups are partially socialised into being Europeans, their institutional identity remains essentially national. And indeed, while one may say that the Council acts according to a mixture of intergovernmental and supranational dynamics, pretty much the same can be said of the institutions (the Commission and the European Parliament; perhaps even of the Court of Justice) which are usually regarded as essentially supranational.⁶⁵ Substantively speaking, the “primacy of Community law” thesis fails to reflect the key fact that the constitutional principles of Community law are not self-standing ones, but result from the very process of integration of national constitutions. As the European Court of Justice has indeed asserted, the deep and fundamental layers of the constitutional law of the Communities are the constitutional traditions *common* to the Member States.⁶⁶ The Treaties are thus a partial positivisation of the said common constitutional traditions, and an elucidation of what they entail in

⁶⁴ Cf. Fiona Hayes Renshaw and Hellen Wallace, ‘Executive power in the European Union: the functions and limits of the Council of Ministers’, 2 (1995) *Journal of European Public Policy*, pp. 559–82; and *The Council of Ministers*, Basingtoke: Palgrave, 2006.

⁶⁵ George Tsebelis and Geoffrey Garrett, ‘The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union’, 55 (2001) *International Organization*, pp 357–390.

⁶⁶ *Internationale*, *supra*, fn 24.

a context of supranational integration (more on §66). As a consequence, any sound explanation of the genesis riddle has to account for the double role played by national constitutional norms in the European legal order: as national norms and as part of the supranational collective of constitutional norms. If this is so, then the conflict between Community and national norms is indeed a more complex one than it seems, because the vertical conflict hides a horizontal one (between national constitutional norms). But when the true nature of the conflict is revealed, it becomes clear that it cannot be solved by simply pointing to the supremacy of Community constitutional norms; what is actually required is to determine how the actual content of Community constitutional law is to be ascertained.

Second, it fails to in providing a sound normative basis to the claim that Community norms should prevail over national constitutional norms. First, the very idea of a hierarchical ranking between two legal orders becomes hard to understand in logical terms, if the 'lower' legal order actually defines the contents of the 'higher' legal order (as has just been claimed on the basis of the substantive identity of national and Community constitutional norms). Second, the national theory of Community law fails to support in normative terms the primacy of Community law. If hierarchical primacy is closely associated in democratic legal orders to the degree of democratic legitimacy of the procedure through which a norm has been deliberated and decided upon, it is not obvious that a regulation or a directive should prevail over national constitutional norms. While this is so in general terms, it becomes painfully clear once we consider the actual substance of the Community norms which are made to prevail over national ones. As it has been observed, the European constitutional setup fosters a structural bias in favour of "market-making" norms which expand the breadth and scope of market forces within the Union to the expense of "market-redressing" norms, essential to ensure the proper functioning of the socio-economic order enshrined in all national constitutions. Under such circumstances, the fact that the primacy of Community law is grounded exclusively on structural arguments (indeed all the three just referred in §33 are highly abstract: the effectiveness of Community law, the eventual democratising potential of establishing common institutional structures and decision-making processes, the underlying expansion of the right to equality, in itself the most formal of all rights) hides in ordinary cases the substantive, distributive consequences of the national theory of Community law, which tends to undermine the very concrete and

substantive collective interests enshrined in the national norms which are left aside. And when the national interests affected are very sensitive in political terms, the conflict is not framed as one about the proper principles of the European socio-economic order, but one about the structural relationships between national and Community law.

II. MACCORMICK'S PLURALIST LEGAL THEORY OF COMMUNITY LAW

A) The defence of a pluralist theory of European constitutional law

§41. MacCormick's pluralist theory of Community law claims that the European legal order is rightly constructed both as an international legal order and as a constitutional legal order. He further sustains that the international and the national theory of Community law are both wrong in claiming that only one of the theoretical standpoints can be right.⁶⁷ Given that European constitutional practice is at pluralist (as at the very least the practices reflected in the case law of the on the one hand the European Court of Justice and on the other hand national constitutional courts correspond to two different, sometimes conflicting, social practices), any plausible legal theory of the European Union should account for that fact instead of obscuring it.⁶⁸ In the view of the Scottish philosopher, this is required not only by the very *practical aspirations* of legal theory, of being capable of offering normative guidance to practice (an aspiration which necessarily remains unfulfilled if the theory gets disconnected from the practice), but also by the observation that the pluralistic character of European social practice underlies the normative surpluses of Community law described by the national theory of Community law. European constitutional pluralism has not only proven compatible with the discharge of the integrative social tasks entrusted to law in Europe, but is the

⁶⁷ MacCormick, *Beyond the Sovereign State*, 52 (1993) *Modern Law Review*, 1-18, p. 5: "One thing which is necessary for jurisprudence of the philosophy of law to do in the present state of affairs is to guard against taking a narrow one-state or Community-only perspective, a monocular view of these things"

⁶⁸ *Ibid*, p. 6: "Instead of committing oneself to a monocular vision dictated by sovereignty theory, one can embrace the possibility of acknowledging differences of perspective, differences of point of view"

fundamental reason why the European legal order has proven to be capable of guaranteeing conflict-solving and coordination of actions in view of achieving collective goals in Europe.⁶⁹

§42. The pluralist reading of Community law is an application of MacCormick's legal theory to European integration. In particular, two key insights of his legal theory naturally lead to a pluralist understanding of the European Union; namely (1) the shift of its theoretical focus from objective legal systems to the regulative ideal of social system embedded in social legal practices; and (2) the argumentative character of actual legal practices.

§43. First, MacCormick's institutional theory of law shifts focus from legal systems as pre-given normative realities to the social practices through which legal norms are created and applied. This does not only highlight the relevance of the point of view *internal* to the legal order, but also underlies the relevance of actual social practices, which do not only create or apply the law, but in the process of doing so project the regulative ideal of legal system to congeries of norms decided under different political, economic and social circumstances.⁷⁰ This opens the way for a pluralist understanding of Community law by means of not only undermining the alleged obviousness of the "objective existence" of the national legal order and/or the Community legal order as legal systems, but also clarifying that the constructive character of law renders logically possible, if not empirically necessary, that the reconstruction of legal norms as a system would proceed according to overlapping but differentiated social legal practices.

Indeed, MacCormick's institutional theory of law seems to combine the key insights of both the Kelsenian and the Hartian theories of law. On the one hand, the Kelsenian *groundnorm* points to the unavoidable normative

⁶⁹ Ibid, p. 17: "Can we think of a world in which our normative existence and our practical life are anchored in, or related to, a variety of institutional systems, each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of which, for must purposes, can operate without serious mutual conflict in areas of overlap?"

⁷⁰ Joxérramón Bengoetxea, 'Legal System as a Regulative Ideal', 53 (1994) ARSP, pp. 66-80.

and constructed character of social legal practices; it rightly reveals the need of assuming an *hypothetical grundnorm* to get access to the normative dimension of human action.⁷¹ But on the other hand, the Hartian rule of recognition reveals the extent to which law is indeed a social and collective practice. MacCormick brings the Hartian intuition further than Hart himself by claiming that the ultimately relevant social practice for any sound legal theory is that of the addressees of the legal norms.⁷²

This combination of theoretical insights has obvious pluralist implications. If there is no objective national or Community legal system, but only social practices through which the congeries of European norms are reduced to a system, then whether there can be overlapping but differentiated social practices is an empirical, not a logical question. And if such a plurality of legal practices co-exist, which should be adopted to reconstruct the law is a practical, not a logical question. The international and national theories of Community law are thus wrong to regard as pathological the co-existence of different “internal” points of view to Community law, of different accounts of the validity basis of legal norms, of the chain of validity of each legal norm, and consequently, of the way in which normative conflicts should be sorted out.

While legal theory has paid some attention to the dramatic consequences of contradictory social legal practices during crisis times (revolutions, enemy occupation or unsettled wars of independence),⁷³

⁷¹ Herbert L A Hart, *The Concept of Law*, Oxford: Clarendon Press, 1961, p. 116: “If [the rule of recognition] is to exist at all, must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something which each judges merely obeys for his part only. Individual courts of the system though they may, on occasion, deviate from these rules must, in general, be critically concerned with such deviations as lapses from standards, which are essentially common or public. This is not merely a matter of the efficiency of health of the legal system, but is logically a necessary condition for our ability to speak of the existence of a single legal system. If only some judges acted ‘for their part only’ on the footing that what the Queen in Parliament enacts is law, and made no criticisms of those who did not respect the rule of recognition, the characteristic unity and continuity of the legal system would have disappeared”.

⁷² MacCormick, *Institutions of Law*, Oxford: Oxford University Press, 2007, pp. 57 and 238. This is closely associated to the central claim made by MacCormick that law is one of the many normative orders of society, and that state law is one of the many institutionalised normative orders in a given society.

⁷³ See Hart, *supra*, fn 71, pp. 119-23. The fact that the British philosopher labelled such situations as “pathological” may reveal that while his legal theory was pluralist friendly, his political theory may not have been so. Indeed Hart seems to have shared with Kelsen the belief that only a monistic legal order could properly ensure social integration trusted to it.

where MacCormick breaks new ground by offering a pluralist reading of Community law is in claiming that it can be a feature of stable and indeed prosperous modern legal orders, as the European legal order is.⁷⁴

§44. The abovementioned conclusion is further supported by MacCormick's analysis of the structure of actual social legal practices, and in particular, by the pluralist implications of the argumentative nature of modern law. The institutional theory of law put forward by the Scottish philosopher affirms that the discharge of the integrative social tasks by the legal order depends on the normative properties and capacities of the two key components of modern legal orders, namely, rules and principles. On the one hand, the specific and unconditional character of rules renders possible the steering of modern societies through law, as it provides authoritative, non-contradictory and explicit normative guidance in the vast majority of occasions in which that is needed to prevent or solve conflicts, and to coordinate action in view of achieving collective goals. Rules render possible mechanic compliance with the law through the internalisation of the said rules. On the other hand, principles render possible to combine the prospective regulation of social relationships with the tailoring of the normative solution to specific factual circumstances when those are not fully foreseeable or simply inexistent at the time the legal norm is drafted.⁷⁵ This has the rather obvious structural implication that the application of principles to specific circumstances, or the resolution of conflicts among concurring and conflicting principles,

This accounts for the implicit "creeping" in Hart's theory of a series of assumptions concerning a common "cultural" code shared by judges, which plays a key role both in ensuring that one and the same rule of recognition underlies the practice of all judges, and in framing their discretion in hard cases. On "cultural" codes and judicial application of law, see Kaarlo Tuori, 'Fundamental Rights Principles: Disciplining the Instrumentality of Policies', in Agustín José Menéndez and Erik Oddvar Eriksen (eds.), *Arguing Fundamental Rights*, Dordrecht: Springer, 2006, pp. 33-52. What is probably lurking there is the "elitist" drive of which not even committed Labourites such as Hart were fully conscious at the time. See Massimo La Torre, 'The Hierarchical Model and H. L. A. Hart's Concept of Law', 93 (2007) *ARSP*, pp. 81-100.

⁷⁴ The stability of this permanent pluralism calls for an explanation, and to this we will turn when considering how pluralist theories solve the "stability" riddle.

⁷⁵ Moreover, principles also make it possible to combine the authoritative collective regulation of social relations with the division of labour between social institutions to avoid overtaxing the capacities of any of them. In particular, they render possible splitting the production of collective action norms between legislative and regulatory decision-making processes.

presupposes the ascertainment of derivative rules which specify the normative solution in the relevant case, to be decided through proper legal argumentation. The constant need of drawing derivative rules from principles makes of legal argumentation a key part of legal social practice, and opens up, even if in constrained and marginal ways, social practice to general practical argumentation.

But if it is a central feature of social legal practices to be argumentative, and if that is perhaps even more so of European social practices, given the complex interactions between legal norms resulting from the co-existence of overlapping institutional structures and decision-making processes, then there are even more reasons to conclude that there may be a plurality of overlapping European social practices underpinned by different conceptions of what European law is, and of how the congeries of European legal norms should be reconstructed.

1. The components of the pluralist theory of Community law

§45. The pluralist theory is composed of three main elements: the two standpoints thesis, which splits the genesis riddle in as many pieces as relevant standpoints from which to reconstruct the legal order; the differentiated and equal standpoints thesis, according to which all that standpoints have an equal claim to sustain valid reconstructions of European law, which dissolves the primacy riddle by means of considering that what matters is *from which perspective* and *for which purpose* we reconstruct the legal order; and the *argument from coherence and non-legal stabilisation*, which claims that the stability of a legal order is critically dependent on *political means of integration* and in “soft” *legal means*, such as the argumentative “discipline” stemming from the inter-systemic version of the argument from coherence.

A) The plurality of standpoints thesis and the genesis riddle

§46. MacCormick’s pluralist theory claims that the genesis riddle once we accept that there are (at least) two standpoints from which to consider the European legal order. In the same pluralist spirit, we will conclude that there is not one single genesis riddle, but that we can consider the present European constitutional practice from *both* the standpoint of national constitutional law and international public law.

If we activate our identity as national citizens, it is clear that the only plausible narrative of the constitution of the present European Union is one that ends up in the national acts of ratification of the key European Treaties, which highlights the need of ensuring that supranational integration does not undermine the core constitutional values of our national fundamental law.

On the contrary, if we give preference to our identity as European citizens, then we will tend to stress the degree to which European integration creates the structural and substantive conditions under which the very principles which underlie national constitutions can be realised, and consequently will find no insurmountable difficulty to interpret the transformative judgments of the European Court of Justice, and their endorsement in political and legal practice as indications that the combined effect of the founding Treaties and the said leading rulings has transformed what was an international into a constitutional legal order.

B) The differentiated but equal standpoints and the primacy riddle

§47. The pluralist theory of Community law claims that there are twenty eight differentiated but equal standpoints from which to reconstruct European law. These twenty eight viewpoints correspond to each of the twenty seven perspectives internal to the constitutional orders of the Member States and to the one internal to Community law. Thus, the primacy riddle should be reformulated in contextual terms, that is, not as concerned with the question of which is the correct way to reconstruct conflicts between national and Community norms *in absolute terms*, but as the ascertainment of the correct theory of the relationships between national and Community norms from the point of view in which we happen to place ourselves.⁷⁶ The differentiated but equal standpoints thesis is defended on two grounds. First, the sociological findings that there is not only a plurality of social legal practices of European law (supported both by citizens and by institutional actors) but also that this overlapping of social practices has not undermined (and even may have fostered) the

⁷⁶ MacCormick, 'Juridical Pluralism and the Risk of Constitutional Conflict', now in *supra*, fn 4, p. 119: "A pluralistic analysis in either of these senses shows the systems of law operative on the European level to be distinct and partially independent of each other, though also partially overlapping and interacting"

social integrative capacities of Community law. Second, it rids the legal theory of European law of a residual attachment to a prescriptivist understanding of law, by shifting the reference point from the command of the sovereign to the way in which law is actually practised in society.

§48. The pluralist theory of Community law finds support for its differentiated but equal standpoints in two sociological findings.

The first one is that there is an actual plurality of European social legal practices. As the exposition of the international and the national theories of Community law abundantly illustrate, it seems well-established that the understanding of European law of on the one hand national constitutional courts and on the other hand the European Court of Justice is far from being the same. How legal arguments about normative conflicts should be formed is not answered in the same way in Karlsruhe or Rome than in Luxembourg. To this it must be added that this differentiated institutional practices reflect wider social practices. While most citizens may tend to share the practice of their national constitutional court, having been educated and socialised in a political system which accepted (and in many cases promoted) national constitutions as the supreme law of the land, some of them may share and even act on the basis of the practice followed by the European Court of Justice, either due to the acceptance of an “existential” European political identity (a phenomenon related to the increasing numbers of citizens which spend a part of their lives in another Member State, or which acquire strong personal links with other Member States) or, perhaps more frequently, to the fact that European law promotes to a larger extent the material interests of the citizens involved.

The second sociological finding is that the co-existence of overlapping social legal practices across and within the borders of a Member State does not undermine the capacity of law to solve conflicts and coordinate actions. This clearly indicates that the preconditions for reconciling legal pluralism with the effectiveness of law are met, at the very least for the time being, in Europe.

§49. The pluralist theory further claims that the differentiated but equal standpoints thesis is normatively superior to either the two legal orders or the one legal orders theses because only the former puts forward a theoretical framework to reconstruct Community law free of any implicit endorsement of a prescriptivist theory of law (which we could label as the

“beyond sovereignty” thesis. By denying any role to the “sovereign”, the pluralist theory shifts theoretical and practical focus from institutional actors to citizens, and thus contributes to “democratise” both the theory and the practice of European law.

The core of the conflict between international and national conceptions of Community law may be reconstructed as a dispute concerning *who* the sovereign is, *where* the sovereign power lays, and more specifically, *who* has the *last word* in solving European constitutional conflicts. This entails that both theories accept the soundness of a command theory of law, which reduces laws to a series of commands stemming from a concrete and single sovereign. Otherwise, both theories would not be so obsessed with determining where final sovereignty in Europe lays.

However, such a conception of law is deeply flawed because it fails to reflect the collective character of legal social practices. Not only modern law as a means of social integration is composed of norms with multiple authors, including non-state authors, but it is also the case that *the legal practice* depends not only on the will of law-makers but ultimately on the *habits of law compliance* of public officials, judges and citizens.⁷⁷

C) The argument from coherence and the stability riddle

§50. The pluralist theory of European law shares with the national theory of Community law the emphasis it places on the non-legal sources of the stability of the legal and political orders. By revealing the existence of a plurality of overlapping social legal practices in Europe, MacCormick does not only call our attention to the key role played by socialisation, political

⁷⁷ In ‘The Benthamite Constitution’, now in *Questioning Sovereignty*, *supra*, fn 4, MacCormick undertakes a very revealing historical research to show that the upholding of “monism” and the rejection of “pluralism” are but the hidden inheritance of “old” natural law theories to “modern” positivism. “Old” natural law theories affirmed that natural law was indeed authored by God. “Modern” positivist theories keep on holding pretty much the same, only they have “secularised” god by means of replacing it by a “secular” character, i.e. the sovereign, or what is the same, the holder of raw power. This implies a full continuity in the assumption that a key feature of law is authorship by a concrete individual will (thus the central role played by God, and now played by the sovereign), reflected in the tendency to reduce laws to “commands”, and consequently, to characterise law as a tool to constrain and limit action, neglects the “constitutive” aspects of law. Similarly, this hidden heritage renders us blind to the close connection between law and practical reason, and consequently, to the necessarily collective authorship of any modern law.

deliberation and negotiation, and arbitration of disputes through quasi-legal or non-legal procedures in ensuring that pluralism is compatible with the discharge of the social integrative task of law, but also emphasises the limits of law as a means of social integration. Similarly, by highlighting the importance of the argumentative coherence in reconciling the plurality of institutional structures and social practices with the capacity of law to serve as a normative guide of action, the Scottish philosopher highlights the epistemological role played by law, which tends to be underplayed if not obscured by the obsession with the coercive character of legal norms.

§51. The pluralist theory of law stresses the limits of law as a means of social integration by showing that it can be underpinned by a plurality of social practices, which in well-functioning social and political orders would overlap on the normative solution they propose for the vast majority of cases, but which may differ in marginal cases, thus creating the need for an alternative social means of establishing which should be the authoritative action norm in the case at hand. This is why pluralist theories of European law tend to consider the integrative role to be played by political deliberation and bargaining, as a process of practical reasoning and decision-making not burdened by the authoritative component of legal reasoning.⁷⁸ In that regard, resort to arbitration of conflicts presents itself as a hybrid solution, placed half way between authoritative legal argumentation and open political argumentation.⁷⁹

§52. Pluralist theories of Community law also share with national theories the emphasis they make on the contribution that law can make to social integration through the providence of normative knowledge. If for the said national theories the preliminary request contributed to entrench the primacy of Community law because it contributed to spread a single view

⁷⁸ MacCormick, *supra*, fn 4, pp. 119-21, especially at p. 119: "Resolving those problems, or, more wisely still, avoiding their occurrence in the first place, is a matter for circumspection and for political as much as legal judgement".

⁷⁹ The proposals to create specific, ad hoc bodies in charge of arbitrating European constitutional conflicts present clear pluralistic undertones. See for example Cristoph Schmid, 'From Pont d'Avignon to Ponte Vecchio. The Resolution of Constitutional Conflicts between the European Union and the Member States through Principles of Public International Law' 18 (1998) *Yearbook of European Law* pp. 415-476 and 'The neglected conciliation approach to the "final arbiter" conflict', 36 (1999) *Common Market Law Review*, pp. 509-14.

on how European law should be constructed and applied, the pluralists emphasise the key role played by legal argumentation, and in concrete by the argument from coherence, in ensuring that the co-existence of a plurality of social legal practices does not undermine the capacity of European law to act as an authoritative normative guide. In particular, the argument from coherence is said to imply in the European context both (1) the substantive Europeanisability of any decision, or what is the same, its soundness from the twenty eight standpoints from which European law can be reconstructed, and at the very least, its *prima facie* soundness from both the national and the European standpoint; (2) the “structural” Europeanisability of each decision, of what is the same, its being compatible with a pluralist conception of Community law which does not undermine the social integrative capacities of European law.⁸⁰

Indeed, the argument from coherence, when applied to the construction of the relationships between Community and national norms, forces institutional actors and citizens to assume *at the same time* their identity as national *and* Community actors, and consequently, to reconcile plurality with normative unity in the actual discharge of their legal tasks.

2. Critical assessment

A) What it contributes

§53. The pluralist theory of European law is very attractive for three reasons. First, it is capable of accounting for European constitutional practice to a larger extent than the national or the international theories of Community law. Second, it rightly claims that the plural foundation of the European legal order has a legal-dogmatic basis, and in particular, in the fact that no institution has been acknowledged the power to settle European constitutional conflicts in an authoritative and final manner. Finally, it offers a deeper account of the role of non-legal institutions and of “non-positive” criteria of legal argumentation in ensuring the stability of the European legal order.

⁸⁰ On contrapunctual theories of European law, see Weiler, *supra*, fn 63; Miguel Poiars Maduro, ‘Contrapunctual Law’ in Neil Walker (ed.), *Sovereignty in Transition*, Oxford: Hart Publishers, 2003, 501-37; Komárek, *supra*, fn 14.

§54. As was already indicated, it is a major strong point of pluralistic theories of European constitutional law that they can account for the fact that European legal practice is characterised by the existence of competing conceptions on how European law should be reconstructed. Pluralist theories of Community law rightly point that European constitutional conflicts are sorted out differently in The Hague, Warsaw or Luxembourg. But perhaps even more importantly, they show that such overlapping of European constitutional practices is not only pathological, but is indeed characteristic of modern legal systems. By shifting the theoretical focus from allegedly “objectively” existing legal norms and legal systems to the very practices through which law is established and constructed, pluralist theories can explain why there is nothing characteristic in the co-existence of several constitutional practices around European law. And indeed their reconstruction of Community law can be seen as the blueprint on the basis of which the legal analysis of national legal order should be conducted.

§55. Moreover, pluralist theories of law rightly stress that the co-existence of social practices of European law has an institutional basis. Neither national nor Community law grants explicit authority to any institution to settle once and for all the conflicts between legal norms produced through Community and national law-making processes. Indeed, the competing claims of national constitutional courts and of the European Court of Justice to have such a power are all based on derivative legal arguments, and as such, are open to be questioned as part of the theory of Community law subscribed by each institution.

§56. Finally, the pluralist theory adds new insides to the contributions made by the international theory of Community law on what concerns the stability of the European legal order. The pluralistic theory of Union law problematises the capacity of a “monistic” legal system to serve as a means of social integration in a complex political community such as the European Union is, at the same time that it prompts us to take seriously the role played by politics and by legal argumentation (and specifically, the argument from coherence) in the discharge of the tasks of conflict solving and coordination in the European Union.

B) Shortcomings

§57. Despite its major contributions, it seems to me that the pluralist theory fails on two accounts. First, its pungent description of the pluralistic character of European constitutional practice is unassailable as a finding made from an external standpoint to the European legal order. As such, it fails to offer guidance when it comes the time to solve European constitutional conflicts from an internal standpoint. Second, it fails to capture key aspects of the complex nature of the European legal order, and in particular, the deep intertwinement of European and national constitutional norms. The illuminating metaphor of the plurality of standpoints somehow obscures the fact that such standing points offer a view over much the same set of norms, a good number of which play a double role as Community and national norms. Third, the highly sophisticated account of the non-legal and non-positive sources of stability of the European legal order does not still explain why the European legal order was capable of growing and expanding even during tumultuous times; and perhaps even more decisively, it fails to consider whether the stabilising mechanisms of the European legal order would suffice in case that voluntary compliance on the side of national institutional actors would break down.

§58. The first major problem with the pluralist theory of Community law is that it fails to offer argumentative guidance in hard cases. While it provides an insightful account of European legal practice, it does so from a perspective external to both national and Community constitutional practices. This indeed allows pluralist to be their characteristic ecumenical selves, but only at the price of failing to provide a concrete theory of legal adjudication of European cases.

Nobody who adopts an internal standpoint to European law can simultaneously accept the soundness of both the national and the Community constitutional practices. At least not in those cases in which different practical consequences stem from the choice of one standpoint over the other (or what is the same, in those cases in which the two constitutional practices lead to conflicting normative conclusions). Indeed, the generalised adoption of such an ecumenical standpoint would undermine the integrative capacities of the law, i.e. to complement morality so as to solve conflicts and coordinate action by means of

determining in a certain manner what the common action norms are.⁸¹ Were law to share the inconclusive character of morality, it will not add certainty to our practical knowledge. This will undermine the key role played by law in ensuring autonomy (nobody can be autonomous if one is asked to observe both a norm and its opposite)⁸² and the *motivational force* of law (what should after all citizens obey? And when could they be criticised on account of lack of compliance?). Indeed, legal argumentation simply breaks down if we assume that one and the same case can have *different*, eventually *contradictory* solutions. One thing is that as a matter of fact they do, and that we observe that they do, and another thing is that we try to make that fact part of the train of *legal reasoning* aimed at deciding the relevant cases. The latter simply cannot be, as we cannot but raise a claim to correctness when we make a legal argument (which necessarily excludes that a contradictory argument could be correct at the same time). But if we accept contradictory solutions as valid legal solutions, we should abandon any pretence to raise a claim to correctness when arguing in law, and will also undermine the core principle implicit in the very form of modern law as a special case of general practical reasoning, i.e. equality.

Indeed, the insufficient conclusiveness of the guidance legal pluralism provides to legal argumentation seems to be the main reason why Neil

81 MacCormick, 'The Concept of Law and the Concept of Law', 14 (1994) *Oxford Journal of Legal Studies*, pp. 1-23, at p. 6. Whether we hold a non-cognitivist or a cognitivist approach to morality, we will regard law as a necessary complement of moral reasoning in the integration of modern societies. The cognitivist will consider law necessary because even if there are objectively, or at the very least intersubjectively valid moral principles, they are unfit to serve as common action norms in modern societies. As already observed, there may be a correct moral answer to each moral problem, but the limited moral faculties of human beings leave us uncertain concerning their actual content. Morality tends to be expressed in the language of principles (first and foremost, the principle of universalisability), while modern conditions call for integration through concrete rules attuned to concrete ethical and prudential questions. Furthermore, moral norms are fragile tools of social integration, given the fact that the inclination to comply with moral requirements may be undermined in absence of the insurance provided by institutions ready to coercively enforce common action norms, or, whether due to disagreement, weakness of will, or simply ignorance, substituted or replaced as a spring of action by the fear of being at the receiving end of the sanctioning power. The role of law as a means of social integration is even further stressed from a non-cognitivist standpoint, given the inexistence of objectively or even intersubjectively valid moral principles. Under such a perspective, law is not so much a complement of morality, but the key medium which holds together a society.

⁸² Jürgen Habermas, *Between Facts and Norms*, Cambridge, Massachusetts: The MIT Press, pp. 118ff; Robert Alexy, 'Discourse Theory and Human Rights', 9 (1996) *Ratio Juris*, pp. 209-35.

MacCormick has reconsidered his doctrine of European legal pluralism, and has clarified that his is a “moderate pluralism” under “international law”.⁸³ Or what is the same, that the two separated but equal standpoints are indeed sections of a more encompassing standpoint, that internal to public international law. This indeed can be seen but as the theoretical development of the basic intuition behind the calls to arbitrate European constitutional conflicts (to which I have already referred in §52).

Still, such a solution does not seem to me very persuasive. First, European constitutional conflicts may be marginal given the institutional and substantive convergence among national legal orders, but when they occur are bound to concern sensitive issues. In such cases, authoritative and effective adjudication is closely dependent on the legitimacy of the body of law which is said to govern the solution and of the actual institution taking the decision. But if the stakes are so high as to put into question that European institutions and European law-making processes can be legitimate enough, can we hope that a decision taken by an institution external to the Union and the Member States, or on the basis of a body of law external to both Community and national constitutional law, be easily accepted? The institutional weakness, legitimacy shortcomings and substantive incompleteness of international law make me conclude otherwise. Although pluralism under international law seems to reconcile the plurality of social constitutional practices with the conclusive character of legal argumentation, it does so only in abstract terms; it is unlikely to actually help us overcome the impasse where legal pluralism leaves us. But second, where it to actually work, it would result in the progressive

⁸³ “Juridical pluralism and the risk of constitutional conflict’, in *supra*, fn 4, p. 102: “This interlocking legal systems, with mutual recognition of each other’s validity, but with different grounds for that recognition, poses a profound challenge to our understanding of law and legal system. The resources of theory need to be enhanced to help deal with a challenge full of profound and potentially dangerous implications for the successful continuation of European integration. We come to the frontiers of the problem of legal pluralism, and have to reflect on solutions to the difficulties for practice implicit in the very idea of pluralism” and pp. 116-7: “Perhaps most credibly of all, it might be held that in a coordinate way, international law functions as a common ground of validity both of member-state systems and of Community law, neither being therefore a sub-system of the other, but both cohering within a common legal universe governed by the norms of international law. Since this position involves pluralistic relationships between the law of the Community and the member-states (and among the states *per se*), albeit within a ‘monistic’ framework of international law, I shall in subsequent discussion refer to this position as that of ‘pluralism under international law’.

fleshing out of the substantive implications of public international law, and consequently, will reduce the degree of “pluralism” in the relationships between national and Community law. Indeed, it is most likely that the primacy of public international law cannot but require, within the European Union, the primacy of Community law over national law.

§59. The second major shortcoming of the pluralist theory of Community law is that it fails to capture the complex nature of the relationship between Community and national institutions and decision-making process. The assumption that there are (at least) two differentiated but equal standpoints from which to reconstruct Community law results in the insufficient consideration of the intertwinement of the two legal orders. In particular, it fails to consider in depth the bridging role played by national constitutions, which individually considered are the higher law of the land from the national perspective, and collectively considered are the higher law of the land from the Community perspective. The complex constitutional role played by national fundamental laws, and the nuances which derive from the fact that they play it individually at the national level and collectively at the European one simply are missing in the pluralist account of Community law. Similarly, the double nature of directives as Community norms and as national norms through their transposition, very especially when it is effected by national parliaments, implies a degree of interconnection between the two legal orders which is simply unexplored when one claims that there are two differentiated but equal orders.

§60. A third major shortcoming concerns the insufficiency of the stabilising mechanisms sorted out by the pluralist theory. As I have already claimed (§56), it seems to me that the pluralist theory rightly points both to the limits of law as a means of social integration and to the integrative effects that the inter-systemic argument of coherence can have.⁸⁴

However, the pluralist theory may be fairly said to point to the stabilising resources of the European legal order assuming a rather tranquil and pacific political, economic and international setting; and assuming that internal political developments within the Union and the Member States

⁸⁴ But such insights can quite obviously be incorporated to any legal theory of Community law, and indeed even to one that assumes that there are good normative reasons to construct Community law along monist lines.

do not put into question the process of socialisation of institutional actors and citizens in their respective European roles and identities. But that is, if I am allowed to play with words, a theory of stability in stable times and circumstances. On the contrary, pluralist theories of Community law do not offer any explanation whatsoever of how the stability of the legal order can be preserved, and eventually re-established, if the social, economic or political environment. Whatever the criticisms that can be addressed to the national theory of Community law on account of its claim that Community law cannot be effective in the if it is not granted unconditional supremacy over conflicting national law,⁸⁵ this thesis contains at the very a grain of truth. It rightly points to the institutional incompleteness of the European Union, to the lack of coercive and material resources at the disposal of the supranational institutions in charge of ensuring compliance with Community law as a serious challenge to the stability of the European legal and political order. Indeed, if European constitutional conflicts were to grow significantly, we would sooner rather than later reach a point at which the motivational force of European law will be in danger. What resources could be mobilised by the institutions of a pluralistically conceived European legal order to countervail this effect? If socio-economic conflicts were to spread on the validity of certain European norms, the risk of disintegration will stop being purely hypothetical and became a tangible threat. Without entering into speculative reflections, it is not fully unreasonable to claim that the sequential rejection of the Constitutional Treaty and the Treaty of Lisbon in three national referenda will not reduce the probability of constitutional conflicts in which national actors will strong reasons to leave aside Community law.⁸⁶

⁸⁵ Quite obviously, the unconditional supremacy of a legal system is a non-starter in empirical terms. Moreover, all laws are occasionally ineffective, or are only honoured in their breach, and as long as this remains a marginal phenomenon, the integrative capacity of the said legal norms is clearly not endangered.

⁸⁶ It is not impossible to imagine that the services directive, the so-called Bolkestein directive, would have silently entered into force was not for the (healthy) politicisation stemming from the debate in France on the Constitutional Treaty. But had it entered into force as it was originally proposed by the Commission, it would very probably would have resulted in social conflict once its effects on labour conditions and level of employment started to be felt. If conflict would have translated into properly organised pressures over national institutions, it is not unconceivable that such conflict would have been legally translated into the pretence to make exceptions to Community economic freedoms in the very name of safeguarding national constitutional principles. If that pretence would be

It also seems to me that pluralist theories overestimate both the integrative capacities of non-legal institutions and the problem-solving capacities of the argument from inter-systemic coherence. On the one hand, the reason why so many social conflicts end up being translated into legal conflicts of a constitutional character is the very incapacity of political deliberation and negotiation to settle the underlying problems. On the other hand, the argument from inter-systemic coherence provides a structural framework within which to solve constitutional conflicts; however, European constitutional conflicts do not generally stem from an insufficient will to reach a Europeanisable decision in either substantive or structural terms, but from the fact that the normative content which should be regarded as binding and authoritative to legal orders adopting either the national or the Community standpoint is openly contradictory.

IV. AN ALTERNATIVE ACCOUNT OF THE PLURALIST NATURE OF COMMUNITY LAW: EUROPEAN CONSTITUTIONAL SYNTHESIS

§61. The theory of constitutional synthesis claims that Community law is the result of a process of constitutional synthesis, of an “ever closer” putting in common of national constitutional norms ; and that the peculiar nature of this process, when compared to both “revolutionary” and “evolutionary” constitution-making, provides us the theoretical key with the help of which we can solve the three main riddles of the theory of the European legal order.

It is important to stress that the theory of constitutional synthesis is put forward as a *reconstructive*, not a *descriptive*, theory. Or what is the same. I do not claim that the drafters of the Treaties were consciously aiming at a process of constitutional synthesis; but that that is the best possible *reconstruction* of what they were actually doing. I claim that it is the best because it makes sense of the whole set of European legal norms in a way which increases the realisation of the fundamental constitutional principles which are said to underlie national constitutions. In Dworkinian terms, it

reiterated in other conflicts, then it is not too adventurous to claim that the integrating capacities of European law would simply collapse.

imposes purpose on European constitutional practice so as to present it under its best light.⁸⁷

§62. The theory of European constitutional synthesis claims that European integration has resulted in the establishment of a new supranational legal order (Community law) which serves as the framework of the progressive and partial synthesis of national constitutions (which we could label as the “one legal order in the making thesis”).

This entails first and foremost that the material constitution of the new legal order is defined by the common constitutional norms of the Member States, and not by a purposeful explicit act of constitution-making (as in “revolutionary” constitution-making) or by constitutional mutation (as in “evolutionary” constitution-making).

Second, constitutional synthesis is grounded on the national constitutional provisions which do not only authorise, but also mandate the active participation of national institutions in the creation of a supranational legal order as the only way to fully realise the principles which underlie the national constitution. Thus, the “opening” clauses of postwar constitutions, and the explicitly European clauses of the more recent ones are constructed as reflecting the self-awareness of the national constitution about the limits of realising constitutional values in one single nation-state.

Third, constitutional synthesis claims that there is a substantive identity between national constitutional norms and Community constitutional norms. Or what is the same, European integration presupposes the creation of a new legal order, but not the creation of a new set of constitutional norms; a key source of the legitimacy of the new legal order is indeed the transfer of national constitutional norms to the new legal order. However, the process necessarily has major constitutional implications for each Member State. For one, the accession of a state to the European Union marks a new constitutional beginning for that State. Contrary to what is the case in most constitutional transformations, constitutional change is not mainly about the substantive content of the fundamental law, but concerns the scope of the polity (there is an implicit redefinition of who we acknowledge as co-citizens of our political community) and the very nature of the new polity (as it actually aims at

⁸⁷ Ronald Dworkin, *Law's Empire*, London: Fontana, 1986, pp. 52ff.

refounding both the national and the international legal orders by means of transforming sovereign nation-states in parts of a cosmopolitan federal order). For two, the very essence of the process of constitutional synthesis is that of the progressive ascertainment of common constitutional standards which may eventually result in marginal changes in national constitutional norms *to align them* with the contents of Community constitutional law, in turn reflective of what is actually *common* to the Member States. In that regard, is to be noticed that Community constitutional law is not defined by reference to individual sets of constitutional norms, but to what is common to all national constitutional norms. In those cases in which national constitutional norms point to different normative solutions, synthesis is not achieved by finding a common minimum denominator, but by means of considering which of the national constitutional norms is more congenial to Community law. This is to be decided by considering the underlying arguments in favour or against the competing national constitutional solutions, and in particular, by considering the extent to which the national norm can be “Europeanised”, both in the sense of fitting with European constitutional law as it stands (as already synthesised in the Treaties, the amendments to the Treaties or the legislation and case law of the Union) and with its consequences being acceptable in the Union as a whole.⁸⁸

Fourth, constitutional synthesis is slow but steady process of “communitarisation” of constitutional norms, fuelled not only by acts which have a constitutional material status (such as the ratification of the founding Treaties and their successive amendments), but also by the application of European constitutional principles in law-making and adjudication).

From the national viewpoint, European legal integration leads to the “opening” of national constitutional norms to the fundamental laws of all other Member States. As already hinted at, this “opening” may eventually trigger a process of reflexive change to reconcile the primacy of the

⁸⁸ If all national constitutional norms converge, as in most cases they do, the common norm is easy to establish. The strong affinity between national and Community constitutional norms is due to the history of European integration, to the fact that all Member States are parties to the European Convention on Human Rights; moreover accession to the European Union is conditioned to candidate states indeed fitting in the constitutional paradigm defined by the common constitutional traditions.

national constitution with the constitutional mandate to integrate into supranational political structures. From the Community standpoint, this entails that the constitution of the Community is underpinned by a plurality of constitutional sources (each of the constitutions of the Member States); but at the same time that the constitutional aspiration of the Community is get a single and cohesive set of fundamental norms as integration proceeds.

§63. The theory of constitutional synthesis offers an alternative articulation of the pluralist insights of MacCormick's legal theory while providing concrete guidance to practical legal argumentation with European legal norms. In concrete, it articulates two key insights of the pluralist theory of Community law when (1) it stresses the open character of the process of constitutional synthesis (which accounts for the fact that no institutional actor has been acknowledged the power to solve in an authoritative and final manner conflicts between norms produced through Community and national law-making processes; §); and (2) it highlights the pluralist source of European constitutional law, the actual result of the process of constitutional synthesis of national constitutional norms. This not only provides the basis for the claim to democratic legitimacy of Community law (transferred from the national to the European constitutional order when national constitutional norms become the core constitutional framework of the Union), but also reveals the complexity of constitutional conflicts in the European legal order, as they are at the very same time "vertical" conflicts between Community and national law, and "horizontal" conflicts between national constitutional laws, aspiring to define the common constitutional standard.

Still, the theory of constitutional synthesis incorporates also some of the key contributions of the international and national theories of Community law, which avoid some of the shortcomings of the pluralist theory. In particular, it reconciles pluralism in the two abovementioned senses with the normative defence of a monist reconstruction of the European legal order, in part for the reasons put forward by the national theory of Community law (§33, very especially, the defence of the social integrative capacity of European law and the fostering of equality before the law across borders), in part on account on the substantive identity of European and national constitutional law. Moreover, it offers a limited but comprehensive explanation of the sources of stability of the European legal

order, at the same time that accounts for the progressive weakening of the said sources.

§64. The theory of constitutional synthesis denies, contrary to what is usually assumed, that the core of the constitution of the European legal order is no other than the founding Treaties of the Communities. It may be useful to briefly explain why such generalised perception is in my view the wrong expression of a correct intuition, namely, that the European legal order was a fully-fledged constitutional order since its very inception.

First, the Treaties both fall short of and exceed the material constitution of the Union; this can be proven on two grounds: (1) the Treaties do not exhaust the set of material constitutional norms, something which was even more the case at the time their original versions were written; basic structural principles, such as those of supremacy and direct effect, were not explicitly laid down in the founding Treaties and are still not to be found in their present version; a basic (if not *the* basic) substantive principle, namely, the protection of fundamental rights, was not enshrined in the founding Treaties, and was only much afterwards, very timidly in the Single European Act, and more boldly in the amendments introduced through the Maastricht Treaty, that it was made part and parcel of the primary law of the Union; (2) the Treaties do contain many norms whose constitutional rank and status is extremely doubtful; it can be said without much doubts that the *international form of the founding Treaties* rendered almost unavoidable the amalgamation of norms of constitutional stature and others clearly of *ordinary legal* stature.

Second, the very existence of the Treaties reveals the constitutional nature of the Union since its inception. They contain some of the constitutional norms of the Union. They are rightly perceived as a partial explicitation of what the *constitutional norms common to the Member States* (the “deep” constitution of the Union) imply in a process of constitutional synthesis. To rehearse the argument one more time. The founding choice of the Union, that of overcoming the system of sovereign nation-states without establishing a full-fledged federal Union, entailed a preference for transferring the material constitutional norms from the national to the European legal order, renouncing to any act of explicit and purposeful rewriting of the said norms. Under such circumstances, it makes sense that the Treaties only contained the principles and rules which were found instrumental to the realisation of the immediate goals of the Communities *when established*. The distillation of the complete set of constitutional

norms of the Union was deferred in time. That would result from the progressive amendment of the founding Treaties, from law-making and adjudication (as specific problems render unavoidable taking decisions on what the common constitutional norms of the Union are) or eventually from an explicit act of constitution-making. And indeed, successive rounds of Treaty amendment have resulted in the further, but still partial, explication of the common constitutional norms; and most of the time, such exercise was influenced if not conditioned by the previous legislative, and perhaps foremostly, judicial practice in which the content of common constitutional norms had been discussed.

1. Constitutional synthesis and the genesis riddle

§65. The theory of constitutional synthesis claims that the genesis riddle is solved once we realize that the establishment of the constitution of the European legal order has not been the result of either an act of revolutionary constitution-making or the outcome of a process of constitutional evolution, but is properly described as the transfer of the common national constitutional norms to the Community legal order as authorized and mandated by national constitutions themselves.

§66. First, the ultimate normative foundation of present European constitutional practice is to be found in the “opening” clauses of national constitutions which authorize and mandate supranational integration as a necessary means to realize the constitutional principles of the fundamental law, given the impossibility of doing so within the confines of a closed national constitutional order. The fundamental laws of three out of the six founding Members of the European Coal and Steel Community, and of five of the six founding Members of the European Economic Community and the Euroatom contained radically innovative clauses concerning the relationship between the nation-state and the international community.⁸⁹

⁸⁹ The Preamble of the 1946 French Constitution stated that “provided the principle of reciprocity is guaranteed, the French Republic will agree to limitations of sovereignty when necessary for the organisation and guarantee of peace”. Article 11 of the 1948 Italian Constitution still reads “Italy repudiates war as an instrument offending the liberty of the peoples and as a means for settling international disputes; it agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and

Since then, general integration clauses have been replaced by specific European clauses, which have also been inserted in the constitutions of most of the states which have acceded to Union membership since.⁹⁰ The constitutional importance of these clauses stems in the fact that they do not limit themselves to determine the procedure through which international treaties have to be negotiated, signed and ratified, or the place assigned to them in the system of sources of law, as standard constitutional clauses on international affairs and external relations usually do. On the contrary, the supranational integration clauses mandate the active participation of the state in the creation and defence of multilateral international organisations, which implies a mandate to exercise some of national sovereign powers collectively, and consequently, the transcendence of the *national* character of such public powers created and disciplined by the constitution itself. These clauses can be properly regarded as the positivisation of the moral

encourages international organizations furthering such ends". Bartolomeo Ruini, who played a major role in the drafting of this article as President of the Italian Constitutional Commission, claimed that it established an obligation to create supra-national institutions. The first two sections of Article 24 of the German Constitution stated that "1. The Federation may, by legislation, transfer sovereign powers to international institutions; 2. For the maintenance of peace, the Federation may join a system of mutual collective security; in doing so it will consent to such limitations upon its sovereign powers as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world". Even if the Luxembourgish constitution did not still contain anything vaguely resembling a proto-European clause, the *Conseil d'État* constructed its fundamental law along very similar lines. When reviewing the constitutionality of the Treaty establishing the Coal and Steel Community, the *Conseil* affirmed that Luxembourg not only could, but *should*, renounce certain sovereign powers if *the public good* so required. See Avis du Conseil d'État of 9 April 1952, at <http://www.ena.lu/?lang=1&doc=9644>. By 1957, both the Dutch and the Luxembourgish constitution had been amended to include a similar proto-European clause. In the Dutch case, the constitutional amendment had been introduced in 1953 in view of the eventual ratification of the Treaty which established the European Defence Community. The new drafting of Article 67 enabled the conferral of legislative, administrative and jurisdictional powers to "organizations based on international law", at the same time that Article 63 went so far as to stating that "the contents of an agreement may deviate from certain provisions of the constitution", subject to the double condition "development of the international legal order requires this" and the agreement is approved by a two-thirds majority in both parliamentary chambers. Moreover, Article 65 as thus amended affirmed the primacy of international law within the national legal order. On what concerns the Constitution of the Grand Duchy, a new Article 49a was inserted into the fundamental law in 1956, and it read that "[t]he exercise of the powers reserved by the Constitution to the legislature, executive, and judiciary may be temporarily vested by treaty in institutions governed by international law".

⁹⁰ See references in *supra*, fn 17.

duty to create common supranational institutions and to agree common norms capable of solving conflicts and coordinating common action in view of the common public interest. This grounds the claim that they must be seen as the late fruit of the cosmopolitan conceptions of democracy and law elaborated in the interwar period,⁹¹ which explains the close relationship in which they stand to the normative foundation of the primacy of Community legal norms.

§67. Second, the establishment of a new common constitution by reference to already existing national constitutional norms offers a (temporary and provisional) alternative to the coupling of democratic agency and legitimacy characteristic of revolutionary constitution-making and to the progressive acquisition of democratic legitimacy characteristic of the evolutionary model. Because the new constitution is formed by national constitutional norms, it draws from them the democratic legitimacy of which they were invested in each national constitution-making process (either through revolutionary or evolutionary constitution-making processes). And because the validity of each and every European law depends on compliance with European constitutional law, then the derivative democratic legitimacy of Community constitutional norms is radiated to secondary Community norms when they are interpreted and constructed according to the basic principles of European constitutional law. This provides integration with democratic legitimacy in the absence of an explicit constitution-making process.⁹²

⁹¹ See references in *supra*, fn 7.

⁹² Integration through the explicit writing of a new federal constitution for the European Union may or may not have been a feasible alternative in the mid forties. It could be argued that the political conditions under which an explicit European constitutional general will could be forged were lacking, and that there was no clear idea of how the institutional and decision-making set up of a supranational Union should look like. That was indeed the paradox of European integration before the European Communities were established. The need of overcoming the nation-state was strongly felt for a rather long-time (stretching at the very least back to the Abbé Pierre and Kant) but an effective and democratic way of breaking apart from the nation-state seemed not to be available. Indeed, the risks of opening an explicit constitution-making process were proven by the failure of the Defence and Political Communities in 1954. Synthetic constitution-making promises to allow us to proceed with the process of European integration sufficiently far as to render the new supranational polity robust enough as to be capable of undergoing an explicit constitution-making process. Because it has a solid (even if derivative) democratic legitimacy basis, a

When these two premises are properly considered, present European constitutional practice reveals itself to be far less problematic than what it may seem at first glance. The claim that European law is the supreme law of the European land is but another way of saying that the common constitutional laws of the Member States are the supreme law of the European land. When one realizes that such transformation was authorized and mandated by national constitutions, the riddle is solved.

2. The one legal order in the making thesis and the primacy riddle

§68. The theory of constitutional synthesis claims that national constitutional orders are in the process of integrating in the Community legal order. Thus, it is neither plausible to claim that there are two separate legal orders (or twenty eight to be precise), as the international theory of Community law claims, or that there is just one single legal system resulting from the absorption of national constitutional orders into the Community one, as the national theory of Community law pretends.

Instead, we are somewhere *in between*, in the following double sense. First, the progressive, open and far from finished character of the process of legal integration implies that it makes sense, both from an analytical and a substantive standpoint, to speak of the Community and the national legal orders as differentiated sets of legal orders, produced through differentiated law-making processes in which differentiated sets of national actors participate. Second, it makes increasingly less sense to reconstruct law in the European Union without paying attention to the increasingly intertwined character of both the institutional structure and the law-making processes of the national and of the Community legal orders. Not only both sets of norms have a perfectly overlapping scope of application, but their respective constitutional norms characterise them as forming a substantive unity, at the same time that they require their consistent and harmonious application (i.e. European or integration clauses in national constitutions; Article 10 TEC in Community law). This explains why not only the actual norms which constitute the constitutional law of the Community and of the member states basically overlap (with the core

synthetic constitution is one that would be expected to operate changes in the legal and political order of the political community it constitutes.

contents of national constitutions norms doubling as national fundamental laws and, as part of the collective of national constitutional traditions, as constitutional law of the Union, as was argued in §§40 and 63), but why it is increasingly hard to differentiate the Community and the national standpoints in the reconstruction of European law, bar in the hard cases where constitutional conflicts emerge.

§69. The “one legal order in the making” thesis comes hand in hand with a defence of the primacy of Community law over conflicting national norms. This is based on three basic normative grounds which I will consider now in some detail in the next paragraph. However, before considering doing so, it is necessary to show that the primacy riddle may have proven to be so intractable because it has been presented as a “nuclear” conflict between on the one hand national constitutional norms and on the other hand Community norms. But once it is observed that European constitutional law is not composed by a self-standing set of norms, but is in reality the outcome of the process of progressive synthesis of national constitutional laws, it becomes clear that European constitutional conflicts boil down to *horizontal conflicts* between incompatible national constitutional norms struggling to become *the* common European constitutional norm. Or to put it differently, any conflict between a national constitutional norm and a Community norm is at the same a conflict between the said national constitutional norm and the national constitutional norms which constitute the source of the Community constitutional norm in conflict. If that is so, then the claim that Community law should prevail over conflicting national constitutional norms really means that in case that the national constitutional norms of the Member States are not fully consistent, the common definition must be based on the national constitutional norms more congenial to European integration; and that the idiosyncratic, less “Europeanisable” ones should be overruled (as I claimed in §62, fourth section).

§70. The normative grounds for the primacy of Community law have been basically exposed when considering the “one legal order” thesis of the national theory of Community law (§§29-30).

First, the primacy of Community law is founded on its close and necessary relationship with the creation and sustenance of the institutions and decision-making processes capable of ensuring integration through law

and equality across national borders. The effectiveness of integration through supranational law, and the effective equality of European citizens before the law requires supranational legal norms to be the same all across the Union. That cannot be so unless European law is reconstructed in a monistic key, as only then the rights and obligations stemming to residents in all Member States will indeed be the same. Indeed, the “horizontal” translation of European constitutional conflicts reveals that the primacy of Community law stems from a process of critical synthesis of national constitutional norms, required to realise the very principles which underlie national constitutions (and critically so the principle of equality before the law). “Commonality” cannot be defined by reference to a “minimum common denominator”, as seems to be required under any pluralist conception of the European Union. On the contrary, it has to be defined by reference to the arguments which underpin each national constitutional norm, so to prefer those underpinned by “Europeanisable” reasons, and to discard those exclusively based on idiosyncratic reasons, purely internal to a thick national or local ethics (as seen in §).

Second, the primacy of Community law is indeed a necessary even if insufficient condition for making supranational democracy possible, so that national democracy is also possible. But for democracy at the supranational level to be possible, it is necessary to create supranational institutions and decision-making processes, whose capacity to serve as a means of conflict-solving and coordination of actions crucially depends on defining primacy of the supranational legal order as the residual rule of conflict. This is so because it prevents political actors from translating into the language of constitutional conflicts, and consequently detracting from the realm of collective decision-making, those issues regarding which they are confident of being on the majority side at the national level, and on the minority side at the collective level.

3. The sources of the stability (and instability) of the European legal order

§71. The theory of constitutional synthesis claims that the key source of stability of the European legal order resides in the foundational role played by national constitutional norms in both the Community and the national legal orders. It is because (and one could add, it will remain on being the case as long as) national constitutional norms play the same role in the domestic and the Community legal orders that European legal integration

is infused with the democratic legitimacy which provides decisive motivational force to citizens and institutional actors alike.

§72. Moreover, the theory of constitutional synthesis shares with the national and pluralist theories of Community law that the stability of the European legal order is critically dependent on the internalisation of the double role they play as national and European actors by all institutional players and citizens. Because the substantive unity of European law comes hand in hand with a differentiated institutional structure and overlapping law-making processes, the way in which law is systematised and turned into a consistent whole plays a decisive role. Thus the theory of constitutional synthesis finds appealing the insights provided by pluralist theories on the relevance of the argument from coherence in ensuring the stability of the European legal order. But it adds that the force of the argument does not merely come from its being a logical part of any theory of legal argumentation, but also from its implicit endorsement by the Community and national constitutional provisions which impose a reciprocal obligation of constitutional loyalty.⁹³ In particular, national constitutional courts assume their double identity as guardians of both the national and the European constitution. Because the said courts are no longer mere national institutions, but part and parcel of the overall European institutional structure; because their opinions are not only relevant to their citizens and permanent residents, but can influence the way in which European constitutional law is constructed (as the synthesis of all national constitutional norms); their role as defender of the national constitution cannot but include that of defender of the Community constitution. To consider one concrete example. If the Polish Constitutional Court adjudicates upon a European constitutional conflict, both Community law and Polish Constitutional law require the Court to ground its decision *not only on a narrow set of Polish constitutional arguments*, but in a *wider* set of Polish constitutional arguments which takes into account the fact that the Polish legal order has become integrated, in application of its own constitution, in the European legal order.

⁹³ Or to put it otherwise, the obligation is not merely moral, prudential or grounded on scholarly constructed principles (as in contrapunctual pluralism, see §52), but it is indeed a legal obligation which derives from the best possible interpretation of the law in force in each and every Member State.

§73. The theory of constitutional synthesis solves the genesis riddle by showing that the integration of national legal orders into Community law implies the definition of the constitutional laws of the new legal order by reference to what is common to national constitutional norms. This transformation is legitimate because it has been authorised and mandated by the national constitutions themselves, and because when national constitutions become the material constitution of the European Union, they transfer to it democratic legitimacy. Thus, constitutional synthesis plays a legitimating role equivalent to democratic constitution-making. In particular, the legitimating value of the participation of citizens in the deliberation and decision-making of constitutional norms is substituted by the *framing of the European legal order by common national constitutional norms*, capable of radiating to the European legal order as a whole *their democratic legitimacy*, based on the fact that they were deliberated and decided upon *democratically* by citizens, as we saw in §62.

§74. However, it must now be added that common constitutional norms can only play a limited legitimising role, as the legitimacy credit they offer is bound to become smaller as time passes and the abstract principle of “constitutional traditions common to the Member States” is rendered concrete through specific decisions, which could reveal a growing gap between concrete national constitutional norms and the concrete Community constitutional norms *expected* to reflect the commonality of national norms. This gives rise to a dynamics of weakening of the democratic legitimacy of the Union, which can only be compensated by direct outflows of democratic legitimacy, be them at the constitutional level (by means of the collective exercise of constitution-making power, capable of repoliticising the constitutional law of the European Union) or at the ordinary decision-making level (by means of a reform of such processes in such a form that they reflect more accurately the *volonté générale* of European citizens, and not merely the aggregate common will of Member States, according to formulae which can lead to results opposite to those of the common will of European citizens).

The founding Treaties explicitly aimed at the social, economic and legal integration of European states, at overcoming the fragmentation of the European political order in nation-states, which resulted in perpetual war among states. The establishment of a European federation may have been possible in the immediate aftermath of Second World War, but it would

have been vetoed by many national governments in 1951 and 1957; once nation-states were back in motion, resocialising citizens into nationals, it was easy for at least one state to mobilise public opinion against such a project, and make it fail.⁹⁴ Actual evidence can be found in the process which ended up with the refusal of the French Parliament to ratify the 1954 Draft Treaty establishing the European Defence Community. To these *structural obstacles* one may add the radically innovative character of the integration process. There had been many federating processes before 1945, but none of them involved states of structural features comparable to those of the founding Members of the Communities in 1951, or for that purpose, 1945 (i.e. welfare states in the making with a complex array of taxing and regulatory powers). Both sets of reasons (the actual rescue of nation-states months after the end of the war, and the innovative character of the process) called for a flexible and experimental framework of integration, which simply could not be based on the *ex ante* ratification of a full-blown federal constitution. In such circumstances, the progressive fusion of constitutional orders allowed for the legitimate launch of the process of integration, and borrowed it democratic legitimacy for the time being, *without predetermining the ultimate shape of the political community*. But the immediate consequence of substituting *the exercise of an explicit pouvoir constituant* for the constitutional traditions common to the Member States was that European constitutional norms remained for a good part *unwritten rules*. National constitutional norms are in most cases *written*, as they are formulated in constitutional statements contained in texts which are widely acknowledged in legal practice as being the national constitution, or a part of it thereof. But as we take the further step of considering *all these national constitutional norms* as fused into a common constitutional law, the formal and substantial differences between national constitutions introduce a degree of uncertainty of what the actual content of the common constitutional law be. Firstly, the degree of correspondence between the formal and the material constitution varies. Some constitutions (generally older ones, such as the Belgian Constitution at the time of the founding) do not contain all, and perhaps not even most, of the constitutional norms *as practiced*. The “living constitution” complements

⁹⁴ On the feasibility of a European Federation, see the anthology of writings of Altiero Spinelli, ‘From Ventotene to the European Constitution’, RECON Report 1/2007, Oslo: University of Oslo, available at <http://www.reconproject.eu/main.php/RECONreport0107.pdf?fileitem=4325406>.

the “written constitution”; that may be a pretty straightforward affair for national legal scholars, but creates an additional difficulty for legal scholars from other Member States, not to speak of citizens in general. In other cases, the formal constitution would basically correspond to the material constitution; but the written constitution having been enacted recently (as was the case in France, Germany and Italy at the time of the founding), the concrete implications of constitutional norms will not have been fully worked out yet; to put it differently, neither political nor judicial practice would have sufficiently determined the derivative constitutional norms which derive from the written constitutional statements. Secondly, European integration was rendered possible by a high degree of structural affinity between national constitutions. Still, differences would remain. On the one hand, there will be differences on what questions have to be decided at the constitutional level, and which not. Thus, which rights should be regarded as part of the “fundamental core” of the constitution, and which should be regarded exclusively as constitutional rights, or even ordinary rights, is a question which is answered in different ways in different national constitutional traditions. On the other hand, there will be differences in the way of weighing and balancing conflicting constitutional principles, resulting in differences in derivative constitutional rights. All Member States do affirm that citizens have a right to property and a right to health, but there are differences in the way these two rights are weighed and balanced in concrete cases.

The establishment of the Communities came hand in hand with the opening of the process of fusion of national constitutional law, and thus, the actual enactment of a common constitutional law. But what was common was not rendered explicit, and indeed remained an unwritten regulative ideal. The Treaties came less than half way on the spelling out of what the common constitutional law said. The task was forced upon the Community legislator and the Community courts by the very dynamics of the process of integration. In discharging such a task, they were left a taller task than that required under national written constitutions, for two main reasons. First, as has just been said, there will be differences in the scope of national constitutional law, and differences among the concrete derivative constitutional norms, which will require lawmakers and courts but to opt for one norm and leaving aside all others in many cases. Second, all national constitutional norms were drafted as part and parcel of national constitutional law, and thus, they will rarely be automatically transferable to the Community legal order, for the simple reason that the context of

integration is actually a different one, because they have to become part and parcel not of the constitutional law of a established legal order, but part and parcel of a legal system of integration of legal orders. This requires very often to *adapt* national constitutional norms, once again requiring a constrained exercise of law-making. Now, the discretion which is required from lawmakers and courts is much less restrained than the one exercised under national constitutional law. Firstly, if common constitutional law remained an unwritten regulative ideal was precisely because there has been European constitution-making process. Consequently, neither lawmakers nor judges can make use of the constitutional debates as a guide when interpreting constitutional norms, as is customary at the national level. Secondly, the very weakness of the European political process, due to the (democratically poor) design of the institutional structure and ordinary decision-making process, which are actually obstacles to the Europeanisation of national public spheres, deprives legal actors of a further guide in the interpretation of Community constitutional norms. As these factors cumulate into concrete decisions, the definition of European constitutional law becomes *autonomous* from national constitutional law, and that could result in further path-driven judgments resulting in an outright contradiction. As European constitutional practice thickens, laws and judgments become more self-referential, thus weakening the normative link between the legal and judicial formulation of European constitutional norms and *national constitutional norms*. This has resulted not only in an increased perception of European laws as *external norms* imposed upon citizens who feel like subjects devoid of political rights to deliberate and decide on European norms, but in the punctual breaking of the democratic legitimacy chain between European and national law. This applies with special strength to the interpretation that the European Court of Justice has been made of the basic European economic freedoms, and very specially, its *active* use as yardsticks of the constitutionality of market-correcting national norms. This can result in a formulation of European constitutional law clearly at odds with the norm resulting from a systematic interpretation of national constitutional law. In that regard, it suffices to consider, for example, the jurisprudence of the Court of Justice concerning the implications for national company taxation of the principle of freedom of establishment.⁹⁵

⁹⁵ The last episode in the long saga is Case C-196/04, *Cadbury Schweppes*, [2006] ECR I-

It could be counter-argued that all constitutional practice tends to become self-referential as time passes; it is only “natural” that judges ground their new decision on past decisions, as they are supposed to be developing a coherent case law which elucidates constitutional law. However, it is still the case that the legitimacy of their decisions is still grounded on their being capable of presenting themselves as guardians of the decisions taken by the *pouvoir constituant* against the constituted powers of the state.⁹⁶ Even the constitutional court with more self-referential proclivities still has to pretend to take good notice of constitutional debates, and of debates on constitutional issues which take place in strong publics. But European courts, both the ECJ and national courts discharging European constitutional tasks, simply do not have such reference points. Thus, they run a higher risk of depleting the legitimacy credit provided by the common constitutional traditions, by simply taking the wrong decisions on the actual content of such common constitutional traditions. A chain of mistakes will necessarily lead to a definition of a European constitutional norm clearly at odds with the relevant national constitutional norms.⁹⁷

7995 in which the Court of Justice has followed the lead of Advocate General Leger and ruled that “[I]n order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory” (paragraph 55 of the judgment). Or what is the same, that establishment *only aimed at reduced the tax burden* is acceptable, provided the arrangements undertaken are not fully artificial.

⁹⁶ Cf. Bruce Ackerman, ‘The Political Case for Constitutional Courts’, en Bernard Yack (ed.) *Liberalism without illusions. Essays on Liberal Theory and the Political vision of Judith N. Shklar*. Chicago y Londres: The University of Chicago Press, 1996, pp.205-19; Carlos Santiago Nino, ‘A Philosophical Reconstruction of Judicial Review’, 14 (1993) *Cardozo Law Review* pp. 799-846; Gustavo Zagrebelsky, *Principi e voti*, Torino: Einaudi, 2005.

⁹⁷ To such *erosion* of the legitimacy basis of European law have also contributed the complementary sources of democratic legitimacy of the European legal order. Two of these sources have acquired special importance as European law has evolved: the legitimacy resulting from the decisive role assigned to direct representatives of the citizens in the law-making process (the so-called co-decision procedure) and the legitimacy resulting from the decisive role assigned to government representatives accountable to national parliaments in the law-making process (unanimous law-making). Still, both sources of legitimacy are themselves ambivalent, as they give rise to democratic legitimacy problems at the same time that they contribute to mending the democratic shortcomings of Union law. Thus, the co-decision procedure is still applicable only in some domains; and moreover, is part of a competence and procedure structure which actually generates its own democratic shortcomings (which it seems to me could be properly said to generate a *structural democratic deficit* of its own). This is so because co-decision reduces the transaction costs of

§75. However, and as will be considered in more detail in the next paragraph, the fusion thesis provides a limited and time-bound legitimacy credit to Community law. This implies that the best guarantee of the stability of the *fusion* constitution will be the exercise of the democratic constitution-making power which lies in the hands of citizens. That should be not be regarded as an outright “romantic” appeal, but as a reminder that only the repoliticisation of European constitutional law can ensure that European Community law keeps on radiating democratic legitimacy to all the norms which are part of the Community legal order. That is far from being incompatible with a strategic analysis of what *democratisation path* would that of least resistance and most promise.



European decision-making, but only to the areas to which it applies, *all of them* relative to *market-making* decisions, or in the usual jargon, relative to the process of negative integration. As *market-correcting decisions* remain the province of more onerous decision-making process, the more that co-decision is extended to market-making, and the more that the votes needed to obtain a qualified majority is reduced, the more that Union law *structurally favours* market-making over market-correcting, negative over positive integration. Second, there are law-making procedures where the collective will of the citizens of each and every Member State must be taken into account, i.e. those instances in which unanimity is required in the Council; such law-making procedures are still democratically ambivalent, for two mains reasons (a) the secrecy of the deliberations in the Council (which is only gradually being lifted)⁹⁷ hampers the effective exercise of *parliamentary control* of the argument and decisions taken by national governments; (b) the design of decision-making processes with a high number of veto points can give rise to *false negatives*, and impede the transformation of an underlying collective European will into legal norms.

Part IV

Nationalism and Cosmopolitanism

10

Nation-states vs. Nation-regions in the post-sovereign European Polity

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INTRODUCTION

It is an honour, a pleasure and a challenge to participate in a collective work aimed at analysing the work of a legal and political theorist and philosopher I admire and persistently tend to agree with, a person I respect and a friend I cherish. MacCormick's theories on legal reasoning, his institutional approach to theories on sovereignty and liberal nationalism, his defence of personal autonomy and social democracy are all essential items of my own intellectual makeup. Since the days I worked on my doctoral thesis under his guidance in Edinburgh, I have seen my own thinking about practical reason, in many significant ways, as an ongoing conversation with Neil MacCormick.

This paper is an invitation to continue that dialogue in relation to the idea and theoretical implications of *internal enlargement*, a term coined by Neil MacCormick when he acted as alternate member of the Convention on the Future of Europe (2002-04) representing the European Free Alliance group of the European Parliament, to refer to the possibility of Member States, like the United Kingdom, dividing or splitting into new Member States. "Internal enlargement" is the EU side of the motto "Independence

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The post-sovereign constellation, Law and politics in Neil MacCormick's theory of law, ARENA, Oslo, 2008, pp. 315-331

in Europe”, a normative institutional aspiration of some citizens in some nations without their own state like the Basque Country or Scotland. This concept raises many interesting questions of Public International Law, European Union law, constitutional law and theory, political philosophy, and practical philosophy generally, but it also challenges the political strategies of established States and of infra-state nationalist movements. More specifically the strategic debate turns around the options of full statehood or independence and regionalism or autonomy. In any case the options presuppose the possibility of choice of status, which requires analysing the difficult questions of sovereignty and self-determination.

A shift of focus has been suggested¹ as regards the understanding of the phenomenon of sovereignty and its normative implications from hard conceptions stressing power, independence and non-interference from other powers to softer or lighter conceptions based upon co-decision-making capacity in a connected world of interdependence. In my contention, this shift of conceptions is leading to a new understanding of sovereignty, to a new concept, which will also have an impact on law and state. However, this shift of focus is for the moment only taking place in the minds of scholars and relevant actors but not in the practice of international relations and especially not in international law. International law still clings to the harder conception of sovereignty and self-determination, as can be seen in the 2008 episodes of Kosovo, or in the South Osetia and Abkhazia Oblasts and the tensions between Georgia and Russia. The different notions of sovereignty used by the relevant States involved in these processes and the lack of coherence in the treatment of these situations tend to show that new phenomena are shaping the understanding of traditional categories like self-determination, respect for State and national structures and conditions for state recognition.

¹ See my own *La Europa Peter Pan*, Oñati 2005

I. NEIL MACCORMICK'S CONTRIBUTION TO THE DEBATE ON NATION, LAW AND STATE IN EUROPE

Nationalism is behind the different motivations of the main players involved in such conflicts: nationalism is the drive for state formation in Kosovo and also the reason for denying Kosovo its own statehood in the larger Serbia. Nationalism is the drive towards reunification of Ossetia, or towards support for such claims on the part of Russia or towards its rejection on the part of Georgia. Nationalism is therefore everywhere but it might be cloaked in a different language like legitimate state interests or free exercise of self-determination. It seems clear that nationalism is in great need of critical analysis going beyond political appraisals of its different expressions in this or other countries. There was great courage on the part of MacCormick to introduce the topic of nationalism in the practical philosophy syllabus, largely influenced by liberalism. Thanks to his valuable contribution, [liberal] nationalism is one of the contemporary issues even in Jurisprudence, not only in political philosophy. *Legal Right and Social Democracy* published in the mid-eighties already had a final chapter showing how some forms of nationalism are compatible with the liberal, democratic and egalitarian, in short, the enlightened principles, defended in the book and add something which is very important to those individualistic principles: collective identity. True, nationalism is not a necessary consequence of enlightened principles but a possible one and the form it will take in the different countries of the EU, depends on the availability of governance and sovereignty models in our contemporary world, on the institutional expression of collective identity and on the particular stage of development of European integration.

But is nationalism plausible? If this question is meant descriptively, the answer is obviously affirmative: nationalism is actually everywhere from the US Patriot Act to the Olympic games, to the Greek veto on the name of the Macedonia Republic, to the Spanish refusal to allow a consultation on the political will of the Basque People² and the Académie Française's

² The law providing for a consultation of the Basque people – on two points, on peace negotiations to bring about a permanent ceasefire and on negotiations between political

zealous defence of the French language;³ one only has to look around at the practice and discourses of most established states and state related organs and at the claims, practices and discourse of many, most political parties, of all trends. The question should rather be, is cosmopolitanism plausible in a nationalist World?

On the other hand, if nationalism is taken to imply classical formal sovereignty of states, then it becomes more of an ideal than a reality, and perhaps not a highly desirable ideal. Full sovereignty of the nation-state, if it ever existed, belongs to the past and advocating it as a normative aspiration seems dated and stale. This is nowhere more challenging than in the European context. In many meaningful ways, the European experiment is an attempt to overcome nation-state nationalism, but the question is, once nationalism is regarded as an obstacle towards integration, what sort of ideology is there to replace it: national interests are not going to disappear and their defence is not going to be considered unjustified. Furthermore, nationalism is a pervasive ideology when it comes to identity issues: national identity is seen as challenged by internal processes of regionalism and self-determination and by external processes of globalisation and European integration and this sometimes leads to a redeployment of state-nationalist strategies, taking new and different forms. Therefore, if nationalism is flatly rejected, it will very probably resurface into some form of post-nationalism or neo-nationalism.

The classical identification of nation and state will also need serious revisions. Nation is seen as the demos, the people of a state, and the state is seen as the legal and institutional format of the nation, ensuring its enforcement by means of the monopoly and allegedly legitimate recourse to coercion. The identification of state and law is so powerful, that even

parties to bring about the recognition and practice of the right of the Basque people to decide on their preferred political status - was passed with a narrow majority by the Basque Parliament as law 9/2008. The consultation was to take place on the 25 October 2008. The Spanish Constitutional Court declared this law (un)constitutional on the grounds that only the Spanish State has the competence to call for referenda and that the said consultation is really a form of referendum. See the ruling of 11 September 2008, available at <http://www.tribunalconstitucional.es/jurisprudencia/Stc2008/STC2008-05707.html>.

³ See its Declaration of 12 June 2008, opposing the constitutional amendment aimed at declaring that the regional languages are part of the French heritage.

expressions of law outwith the state format like the law of international organisations or *lex mercatoria* phenomena, are still considered as creations (or recognitions) of states. In this area, another of MacCormick's key contributions, his theory of law as institutional normative order conceptually independent from the state, allows us to separate state and law and to disentangle law and coercion. This separation has crucial consequences for the theory of sovereignty and of legal order.

The importance of the state can hardly be overstated: it is a coercive organisation controlling a territory and its people, deploying administration and services, using physical force for enforcement of individual norms or keeping credible the possibility of its use in order to guarantee "law and order". And claiming that this use of force by State organs is legitimate while banning as unlawful and wrong the use of force by other, unauthorised, players. Law is the make up and the output of the state.

But state law is only one kind, the most *visible* and central case of law and sovereignty. There are interesting legal orders at the conceptual borders of law that do not rely on coercion but rather on coordination and cooperation, although the question remains to what extent they do not somehow depend on the backup of state coercion in order to ensure compliance. If state law does not exhaust the phenomenology of legal orders, the possibility of legal pluralism is not denied, at least not in theory. Different institutional normative orders or sets of norms that we cannot simply discard as non-legal can be simultaneously applicable in a territory. We are now referring to normative orders within the family-resemblance of law, not to morality or ethics. Coexistence of legal, moral and political norms is not found to be problematic from the point of view of state law even if clashes between law and morality are the gist of most hard legal cases, and clashes between politics (simple majoritarian will in a constituency) and law (rights and guarantees protecting minorities) are in the essence of constitutionalism. Yet the state legal system and its legal field, in both stages of law creation and law-application, does not consider other normative spheres like ethics, or political morality as legally challenging, and it finds devices for accommodating them via legal principles, or for tolerating them via justifications and excuses in a highly

sophisticated institutionalised setting of practical reasoning which is typically legal: judicial institutions.

But where alternative forms of “law” appear, where groups of people guide and justify their social action on the basis of norms that are not considered to spring from the acceptable sources of the state legal system,⁴ problems of legal challenges and coordination are inevitable. The question will then open up to what extent these norms are coordinated and brought into one single normative system like the state law under the unifying aegis of a shared rule of recognition, most likely by considering them to be “customs” or whether sociologically we can observe that all these different practical norms guiding and justifying behaviour coexist in other ways, e.g. by ignoring each other, by avoiding clashes or even by acknowledging each other to some extent. To the extent that they require enforcement by coercion, they will need to come to terms with state law and recognise its supremacy or sovereignty. But if other, softer, alternative, means of “enforcement” are developed by the actors following those rules like peer pressure, social criticism, market exclusion, diversion of investment, delocalisation of production plants, consumer boycotts, then submission to state law loses weight, and state law will prevail in practice only where points of connexion between these norms are brought before a state organ of law application. Legal pluralism can then be denied successfully by state law: when the challenge between contenting legal sources is brought before a state organ, there is a final reception or rejection on the basis of state law; but the question from the sociological and anthropological understandings of pluralism is precisely the normative pluralism before the challenge is redirected to judicial institutions.

There are interesting expressions of “coordinated” or quasi-official pluralism both above and below the state level. Decentralised and/or federal states often recognise internal territorial legal orders of public law, even of criminal law, and sometimes also of private law. In principle, these territorial infra-state legal orders are coordinated with the State legal order

⁴ Although legal order and legal system can be distinguished in a strict sense (see my “Legal System as Regulative Ideal”, 53 (1994) ARSP, pp. 66-80. In this section I use the terms legal system, legal order and law as equivalent.

on the basis of the division of competences between the State and the infra-state entities, regions. The rule of recognition that ensures the ultimate unity of the state legal system can be seen as the result of an authoritative decision adopted at a higher or at a larger level, but the interpretations made by the infra-state entities need not go along with this authoritative view. Regions might consider themselves to be autonomous and therefore sovereign, and they might claim to keep the right to decide on the ultimate rule of recognition or at least to co-opt and co-decide on this rule either bilaterally with the state, or multilaterally with the other nations that make up the state. The pluralism question in these cases is not so different conceptually from the one that obtains between the Member States and the supra-state entity, the EU: who has ultimate authority to decide as to who decides, also seen as the issue of *Kompetenz-Kompetenz*, and to what extent does that authority exercise its prerogatives by imposing constitutional dogma or by engaging in discourse argumentation. Recognition is not only defined by a rule of authority, that very rule would itself need to be considered authoritative: if this, again, takes us to a new authoritative rule, the regression to the infinite seems inevitable. More interestingly, recognition can be the result of a practice whereby decisions by certain organs under certain conditions are considered by a group of jurists in a society as authoritative, and this opens up new approaches from the sociological analysis of legal professions and legal cultures.

As regards the EU, legal “pluralism” obtains in a conceptual way, and the debate turns on the question whether that unifying rule of recognition – using the language of effectiveness and the uniform application of community law and setting aside incompatible national rules rather than the language of primacy and hierarchy – has moved to the federal supra-state level or remains with the Member State, “national” constitution. But ultimately, there will be a case by case judicial solution in a gradual process in permanent motion, and over time it might be the case that we detect the shift towards a European rule of recognition and when this shift will have finally been accepted by all higher courts of the Member States and by the larger juristic community, we shall be able to infer the existence of a European Grundnorm, or it might be that the different norms (and practices) of recognition of state law and “common” law all claim ultimate authority and only tolerate each other in order to avoid overt constitutional disputes. A legal culture might develop amongst European jurists leading

them to consider such ultimate pluralist situations as not necessarily problematic but permanently contested sources of legitimacy. The institutional theory of law can be of great help for the development of such open and democratic culture. But if the dominant culture tends to see national constitutions as the only source of authority, then state conceptions will carry the day and if anything like a European Grundnorm is to develop, it will require a transformation of the EU into some sort of federal constitution.

But this semi-official pluralism of legal orders, which become operative through courts and agents, cohabits with other domains of practical, normative reason like morality and political morality, and “other laws”, and these remain autonomous. To the extent that organised groups of people govern their social relations or certain aspects of them, according to these normative orders and deliberately avoid following the “official” law, we can speak about legal pluralism in a stronger sense, not unrelated to cultural pluralism. Law seeks its justification, it lays a *claim to correctness* in being a normative order based on certain values, and this claim necessarily engages moral agents in deliberative discourse and rational action. Critical reflective compliance, which, incidentally, does not rule out civil disobedience in hard cases, becomes the cosmopolitan moral and political position of citizens in modern democracies, at the local, national, state, or global level. The pretension that only official law is valid and commands compliance is often made by established states but to the extent that coercion is the major argument to support this pretension, all the state can hope for is precisely that: prudential obedience or covert compliance, not overt alliance. In that case, State sovereignty retains the formal validity of law and the claim to obedience, but it no longer carries any deeper implications of political morality or of functional governance. But then, it risks failing to be law: all law lays a claim to validity, to correctness and to rightness; if it only obtains a calculated, prudential obedience, it will need other systems of support in order to ensure acceptability. Formal validity might remain uncontested, as is the case in totalitarian law, but then engaging in the practical reasoning underlying the law becomes a mere question of discipline: very far removed from deliberative democracy and practical rationality.

The latest development of MacCormick's institutional theory of law, *Institutions of Law*, revises the strict separation thesis of legal positivism. No law can conceptually be conceived that does not purport to govern social action in a rightful way. That it actually gets it right is a matter of judgment, and this cannot be finally settled by the law, but the way to engage the law and its officials into a discussion of its merits is precisely by assuming that it purports to govern righteously and to achieve justice. The strict separation of law and ethics might have been a healthy reaction to the ideological confusion of law and morality which totalitarian regimes have accentuated but it has led to a monologue of legal validity: the law is the law is the law... In order to evaluate it morally you need to step outwith the legal confines but how can a moral debate on the law be engaged within the law?

On the other hand, if it is acknowledged that law makes claims to moral and political correctness, the rationality debate must be engaged: the question is where, in what forum? If it is state law, there is a high possibility that the forum will be in a supreme court, in a constitutional court or in parliament, and the discussion will be juristic in tone. Issues of jurisdiction, of access and representation, of standing and title will then become prominent, and the definition of the majority and of the people in whose name decisions are made also becomes crucial: who is the demos on whose name final *legal* decisions are made about the moral and political *worth* of the law? Inevitably we need to tackle the issue of relevant majorities in relevant constituencies and of protection of those minorities that do not have a chance to become a constituency of their own.

By constitutional definition the demos is the nation, i.e. the state law in the nation-state, but who is the demos within pluri-national states? How is the demos to be defined there and who has final authority to settle its delimitation? In pluralistic contexts, there will probably be contested *demosi* and a majority might eventually carry the day and define the people. And what happens in supranational contexts, is there a new larger demos in the making? And can there simultaneously be more than one demos over a given polity? If each polity carries its own demos, then the question become one of defining the polity. We are now about to reformulate the question of the demos in terms of the question of the polis. Perhaps this makes it easier to conceive of a plurality of *demosi* coexisting in different

coordinated polities, and perhaps Europe is precisely the laboratory for such ideas: over one concrete territory there are several overlapping polities and jurisdictions of different sizes: regional, national, supranational and each of these might have its own demos, understood itself as a pluralistic body of citizens deciding on common issues of crucial interest. The state is not the only polity, this seems clear enough. There are other polities below and beyond the state and each of them creates their own law.

II. PLURAL POLITIES AND PLURAL *DEMOI* IN A POLYCENTRIC EUROPEAN FEDERATION

What is at any rate clear, as MacCormick explains, is that the EU makes it possible to have politics beyond the sovereign state. I take this to be a very moderate but forceful response to the "no demos" objection, which I see as rather nationalist or nation-state oriented. These will be a different type of politics with a completely different notion of the demos and popular representation, political debates, political culture, accountability, representativeness, media participation and (mis) representation. It is not politics without the sovereign state nor is it exclusive or dismissive of it, rather it is inclusive of Member Statehood and of other forms of polity above, beyond and underneath the Member State.

Whether democracy is possible in any polity, even in the nation-state is a loaded question, which requires clarification of the principles that inspire democracies. Local and Regional democracy and democracy at a multinational federal state level are quite different too. According to the logics of subsidiarity, the local and regional levels would be closer to the citizens and in principle they would be the "natural" forum for the adoption of decisions, unless greater efficiency and economies of scale would be obtained by taking the decisions at a larger level, i.e. the state or the supra-state levels or even the global level. The difficult issue will then be how those decisions are adopted at a higher level, by which representatives under what possibilities of citizen control.

The extent of normative power in the EU today depends on the division of competences between the EU and its Member States and also on the

distribution of competences within each of these Member States. To the extent that sovereignty amounts to legitimate norm-making capacity, it is divided or shared between the supra-national or supra-state, the state-national and the infra-national or infra-state regions, and in a constant flux, it is dynamic and dialectic. This would take us to a concept of shared sovereignty based on two guiding principles: distribution of competences and subsidiarity, which encompasses other principles like efficiency, proportionality, proximity.... Yet, there are surprisingly few political debates turning around subsidiarity, on the effectiveness of local versus global approaches, on economies of scale, on allowing local standards to prevail. These debates would require rather subtle and informed arguments and judgments based on social “scientific” and policy knowledge whereas dominant political debates tend to simplify and chose cleavage issues that more easily appeal to popular sentiment.

Formal sovereignty therefore implies title or competence to decide. Real sovereignty is sometimes reduced to this formal legal aspect of competence and capacity although it would need to involve something more than that: a real opportunity to determine the state of affairs. If formal sovereignty means having the title or the power to make norms, material or factual sovereignty would imply being able to make any decision, unfettered by limitations, by financial constraints and by redlines imposed by the powers that be. The visibility of power and sovereignty is again a different matter and it takes us back to the issue of state coercion: it is easier to perceive sovereignty behind an armed policeman taking an accused before a female judge in a local court than behind the executive board of an equities firm moving spectacular investments around the world to countries where wages are low and trade unions weak.

Besides having a title to decide and having the means and know-how to carry out decisions, sovereignty also implies having the administrative and bureaucratic means to implement decisions, and here, again we find different formulae. Even EU competences are exercised or implemented by means of national (state, regional or local) administrations which means that even when the decision was adopted at the supranational level, it is actually implemented at the local level. On top of this, the areas where MS retain competence like social control - criminal law and justice systems - protection - law and order, police and defence - the creation of

infrastructures - roads, major transport and engineering projects - or welfare – social security and other social advantages – and of course the raising of taxes to make sure all these “regal” services can be provided, are all exercised with serious consequences on the lives of the citizens by state organs. As a result state authorities tend to acquire maximum visibility and social presence in contrast with EU bodies which have made the original norms in cases where they had the title, or have simply coordinated and recommended state action. Mass media pay attention to these tasks adding to the impression that the State remains the real centre of power. Setting the limits of political debate and liberties by means of the criminal law will give us a wrong impression of the dilution or transformation of sovereignty and of the polycentrism of power, competences and decision making. We tend to forget that important spheres of power are deployed at a higher transnational level and that the possibilities for innovation, adaptation and success depend on the local fabric. Yet the local and the global are presented as powerless spheres; the focus of political debate is still thought to be the state. However other non-state versions of the demos might very well be in the making. They will be subtle and silent and will involve new forms of governance. The interesting question is whether they can be democratic forms of governance.

Can there then be different expressions of democracy at the three or four levels – local, regional, state-national, supranational - we have identified? Can there even be non territorial democracies? We begin to understand that the demos is not always clearly defined and that the better conception of democracy is one that operates with inclusive procedures⁵ of participation in the decisions that shape the way of life or the lifeworld in a community. This is the essence of politics, the discourse of the polis. But we can see that the higher the level is removed from citizens and their communities, the greater the risk of alienation and disconnection between citizens and relevant decision-makers. Other stake-holders with particular

⁵ See Samantha Besson, *The Morality of Conflict, A Study on Reasonable Disagreement in the Law*, Oxford: Hart Publishers, 2005; and Will Kymlicka, *Liberalism, Community and Culture*, Oxford: Oxford University Press, 1989; *Multicultural Citizenship*, Oxford: Oxford University Press, 1996; and *Multicultural Odysseys: Navigating the New International Politics of Diversity*, Oxford: Oxford University Press, 2007.

interests can reach the decision-makers at higher levels. Where normative decisions on the lifeworld, and the market are adopted, they take the form of legally predefined sources of law, following legally predefined procedures. Decision-makers are to be formally mandated or authorised to make decisions representing their constituencies, but it is often the case that their constituencies are not fully aware of what is being decided and what is at stake in the adopted decisions. The responsibility of the decision-makers and the opposition candidates is therefore to be as informed as possible about the implications and repercussions of proposed legislation and to seek the advice and the opinions of their constituents. Subsidiarity can imply precisely this awareness of impact.

Perhaps there is excessive juridification or legalism in the EU and politics is dominated by technical, institutionalised law-making and new modes of governance. Perhaps there is fragmentation from the inside, with each subsystem having their particular logics and perhaps it is difficult to interpret these processes from a coherent standpoint. The discussion at the EU law- and policy-making levels becomes technical rather than principled, subject to pressure from interest groups specialised in each field and from stakeholders that are more influential than relevant, and accordingly, the feeling of a genuine political discussion is lost, the elements to reintroduce overall coherence are then called for in order to bring the whole legal and political process under meaningful action, at least meaningful to those affected. As mentioned above, this seems more plausible the closer the decisions are made to the citizens.

But the counterargument usually runs that the important processes are not locally decided, but globally and this seems to justify action at the higher levels, removed from the citizens. For democracy to be at all meaningful, the citizens would then need to be properly involved in these processes, including the transnational processes that bring about the effects we tend to call globalization: understanding procedures, having the relevant factual information and understanding it, being able to foresee the consequences of their decisions, mandating their representatives with precise terms, and being in a position to call their representatives into account, having a forum to question decision-makers based in other jurisdictions. If these forms of participation required by modern versions of democracy are to be meaningful, it becomes crucial for citizens to detect a sense of direction at all levels of the polis: this is the only way to expect them to partake in the

demos and have a sense of identity. Macroeconomic objectives such as those set out in the Lisbon Agenda, especially with the sustainable development turn it took in the Gotteborg summit, combating all forms of discrimination or protecting Human Rights and fighting climate change are all higher level aims which provide the EU with a telos and a sense of direction.

It is not certain whether citizens will actually develop a sense of identity on the basis of such universal ambitions allowing a European demos to develop, but it seems plausible that without them politics at the EU level will remain a domain reserved for initiates, experts and lobbies. But if the media are not there to report what is at stake and whose interests are dominating, and if public opinion, civil society, NGOS and political parties will not be interested, then how can the citizens be expected to remain involved and supportive to the extent that the entity can be said to enjoy some form of democratic legitimacy, assuming that is, that citizen involvement is something that interests not only the key decision-makers but generally all those who believe in democratic governance.⁶ The risk of the no-demos (i.e. no pan-European demos) is therefore that important decisions adopted in a polity go largely unchecked by those who are greatly affected by those decisions. The alternative picture of the EU is that a purely technical and bureaucratic intergovernmental forum, left to the diplomacy and policy negotiation skills and know-how of government officials, trusted to bring about welfare and benefits to their respective demoi. The history of European integration shows constitutional episodes or moments that can be understood from either of these standpoints, and the recent developments from the 2001 Laeken declaration to the 2008 Irish referendum on the Lisbon Treaty confirm the difficulties the EU is encountering in coming to terms with its own democratic aspirations. Resistance to the so-called European super-state can sometimes be interpreted as perceived risks of the decline of the sovereign nation-state, and as agonistic and sentimental attempts to preserve it, or to save whatever is left of it. For some, this is a futile attempt, something like

⁶ On the other hand, when an issue decided at European level gets sufficient public attention, the citizens are keen to have a voice, as the discussions on the services (e.g., Bolkenstein) directive showed.

resisting the incoming tide; for others it is the only way to make sure that this process will not develop into something truly supranational.

Purely formal sovereignty is thus analyzed as an all or nothing question, equivalent to state personality in international law. Traditionally this has been interpreted as unrestrained prerogatives to make laws and immunity from external interference or pressure in norm-making, but in the EC, EU and ECHR this full power and immunity no longer hold, they have become system-relative or competence-bound. The sovereignty of the States has an interesting common projection into the European Community and into the European Union. Formally the EC is a very special type of international organisation, so special that it has developed into its own genus, and the EU is an interesting entity: the type of sovereignty the EU might enjoy comes from the powers and competences exercised in concert by the sovereign Member States or attributed by these to the Common Institutions, and from the legal personality of its first pillar, the EC, as an international organisation.⁷

The resulting scenario is one where different polities, below and above the state, exhibit formal sovereignty along with traditional nation-state sovereignty. The fact that these new forms of sovereignty can ultimately be traced back to the state, both formally and conceptually, does no longer imply that they are state dependent or state forms of sovereignty. Below the state, the development of constitutional regions has actually transformed the very understanding of complex states. Take the example of contemporary Belgium in the EU or of Switzerland, outside the EU: they are inconceivable as anything other than consociational states constituted by their infra-state entities. The formation of the will of the state is a complex result of participation and concert between these regions. Similarly, when talking about the criminal laws of the Member States one cannot sidestep the fact that states like the UK have more than one criminal law, that there is no national criminal law above that of Scotland, Northern Ireland and England and Wales, and possibly other special cases for some of the isles. Formal sovereignty of a State thus

⁷ It is open to debate whether the EU has any personality in law, or for that matter, any formal sovereignty

transforms into something more nuanced if we are talking about criminal law in the UK or if we are talking about corporate taxation in Spain where there are five different quasi-sovereign” legislators: the three historic territories of the Basque Autonomous Community, the Foral Community Navarre, and the common regime of the rest of Spain.

The discourse I have so far developed might have given a slightly misguided impression that Member States are now powerless, whereas the EU is almighty. It might have even given the impression that infra-state levels of governance like the regions, not to mention cities, have no role at all to play in the sovereignty game. This is very far from the much more nuanced and complex ways in which classical state-national sovereignty has been transformed in the World context since the creation of the UN and other international organisations, and in the case of post-WWII Europe, since the creation of the EEC and the Council of Europe.

If we take nation-states like Luxembourg, Estonia, Portugal, Malta, Ireland or Bulgaria, would we say that they have altogether lost or gained in sovereignty as a result of these processes? Obviously if sovereignty is to be understood as the formal normative capacity to make laws, unrestrained by external influences or commitments, then those States have willingly limited or reduced that capacity by assuming certain international law obligations, but even the theorists of formal sovereignty - except those who hold on to the theory that the Queen in Parliament has no limits - will say that they have done so exercising their external sovereignty as relevant subjects of international law. Now, a country like Ireland can stop the entry into force of a Treaty (the Treaties of Lisbon) that it has formally signed with 26 other Member States, and the rest accept this as constitutional orthodoxy because the Treaty they have signed consecrates precisely this model of the necessary ratification by each and everyone of the national *demoi*. Formally speaking, Ireland has acquired formidable weight, and a formidable responsibility as well, for it has signed into Lisbon and is holding 26 Member States who have signed it and 23 who have already ratified it.

This extraordinary formal power gained by smaller Member States involved in the current stage of development of European integration might be a powerful argument in favour of internal enlargement and

independence in Europe. For those nation-regions that are currently part of a larger Member State, the suggestion might be to secede from those plurinational states and to set up their own Member State, to gain the type of formal sovereignty afforded by Member Statehood.

I understand Neil MacCormick as arguing for a Scotland, independent within the EU but keeping some sort of special relation through the Council of the Isles wherein England itself would correlatively evolve. We are not told how Wales and Northern Ireland would themselves evolve and I take this silence to be respectful of their autonomy as nation-regions, but while MacCormick offers a dynamic view of the UK, his vision of the EU tends to be rather static, remaining as it is - a commonwealth - or alternatively a confederation. But in the ideal - not unrealistic - constitutional framework proposed for Scotland and for the future UK, there seems to be more of a rational reconstruction of the current EU than an ideal model or proposal for its evolution in the future.

My approach differs slightly from MacCormick's and that of the European Free Alliance. If something like the United States of Europe develop, the issue of independence in Europe becomes at the same time less tragic and less attractive. For one, the Member States would relinquish part of the formal sovereignty which is brought by the power of veto, thus making it less attractive to become a federated state and making it more attractive to form part of a larger voting block. On the other hand alliances between smaller federated states will be possible and one cannot always take it for granted that the larger federated state will defend the interests of one of its nation-regions. But the choice becomes less tragic for those who are against it: secession is currently a traumatic decision because a formally sovereign Member State loses one of its component nations, but if all these nations agree to federate into a larger state, there would simply be a rearrangement of the federation, no real secession to combat. I argue for a federal Europe to which, even formally, current Member States would have vested not just specific powers but formal or external sovereignty as well, keeping a right to exit and regain formal sovereignty. This is not the way I would reconstruct the current EU but rather how I would like to see it transforming in the near future, as a European Federation. In that ideal scenario, the current nation-states would become nation-regions and there would be nothing dramatic in current multinational Member States

dividing up and generating new nation-regions, unless they chose to develop their multinational status and federate with other European nations. This is of course a claim for the transformation of Europe.

The development of the EU follows drives that pull in different directions, some towards greater integration and efficiency, others towards self-respect for Member States' traditions and regional identities seeking the maintenance of different centres of decision-making, but still calling for a successful operating Union. If Europe is diverse and polycentric, as I certainly want it to be, it will hardly move forward smoothly without tensions or contradictions. What is essential is that it is not blocked in deciding what to do, thus failing to deliver as a world actor.



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