THE EU AND THE MANY FACES OF LEGAL PLURALISM TOWARD A COHERENT OR UNIFORM EU LEGAL ORDER?

Matej Avbelj[*]

I. Introduction

In the last decade or so, legal academia has witnessed a literal explosion of discourse of legal pluralism. Far from being an exception here, the field of EU law is at the forefront.[1] In this paper we will try to explain briefly what the reasons for this are, and above all what legal pluralism, in its various forms, actually stands for. For this purpose, we will compare the so-called classical conceptions of legal pluralism on the one hand, and legal pluralism as it has emerged in the European Union on the other hand. It will be argued that the classical conceptions of legal pluralism fall short of explaining, and are conceptually different from, the legal pluralism that has been taking root within the EU.

Having understood this difference, we will then focus more precisely - and this will constitute the core of the paper - on the European Union and the pluralist challenges that ensue from the uneasy and complex relationships between the legal orders of the Member States and the supranational legal order. The core question in that regard is how to approach the challenges that EU legal pluralism in its various forms and degrees poses for the role that the law is expected to play in the European Union. It will be claimed that the two different responses to this question are: either by preserving EU legal pluralism or by thwarting it, namely, by conceptualising and developing the EU legal order as a coherent or as a uniform legal order. Finally, it will be argued that since each of these two models seems to presume a different image of the European Union, the choice between the two depends on which should better ensure certainty in the allocation of rights and duties that best fits the conception of justice prevailing in the EU.

[*] PhD Researcher, European University Institute, Florence. LL.M NYU School of Law. I would like to thank Neil Walker for the comments on an earlier draft of this paper. Comments are welcome at <matej.avbelj@iue.it> and the usual disclaimer applies.

[1] The literature is huge. In order to avoid repetition it will not be listed here, but it can be found in the footnotes that follow in the rest of this paper.

II. The Many Faces of Legal Pluralism

a) Classical conceptions of legal pluralism

Legal pluralism can be defined as a concept which refers to legal systems, networks or orders co-existing in the same geographical space.[2] Its origins can be traced back to the 1960s' empirical studies of post-colonial societies conducted by legal anthropologists who showed that in colonial and post-colonial societies a great deal of social and conflict resolution took place under traditional norms and processes which were not officially recognised as law and which were sometimes even in conflict with national or state law,[3] usually termed as modern law and imposed by western colonial forces. The beginnings of legal pluralism were thus underlined by the critique of hegemonic ex-colonial forces and of their disregard and contempt for the indigenous law and for local traditions. This line of legal pluralism can be called a *post-colonial account of legal pluralism.*

These studies were later extended to embrace modern societies where legal pluralism (*state legal pluralism*) was claimed to be concealed by a common ideology of unitary positive law. Different sociologists of law have pursued these claims further, contending that a systematic, homogeneous positive law, bound to a central legislator and jurisdiction, co-exists with habits that are collectively binding by way of the repeated practice of widespread recognition and whose importance lies within their potential to consolidate, transform or even alter positive law.[4] Furthermore, positive law is hence not the exclusive source of binding norms in a society, since an array of social actors has the authority to create collectively binding norms beyond the political process itself and beside the political legislator.[5] These two accounts of legal pluralism (post-colonial and modern statist) seem part of the conception of legal pluralism which is confined to the state and is characterised by its attack on the dogma according to which positive law enacted by the state is the only source of law.

Subsequently, an even broader conception of legal pluralism was developed, according to which legal pluralism within the state is only a subspecies of legal pluralism. It was emphasised that the state is not the only source of normative and legal regulations and that individuals or

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[2] W Twining, *Globalization and Legal Theory* (Butterworths, London, Edinburgh, Dublin 2000) 83.

[3] Ibid 84.

[4] E Ehrlich, *Grundlegung der Soziologie Des Rechts* (Duncker und Humblot, Berlin 1989).

[5] L Pospisil, *Anthropology of Law - A Comparative Theory* (Harper & Row, Publishers, New York 1971).

other legal subjects now regularly find themselves governed by a variety of regulatory orders which overlap, interact and often conflict.[6] Santos described these different intersecting legal spaces superimposed, interpenetrated and mixed in our mind and actions as *interlegality.*[7] Accordingly, this broader conception of legal pluralism led to recognition that local, national, transnational, regional and global orders could all apply to the same situation.[8] It was convincingly shown that many law-creating activities also take place beyond and within the state - on the sub-state level, that is, on the local and regional level, and not just on the level of the state itself.

However, this euphoric achievement of disengaging the law and the state which results in the hypertrophy of legal pluralisms calls for a great deal of caution. Whereas legal pluralism suggests a huge internal diversity present in every society, whether a self-contained or an open one, which positive law tends to overlook or even suppress, legal pluralists generally overlook the importance of the positivity of law and the formal conditions that certain norms have to satisfy in order to count as law in the first place. By designating statist positive law only as one of many semi-autonomous social fields[9] - and even not the most important one in their eyes - legal pluralists achieve two things. First, and this has to be welcomed, they show that the creation of law is a dynamic process which encompasses all institutional layers of society, that is, both informal and normatively structured societal areas.[10] They emphasise how the law as an institutional normative order cooperates but also conflicts with other normative orders in society. Nevertheless, the proponents of legal pluralism tend to neglect the conceptual problems that are raised by their approach. Thus, they often simply disregard the problems of when, where and how to draw distinctions between legal and non-legal phenomena and between legal orders, systems, traditions and cultures.[11] It is very common for legal pluralist to see the law more or less everywhere: in families, at working places, in favelas, in the relations among global actors, for example multinationals,[12] and so forth. Therefore, classical legal pluralism,

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[6] Twining (n 2) 84, citing J Vanderlinden, 'Return to Legal Pluralism: Twenty Years Later' (1989) 28 Journal of Legal Pluralism 149, 154.

[7] B de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Rutledge, New York 1995) 472-473.

[8] Twining (n 2) 85.

[9] S Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1972/1973) 7 Law and Society Review 720.

[10] Ibid.

[11] Twining (n 2) 85.

[12] In the activities of these large multinational corporations, some scholars have even managed to locate constitutional law (sic!). See, for example, HW Arthurs, 'Constitutionalizing Neo-Conservatism and Regional Economic Integration: TINA x 2' in TJ Courchene (ed),

in its internal to state and broader conception, despite its advantages in breaking the hegemonic understanding of law, remains largely vague and without a clear sense of direction.[13] Ultimately, it leaves us, as Teubner's reply to Santos clearly confirms, in ambiguity and confusion.[14]

Conceptually, methodologically and practically, this is an utterly disappointing result. The classical account of legal pluralism apparently does not live up to its challenges and instead of analysing, critically evaluating and simplifying the problems on which it is focused, it rather exacerbates them. But even if the discourse of legal pluralism managed to overcome these fundamental shortcomings, it should - at least in our eyes - achieve much more. It should be able not just to point to the diversities in modern societies and to the complexities that arise when they interact, but should provide a matrix within which the negative consequences of legal pluralism could be tamed while at the same time the benefits of pluralism would be preserved.

Finally, and above all, as we will see below, legal pluralism - due to its original micro-level anthropological orientation, from which it apparently cannot be successfully severed - can hardly be of any epistemological or explanatory help in understanding the legally pluralist nature of the European Union. This point has to be made clear in order to prevent further methodological misconceptions or naïve expectations about the potential constructive role of classical legal pluralism in research in the field of European Union.

b) Legal Pluralism in the European Union

On the face of it, the European Union nicely fits the broad definition of legal pluralism, being *inter alia* defined as *a concept which refers to legal systems co-existing in the same geographical space.*[15] Indeed, within the geographical space of the Member States of the European Union, there are (at least) two distinct legal orders,[16] that of the respective Member State and the supranational legal order of the EU. The legal order of the Member States has been historically conceived as a hierarchical sys-

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*Room to Manoeuvre? Globalization and Policy Convergenc*e (McGill-Queen's University Press, Montreal and Kingston 1999) 17.

[13] Twining (n 2) 228.

[14] G Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 Cardozo Law Review 1443.

[15] Twining (n 2) 83.

[16] And with the development of differentiated integration, there might even exist multidimensional claims towards ultimate legal authority. For a more theoretical grounding of these issues, see N Walker, 'Sovereignty and Differentiated Integration in the European Union' in Bankowski and Scott (eds), *The European Union and its Order: The Legal Theory of European Integration* (Blackwell, Oxford 1999) 32-33.

tem with a clear and single source of ultimate legal and political authority - popularly called sovereignty - grounded in a wider political democratic system which exists for, and is created by, the people.[17] On the other hand, and this is a very well-known story, alongside the legal orders of the Member States, a supranational EU legal order was created by their common accord. This was in due course proclaimed as an autonomous legal order for which Member States have limited their sovereign rights, albeit in limited fields,[18] although of course they have not given up the autonomy of their own legal orders. The European legal reality is then one of the co-existence of autonomous legal orders, each of them claiming ultimate legal authority[19] expressed by the principle of the supremacy of EU law on the supranational side, and the invocation of sovereignty on the statist side.

It is precisely this existence of *competing plausible claims to ultimate legal authority from two different sources* - the states and the supranational EU - that distinguishes European legal pluralism from classical legal pluralism. The latter did not envisage this kind of situation and therefore, as intimated before, it falls short of explanatory power in the field of the European legal order. However, in order to fully understand this distinction between the two conceptions of legal pluralism, it is necessary to clarify the character and meaning of the term "plausible claim to ultimate legal authority".

The latter defines sovereignty in legal rather than in political terms, as a threshold concept (i.e. being a matter of degree), referring to the internal order of a polity rather than its external relations, and as divisible, yet requiring a finality of decision.[20] It stems from the conceptual deconstruction of the concept of sovereignty achieved by the simultaneous severing of sovereignty from the state[21] and by decoupling the political

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[17] This nice, transparent, self-referential hierarchical structure of formal general rules produced certainty and consequential confidence in the thus-conceived legal order. This has been so since the Peace of Westphalia. The concept of law as unity, with its faculty for providing certainty and confidence, dates back to, and is a very reaction,to, the uncertainties and insecurities existing in Europe of that time. See SD Scott, *Constitutional Law of the European Union* (Pearson Education, Harlow 2002) 278.

[18] Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

[19] The term was coined by N Walker. See Walker (n 16) 59 - 64.

[20] Ibid.

[21] One way of defining the sovereign state is to see it as a territorial political order coupled with the legally defined position of near-absolute legislative power. Externally, the state is sovereign if there are no external limits to its internal exercise of political and legal power. MacCormick claims that these kinds of states nowadays no longer exist and, furthermore, sovereignty is not the core concept. Law does not require a sovereign in order to be law, since it is the law which determines the sovereign. See N MacCormick, 'Beyond the Sovereign State' (1993) 56(1) MLR 12.

and legal nature of sovereignty.[22] Law and politics, despite the fact that they are mutually constitutive,[23] are nevertheless two different concepts. Law is an institutional normative order characterised by the fundamental word "*ought*" as opposed to the word "*is*", which belongs to the political world, i.e. to the world of power.[24] This decoupling of the legal and political nature of sovereignty enables us to overcome the historically enrooted "absolute" conception of sovereignty, according to which being sovereign means having absolute power which ends in the absolute obedience of individuals and agencies within the legal and political order of a particular state. The absolute conception of sovereignty is thus primarily conceptually superficial and, as correctly pointed out, it is also sociologically naïve.[25] Once politics as power and law as normativity are conceptually distinguished, we are immediately able to see social reality with different eyes, allowing us a more sophisticated, nuanced view transgressing the old-fashioned all-or-nothing approach. In other words, decoupling the legal and political nature of the concept of sovereignty is a prerequisite for conceiving and understanding legal pluralism as such, and *a fortiori* its EU version.

Whilst for one part EU legal pluralism thus conforms to classical legal pluralism in its conviction that the state is not the only source of law (regulatory authority, etc), it nevertheless takes a completely different stance from that of classical legal pluralism. First of all, EU legal pluralism does not operate on the micro level by putting forward examples of numerous other private actors that in different informal, semi-formal and formal environments allegedly also create law. Rather, it works on the macro level by contending that there is another structure, i.e. a supranational legal order, which claims to be autonomous, on an equal footing with the state, or even trumping it by asserting equally plausible ultimate legal authority. In other words, while legal pluralism in classical terms points to the other sources and actors of norm creation, it is clear that these sources and actors do not think of themselves as autonomous entities that are equal to states or even something more than states. Even if we adopt the stand of classical legal pluralists according to whom different non-state social structures, such as families and working and living communities also create law properly called, which, as we have stressed above, is in itself contestable and more or less implausible, we can certainly note that these social structures do not claim ultimate legal authority. Even if they did claim it, these claims would be plausible neither

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[22] Walker (n 16).

[23] N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 343

[24] See N MacCormick, *Questioning Sovereignity: Law, State and Nation in the European Commonwealth* (OUP, Oxford, New York 1999) 4..

[25] Walker (n 16) 34.

in an objective nor in a subjective sense.[26] On the contrary, they, as the proponents of classical legal pluralism suggest, demand the recognition by this very state's positive law which they want to reshape in order to make it more inclusive and more responsive to the whole range of diversities and of different social-norm-creation-sources in society. This can also be neatly shown by the following examples.

It is completely implausible, for example, for a family, or to make it less bizarre, for a favela, to claim one day ultimate legal authority, i.e. the right to autonomy and self-governance separately from the state, by contending that its law is higher than the law of the state in which the favela is located. This would simply be considered as a riot and thus as a manifest breach of the law of the state. The same holds true for the so-called global networks, to which classical legal pluralism also points, such as NGOs, multinationals, etc. They do not claim ultimate legal authority either, but they rather strive for recognition by the law of the state in which they are active, and they have to comply with this very law. Amnesty International, perhaps as the most notable example of a global NGO, has never claimed that "its law" trumps the law of a certain state (of course, it has many times claimed that the law of a particular state is contrary to the minimum standards of human rights protection under international law, which is, however, a completely different kind of claim). A similar story relates to so-called global functional "guild" organisations such as sporting organisations. While their rules are granted a great deal of autonomy and the states do not in principle interfere with the setting of the rules of the game, the transactions of players and so on, this is only as long as their "autonomous rules" do not contravene some laws of the respective state. For example, if, for the violation of its autonomous rules, the Federal International Football Association (FIFA) or a national football association (the Slovenian association, for example)[27] imposed a

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[26] This distinction can be traced back to HLA Hart, *The Concept of* Law (Clarendon Press, OUP, Oxford, New York 1994). Hart's conception of law based on the rule of recognition as a source of criteria of the validity of the particular legal system distinguishes between the two indispensable sets of requirements - objective and subjective - for the existence of a legal system. The *objective criterion* is expressed in terms of the effectiveness of primary rules which is measured by the compliance (or obedience) of the individuals with them. Or in Hart's words *"[so] long as the laws which are valid by the system's test of validity are obeyed by the bulk of the population this surely is all the evidence that we need that a given legal system exists."* The *subjective criterion* is fulfilled on the level of secondary rules by the attitude of officials who have to create and comply with these rules because they perceive them as binding law, and not for whatever kind of reason in terms of compliance, as this is a case of obedience of "ordinary individuals" to the primary rules. Again, as Hart put it: the "[l]*egal system's rules of recognition and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials"*.

[27] A similar case arose before the Slovenian Constitutional Court (case **U-I-51/94,** at <http://www.us-rs.si> accessed 1 October 2006). It was, however, rejected on purely procedural grounds, yet it was emphasised later that the Court's reasoning would go in the direction that we pointed to above.

huge fine on a football club which would imminently lead to its collapse, this would cause an infringement of the fundamental constitutional right of freedom of association. Consequently, the constitutional court would scrutinise the decision of FIFA for compliance with the national constitution. If this FIFA decision was found to be disproportionate, thus constituting an unjustified interference with the constitutional right to association, the constitutional court would certainly not hesitate to strike it down. There is no plausible way in which FIFA or a national football association could contend that its autonomous rules are above the state constitution and that the latter should therefore give way to it. Yet, in the European Union, precisely these kinds of claims emerge as a sign of legal pluralism. In the following section we examine how they have been dealt with and what types of responses there are to EU legal pluralism.

III. Types of Responses to EU legal pluralism

As we have seen, legal pluralism in the European Union is characterised by the competing plausible claims to ultimate legal authority between the legal orders of the Member States and the supranational legal order. The relationship between these two sets of legal orders came to the centre of attention of the European scholarly and broader public after the adoption of the Single European Act and the subsequent creation of the European Union by the Treaty of Maastricht. This was the time when both exit and voice were lost,[28] supranationalism started to bite, and the Member States, more accurately their highest courts, showed their teeth as well. The time has come when the actors in the national legal orders have realised that supranational polity has been successfully constituted, that it exists alongside the Member States, and that it penetrates them even on the most fundamental level, on the traditionally sacrosanct level, i.e. on the level of state constitutions that would, according to the EU principle of supremacy, need to give way to the tiniest supranational legal act in the event of conflict. Then came the proverbial constitutional conflicts, admittedly very few, but nonetheless imposing, when most notably the German but also the constitutional courts of the other Member States started to assert their own supremacy, their own remaining capacity to police the boundaries and subsequent validity of the supranational legal order.[29] Since the available space in this paper necessarily requires that we cut this long story short, we will just briefly present the types of

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[28] For a discussion of the interplay of the interplay of notions of voice and exit, see JHH Weiler, 'The Transformation of Europe' (1991) 100 YALE LJ 2403, 2401.

[29] For the majority of cases, see A Oppenheimer (ed), *The Relationship Between European Community Law and National Law: The Cases* (Cambridge University Press, Cambridge 1994 and 2003) vol.1 and vol.2..

responses to EU legal pluralism that have developed in reaction to the given constitutional conflicts.

Among the debates between constitutional and international law scholars, we can identify two major approaches to the understanding of this relationship: the hierarchical and heterarchical approach. However, it is becoming increasingly difficult to draw the line between the two.

Under the hierarchical approaches, whose leitmotif is to respond to the challenges of EU legal pluralism in a monist way, we can distinguish between the monist international law approach, the statist federal approach, and the pluralist approach under international law. According to the monist international law approach, the supranational legal order, EU as a polity, cannot plausibly claim ultimate legal authority, since its origin has to be traced back to the common international accord of the Member States which remain the ultimate arbiters of the validity of EU law.[30] Pursuant to the federal approach, the EU is already, or it is at least certainly on the way to becoming, a fully-fledged federation where EU law has its own foundations, where as the law of the land trumps the legal rules emanating from the legal orders of the Member States in the event of contravention.[31] Both of these accounts are classical and well-known expressions of monism under international or federal state law. The last example of the hierarchical approach to the relationship between the legal orders in the EU is much more nuanced and already draws heavily on the heterarchical approach. The best example of this is the approach endorsed by MacCormick according to which the relationship between the legal orders of the Member States and the supranational EU legal order is one of heterarchy - mutual recognition of the autonomous existence of both systems, which are, however, in the good old Kelsenian tradition, subordinated to the overall rules and principles of international law that should provide a solution when the equally plausible claims to ultimate legal authority of both legal orders conflict.[32]

As opposed to the hierarchical approaches, the heterarchical approaches recognise for both supranational and national legal orders equal plausibility of their claims to ultimate legal authority within their respected fields. Both legal orders are considered as autonomous, with their own

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[30] See, for example, T Schilling, 'Who in Law is the Ultimate Umpire of European Community Law?' Jean Monnet Working Paper 10/96.

[31] There are many examples of this account which is, however, quite diversified. For a very prominent assertion in the direction of this approach, see J Fischer, 'From Confederacy to Federation: Thoughts on the Finality of the European Integration' (Speech given at Humboldt University, Berlin, 12 May 2000). See also J Habermas, 'Why Europe Needs a Constitution?' (2001) 11 New Left Review 5.

[32] See N MacCormick, 'Juridical Pluralism and the Risk of Constitutional Conflict' in MacCormick (n 24).

full, exhaustive, definitive set of secondary rules.[33] While autonomy can never be literally complete, since social systems cannot exist in splendid isolation from their environment,[34] i.e. in this case from the other legal orders, and it is thus always a matter of degree, the degree of autonomy which should be recognised for the EU supranational legal order differs among authors according to how radical an account of legal pluralism they have adopted. Following the most radical account of EU legal pluralism, i.e. epistemic pluralism, most notably pursued by Walker, the EU supranational legal order and the legal orders of the Member States are recognised as different sites, each possessing its own epistemic starting point, i.e. its own way of knowing and understanding. Accordingly, this means that in the event of conflicts between the competing claims to ultimate legal authority there is no plausible perspective, no sure basis of historical knowledge, no Archimedean point, from which these claims could be reconciled, for as long as the EU legal order and the legal order of the Member States are treated as different unities.[35]

Other proponents of the heterarchical accounts, while recognising the autonomy of each respective legal order, fall short of epistemic pluralism and try to find a plausible solution for the reconciliation of apparently irreconcilable claims. However, as a result, some of them tend to drift, *volens nolens,* back to the monistic - non-pluralist solution. An example of this is an attempt towards the creation of a set of legal principles that would best fit into the practice of pluralist relationships between the national and supranational legal order and which would consequently enable the courts of last instance to find an equilibrium between the competing conflicting claims. However, according to this approach, the last word in the case of the competing claims embodied in the so-called constitutional conflicts goes to the national constitutional courts.[36] Similarly, but in a broader context that transgresses the constitutional conflicts and the role of the courts of the last instance, it is claimed that a sort of harmony (*contrapunct*) between the competing legal orders should be achieved by the greater inclusion of various participants, ordinary courts, political actors, and individuals in the EU legal discourse.[37] Finally, Weiler sees the

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[33] See B Simma and D Pulkowski, 'Leges Speciales and Self-Contained Regimes' <http://www. freewebs.com/create-future/Leges%20specialis%20and%20self-contained%20regimes. PDF> accessed 18 Dec 2005.

[34] Ibid 3.

[35] Walker (n 23) 338.

[36] M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11(3) ELJ 299.

[37] M P Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed), *Sovereignity in Transition* (Hart, Oxford 2003).

solution of the tense relationships between the competing supranational and national legal orders in the practice of so-called constitutional tolerance.[38] This is an example of normative pluralism which is the expression of the ethics of political responsibility in Europe that should be founded on mutual recognition of and respect among the national and supranational authorities.[39]

What all these accounts of EU legal pluralism have in common is the setting of the strategies of conflict avoidance in order to maintain a sort of tranquillity or harmony in the relationship between the supranational and statist legal orders. However, in order to fully understand what these constitutional conflicts among the legal orders in the EU are really about and how the desired harmony could be achieved by legal means, if at all, it is necessary to focus on the nature and role of law in the era of the challenges posed by legal pluralism.

IV. Dual Nature of Law

It has been submitted that globalisation and its phenomena, and perhaps most notably the emergence of the European Union, have challenged the traditional understanding of law, even to the degree that an entire shift of the paradigm of law is said to be required.[40] However, while we generally share the beliefs of these paradigm-shifters, we are nevertheless convinced that despite the fundamental changes in the environment in which the law is embedded, the law still remains the cornerstone

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[38] See JHH Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg' in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press, Cambridge 2003).

[39] The definition of normative pluralism is Walker's, see Walker (n 23) 337.

[40] For these kinds of claims within the context of the European Union, see, for example, N MacCormick (n 32):"…*the interlocking of legal systems […] poses a profound challenge to our understanding of law and the legal system. The resources of theory need to be enhanced to deal with a challenge full of profound and potentially dangerous implications for the successful continuation of European integration…*" In a similar vein, it was claimed that the EU challenges more than two centuries of traditional legal theory on the unity, hierarchy, systematic and internally consistent structure of law which derives its legitimacy and its origin from the state, whose will has even been personalised in the will of the demos represented in an unified institutional structure of the government. See, for example, M Wind, 'The European Union as a polycentric polity: returning to a neo-medieval Europe?' in JHH Weiler and M Wind (eds) (n 38). For very similar claims, but within the broader field of classical legal pluralism, see H Petersen and H Zahle, *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot, Darmouth 1995).

of modern society[41] due to some of its intrinsic qualities[42] that emanate from its dual nature.

Speaking about the dual nature of law, we refer to the formal and substantive dimensions of its existence. This is a very well-known issue that has historically divided lawyers, roughly speaking, between the proponents of positive law, i.e. legal positivists that have focused on and promoted the formal conception of law, and the proponents of natural law in various forms who have emphasised the substantive conception of law.[43] As the following discussion will show, the two accounts of law - formal and substantive - cannot be taken separately or even antagonistically. Rather, they have to be fused in the so-called integrated conception of law.

From the purely formal understanding of law, the purpose of legal regulation in society is the maintenance of order based on legal rules that their addressees should be able to comprehend and according to which their actions should be guided. For the formal conception of law, it is thus indispensable that valid legal rules are promulgated in a correct manner by a competent body, that they are of prospect temporal validity and that they are clear and identifiable so that the addressees of these legal rules which confer rights and impose duties know how to conduct themselves in order to remain in compliance with the law. Non-compliance with legal rules is, according to the formal conception of law, the only justified reason for sanctions (coercion) imposed on the individual. Sanctions can be imposed only by independent courts to which everybody must have equal access. In essence, the formal conception of law is about certainty: individuals have to know who adopts the law, what their rights and duties are according to the law, and who adjudicates the cases of conflict and non-compliance.[44]

The advocates of the substantive conception of law recognise the importance of certainty, which legal positivists posit as the paramount

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[41] Some would push this claim even further by contending that law is actually the only remaining integrative force of modern societies once all the metaphysical integrative forces are lost. See, most notably, J Habermas, *Between Facts and Norms* (MIT Press, Cambridge 1996). Habermas claims that within complex societies the only remaining tool of social integration is communicative action exercised through the means of law which, with its specific dual nature of coercion (ensuring effectiveness) and legitimacy (rational acceptance of law), brings security (positive law is effective and presumed to be valid) and leaves the people free as to their motives for compliance with the law. Law thus guarantees both security and freedom, and this is what holds modern societies together.

[42] Above all, law's capacity to contain and channel conflicts, which is also a source of the authority of law. See, D Chalmers, 'Deliberative Supranationalism and the Reteritorrialization of Authority' (comment in EUI Working Paper LAW No. 2005/12).

[43] In what follows we draw heavily on P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) Public Law 467.

[44] Ibid 469, citing J Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR. 195.

value, but they go further in their quest by raising the question of good and bad law. For legal formalists, this question pertains to theories of social and political justice, which are, of course, not unimportant, but which are methodologically unnecessary and even inappropriate for the formal conception of law and should therefore be excluded from its ambit.[45] On the other hand, the appropriate theory of justice embedded in law constitutes the core of the substantive conception of law. The substantive conception of law is therefore not just about certainty, but about the certainty in the allocation of rights and duties between individuals and the public authority that fits best the chosen conception of justice of a particular community.[46]

Neither of the two conceptions of law can stand in isolation from the other. An exclusively formalist approach without substantive justice would soon turn certainty into oppression, whereas an exclusively substantive approach without formal means to contain and check the claims to an appropriate conception of justice would sooner or later turn justice into injustice and arbitrariness. Since to be valid law has to be effective (certainty and coercion) and legitimate (justice), the only viable conception of law is an integrated conception that merges the formal and the substantive. According to the latter, the role of the law is to provide certainty in the allocation of rights and duties that fits best the chosen conception of justice within the respective community.

V. Integrated Conception of Law in a Pluralist European Context: Towards a Coherent or Uniform Legal Order?

The integrated conception of law faces great obstacles, in terms of the pluralist nature of the European Union, on its way to the successful role that it is expected to play. First of all, certainty by default seems to be undermined by the plurality of the competing plausible claims to ultimate legal authority. Secondly, the allocation of rights and duties in accordance with the conception of justice appropriate for a certain community faces an even bigger obstacle. It is not just that in the European Union we cannot speak of the traditional self-contained communities,[47]

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[45] Ibid. This "purification" of law has, of course, been most famously pursued by H Kelsen in Max Knight (tr), H Kelsen, *Pure Theory of Law* (Gloucester, Mass. 1989).

[46] Ibid 477 citing R Dworkin, *A Matter of Principle* (Clarendon Press, Oxford 1986).

[47] We can distinguish between two types of communities: self-contained and open communities. A self-contained community is one which is autarchic, self-sufficient, with its own primary and secondary rules which are efficient. The relationship to the other self-contained communities is one of co-existence, as opposed to co-operation, and contacts between these communities are regulated by legal rules stipulated by them on a consensual basis (read international law). Self-contained communities regard themselves, and are regarded by others, as sovereign, i.e. they can decide on their own and by themselves on the law and the conception of justice that will govern the relationships between the actors

which were the starting points of the classical works of legal and political philosophy,[48] it is simply impossible to speak of the European Union, at least at first sight, as a single community. The EU is a multilayered polity, constituted by twenty-five different communities, which are internally differentiated, and by a supranational level which claims its own autonomous existence. Instead of one self-contained community, we thus have twenty-five open communities plus an overarching supranational one. What follows from this is the main and utterly complex question of what kind of conception of justice could plausibly be adopted on the supranational level that would not conflict with the conceptions of justice of the twenty-five national communities.

Ultimately, it turns out that it is precisely this question that lies behind European legal pluralism and behind all the (constitutional) conflicts between the supranational and national legal orders. Constitutional conflicts in the European Union are therefore not just about which formal legal rule, EU or national, prevails over another legal rule. This would be the case if we stuck only to the formalist conception of law, but this, as we have seen, is not possible. If it was all just about competing rules without any substance, we could merely construct a system of conflict of laws which would lead first to one, and then to another rule, and certainty in the practical results would be achieved. But legal rules are also about substance, in which the conception of justice adopted in a certain legally-regulated community is mirrored, and the choice between different rules therefore entails strong policy considerations,[49] and this cannot be done mechanically. The conflicts between national and supranational legal orders in the European Union - and hence the essence of EU legal pluralism - are thus essentially a matter of the most appropriate conception of justice on which the allocation of rights and duties of individuals and the overall just institutional structure of the Union should be built.

Having realised that and assuming that we are not wrong, where do we go from here? How to deal with these fundamental and hard questions instigated by EU legal pluralism in its various forms and degrees

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in the community. A typical example of a self-contained community is the national state of the post-Westphalian world. However, as we have seen above, this kind of state has been brought to an end by the European Union, and similar processes are taking place throughout the world on account of the so-called process of globalisation. Self-contained communities nowadays thus do not exist anymore, certainly not in the European Union.

[48] See, for example, J Rawls, *A Theory of Justice* (OUP, Oxford 1972): "*I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived [...] as a closed system isolated from other societies.*" Much the same can be said for most of Dworkin's works which are limited to the confines of the American or, at best, also to English society.

[49] See C Joerges, 'Rethinking European Law's Supremacy' (EUI Working Paper LAW No. 2005/12, 9) for, *inter alia*, the evolution of the field of conflicts of laws from the "purely private law matter" to the politicisation and realisation of its general social significance.

in order to ensure certainty in the allocation of rights and duties among the individuals that fits best the appropriate conception of justice in the European Union as well? As we have seen, there are roughly two different ways of answering this question: either by preserving EU legal pluralism, or by thwarting it. Namely, by conceptualising and developing the EU legal order, either as a coherent or as a uniform legal order. In the former model, the EU legal order should function as a pluralist harmonious connection of several national legal orders which co-exist and co-operate without destroying or contradicting each other and the whole. In the latter model, the EU legal order would be constituted as a unity - as a legal order which is complete or entire in itself and, as such, allows only for a limited degree of diversity.

It is apparent that each of these two models presupposes a different picture of the European Union and that the core issues of the EU legal order[50] figure very differently depending on whether the EU is conceived as a coherent or as a uniform legal order. The choice between these two models is in our view contingent on which of them better fits into the current EU reality (*capacity of description*), which of them can provide better tools for its understanding (*epistemological or explanatory capacity*), and which can better fit the requirements posed by the integrated conception of law (*normative capacity*). The final decision, however, cannot depend just on legal considerations, since we have to be aware of the limited capacity of law in shaping society. Especially in the supranational context,[51] we also have to exercise extreme care not to succumb to legal fetishism.[52] Many other factors, above all political and economic, play an important role in society, and they have to be taken into account. This contextualised approach is after all demanded by the endorsed integrated conception of law and is at the same time intrinsic to the European Union. By focusing just on the legal and institutional aspects, above all on the role of the judiciary, as has been done too often so far, we risk neglecting many processes that play an equally important role in the life of the Union and which cannot be overlooked by any of the competing models of EU legal order.[53]

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[50] Hereby we have in mind especially the fundamental principles of EU law (supremacy, direct effect), standards of human rights protection, types of differentiated integration, overall constitutional image of the EU, etc.

[51] Joerges (n 49) claims that in the supranational context "*the wisdom and power of law are limited*" and continues that "*in terms of conflict resolution the law should encourage the concerned actors themselves to take up the search for problem-solving interest-mediation. It should ensure that their activities respect principles of fairness, enhance their deliberative quality and then eventually acknowledge such societal norm generation.*"

[52] Hereby we paraphrase N Walker's constitutional fetishism. See Walker (n 23) 319.

[53] One of such phenomena, which cannot be overlooked, is the phenomenon of new governance.