



ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

Edited by Justin Lindeboom and Ramses A. Wessel

THE PRIMACY OF EU LAW: INTERPRETIVE, NOT STRUCTURAL

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ABSTRACT: A leading position among European Union lawyers is that the primacy of EU law has a “structural” dimension. Under views known as pluralism and monism, many scholars believe that the EU has created a new legal system which either sits next to or, alternatively, above the legal systems of the member states. These views, however, are paradoxical and self-defeating. This is shown when we apply the structural theories to the question of primacy as put by the Polish Constitutional Tribunal in case K 3/21 of 7 October 2021. Neither pluralism nor monism can show that EU law prevails over a state that takes Poland’s defiant position. The correct way of understanding EU law is interpretive, not structural. It is the only way that shows that the Polish Court has acted unlawfully. The EU Treaties have not created a new “legal system”, allegiance to which remains optional. According to the best view of EU law, universally accepted in legal practice although not yet fully by legal theory, EU law is entirely continuous with the established constitutional settlement. The EU treaties are ordinary treaties of international law that create constitutional obligations in the normal way. They create bonds of cosmopolitan reciprocity that each member state is legally obliged to respect. The primacy of EU law is based on our ordinary practices concerning the status and authority of the law of nations.

KEYWORDS: primacy – pluralism – monism – dualism – interpretation – cosmopolitanism.

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I. INTRODUCTION

Primacy is the most important principle of European Union law, yet the exact way it operates is continuously tested by domestic courts. Most challenges accept the principle, but quibble about its effects. Unusually, the Polish Constitutional Tribunal has challenged the principle itself. In a judgment issued in October 2021, the Tribunal departed from its earlier case law and ruled that Polish law applies in preference to the Treaties in various ways.¹ The judgment appears to accept the account of EU law proposed by the Polish government in a lengthy “White Paper” issued in 2018, which made extensive use of the theory of “constitutional pluralism” offered by the eminent legal philosopher Neil MacCormick. This was a most unusual association, because MacCormick was a passionate European, a member of the conference that drafted the Treaty on the European Constitution and an advocate of a theory of a “European commonwealth”.² How could his thought ground an act of defiance by a Eurosceptic and illiberal government? Yet, as we shall see below, pluralism is a very unstable basis for EU law, something that MacCormick ultimately saw very clearly.

The Polish challenge asks the question of primacy in a remarkably clear way. It asks: what is the constitutional authority of the treaties as a matter of legal doctrine? This question cannot be answered through ordinary EU law. We cannot respond to it by reading the Treaties back to Poland. The Polish Tribunal says precisely that these Treaties lack authority. We therefore need to turn to deeper questions concerning the relationship between treaties and constitutions and ask fundamental questions about the structure of national and transnational legal orders as a whole.

In this *Article* I will try to do just that. I will take the Polish challenge seriously as a theoretical argument. As I read it, Poland’s defiance gains some support from MacCormick’s analysis. Nevertheless, the sceptical conclusion it reaches must be rejected, because pluralism itself must be rejected as a theory of law. I will take the view that the basic principles of EU law, namely direct effect, primacy and autonomy, make sense only as set of coordinated principles of interpretation of the Treaties under a broadly cosmopolitan framework of law. Hence, the principle of primacy is interpretive, not structural. This reading of EU law considers it to be a part of the law of nations, hence I call this an “internationalist” view.³

This view has to be contrasted to the currently dominant view among European Union lawyers, which I take it to be “structural” in orientation. Structural views say that the

¹ Constitutional Tribunal of Poland of 7 October 2021 K 3/21 trybunal.gov.pl. The same court had found the EU treaties compatible with the Polish constitution when Poland first joined the EU in case K 18/04 of 11 May 2005, available at isap.sejm.gov.pl.

² See N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press 1999).

³ I defended this view in greater detail P Eleftheriadis, *A Union of Peoples: Europe as a Community of Principle* (Oxford University Press 2020).

European Union has brought about changes to the general framework of the legal orders of the member states by creating an entirely new “legal system” that competes or supplements the legal systems of the member states. The formation of the EU legal system is often seen as the beginning, to put it at its lowest, of an inexorable path to the creation of a unified, federal legal system. Some such “federalist” approach is adopted by leading scholars of EU law. Ingolf Pernice speaks for many others, I believe, when he writes: “European law, thus, is considered an autonomous, new and specific legal system based upon a transfer of sovereign rights to the European institutions with ‘real powers’”.⁴

A different, but equally structural in orientation, approach is being suggested by Neil MacCormick, when he writes: “The legal systems of member-states and their common legal system of EC law are distinct but interacting systems of law, and hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another”.⁵

The Polish Tribunal endorses MacCormick’s view, but it does so in a surprising manner. It invokes pluralism in order to reject primacy, not to affirm it. As I will argue below, the structural argument fails. The correct way of understanding EU law is interpretive, not structural.⁶ According to the best view of EU law, a national court is bound by the Treaties and is under an obligation to give them primacy in light of the judgments of the Court of Justice. This is the standard view in legal practice. But this view rests on an internationalist reading of EU law and not a federalist reading. A closer look at the structural argument shows that it is ultimately self-defeating. The only way in which the primacy of EU law can be vindicated is if we accept that the European Treaties are fairly unremarkable international treaties. They have not brought about any structural changes to the legal orders of the Member States and have not created a rival legal system. They have merely introduced new legal principles as a matter of accepted constitutional essentials. The principle of primacy is thus interpretive and not structural: it binds all domestic courts as a matter of both treaties and constitutions in a spirit of cosmopolitan reciprocity. The primacy of EU law is based on ordinary practices concerning the status and authority of the law of nations.

II. DEFIANCE

The judgment of the Polish Constitutional Tribunal in case K 3/21 is extremely brief and its reasoning unclear. The Tribunal said that in so far as any articles of the Treaty on the

⁴ I Pernice, ‘*Costa v ENEL and Simmenthal: Primacy of European Law*’ in M Poiras Maduro and L Azoulay (eds), *The Past and Future of European Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 47, 49.

⁵ MacCormick, *Questioning Sovereignty* cit. 117–118.

⁶ I use the term “interpretive” here in a non technical sense, referring to the ordinary process of legal interpretation. The argument does not depend, on the truth of ‘interpretivism’, the theory of law articulated by R Dworkin, *Law’s Empire* (Harvard University Press 1986).

European Union created an “ever closer union among the peoples of Europe”, according to which “the European Union authorities act outside the scope of the competences conferred upon by the by the Republic of Poland in the treaties; [and] the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application; [and] the Republic of Poland may not function as a sovereign and democratic state” they were incompatible with the Polish Constitution.⁷ This sentence implies that whether the Treaties require Poland not to be a ‘sovereign and democratic state’ is an open question, something to be determined by the Polish courts in each case, and not something that had been settled once and for all by Poland joining the European Union in accordance with its constitutional requirements (which had been confirmed by the Tribunal’s earlier case law).

The Tribunal’s focus is on the Treaties and their design of the institutional arrangement of the EU, not on any supposedly “ultra vires” interpretation of them by a judgment of the court (and to that extent the judgment is different from other criticisms made of the CJEU by national courts over the years). Unfortunately, there is no development of these surprising assertions by the Polish Tribunal, nor is there any reference to its earlier case law. The judgment is extremely brief, perhaps irresponsibly so. Everyone familiar with European Union law has condemned the judgment. The editors of the *Common Market Law Review* observed that “While constitutional courts of almost all Member States have challenged the ECJ’s rather absolute conception of EU primacy, most notably the *Bundesverfassungsgericht*, this is the first time in history that actual Treaty provisions have been deemed (partly) incompatible with a national constitution”.⁸ The Editors conclude that the “The potentially disintegrative impact of this ruling, for the EU legal order and by extension, the EU itself, can hardly be overstated”.⁹

It is obvious that the judgment has an inescapable political dimension. The Polish courts have been in turmoil for years. The Constitutional Tribunal has rejected the interpretation of the principle of the independence of the judiciary reached by the European Court of Human Rights in *Xero Flor*. The problem here was not with any set of European laws, but with the existence of any mechanisms of accountability itself. The European Court of Human Rights concluded in *Xero Flor v Poland*, that the Polish government set about its course of changing the composition of the Polish Constitutional Tribunal by first ignoring a domestic court judgment:

“In the present case, the [Polish] legislative and executive authorities failed to respect their duty to comply with the relevant judgments of the [Polish] Constitutional Court, which determined the controversy relating to the election of judges of the Constitutional Court,

⁷ Constitutional Tribunal of Poland K 3/21 cit. The same court had found the EU treaties compatible with the Polish constitution when Poland first joined in case K 18/04 cit.

⁸ See Editorial Comment, ‘Clear and Present Danger: Poland, the Rule of Law & Primacy’ (2021) CMLRev 1635, 1640.

⁹ *Ibid.* 1642.

and thus their actions were incompatible with the rule of law. Their failure in this respect further demonstrates their disregard for the principle of legality, which requires that State action must be in accordance with and authorised by the law”.¹⁰

The Polish government is not only ignoring European Courts, it is also ignoring its own courts. The problem with Poland goes beyond EU law.

The European Parliament criticised Poland in an acerbic resolution of its own. It said that the Parliament:

“Deeply deplores the decision of the illegitimate ‘Constitutional Tribunal’ of 7 October 2021 as an attack on the European community of values and laws as a whole, undermining the primacy of EU law as one of its cornerstone principles in accordance with well-established case-law of the CJEU; [...] underlines that the illegitimate ‘Constitutional Tribunal’ not only lacks legal validity and independence, but is also unqualified to interpret the Constitution in Poland”.¹¹

The European Parliament’s charge of illegitimacy derives not only from various judgments of the Court of Justice of the EU but also from the judgment of the European Court of Human Rights, which, in case *Xero Flor* has found that the Constitutional Tribunal had been unlawfully constituted since October 2015, when the newly elected Polish government ignored the lawful appointments already made to that court by the outgoing government.¹² The Strasbourg Court ruled that “that breaches in the procedure for electing three judges, including Judge M.M., to the Constitutional Court on 2 December 2015 were of such gravity as to impair the legitimacy of the election process and undermine the very essence of the right to a ‘tribunal established by law’”.¹³ The European Commission followed suit and by the end of the year it issued infringement proceedings against Poland along the above lines.¹⁴ In late October 2021, in Case C-204/21R *Commission v Poland*¹⁵ the vice-president of the CJEU imposed a fine of one million Euros per day for Poland’s failure to comply with an interim measures order of July 2021.¹⁶

¹⁰ ECtHR *Xero Flor v Poland* App n. 4907/18 [07 May 2021] para. 282.

¹¹ Resolution 2021/2935 (RSP) of the European Parliament of 21 October 2021 on the rule of law crisis in Poland and the primacy of EU law.

¹² *Xero Flor v Poland* cit. In March 2022 the Polish Constitutional Tribunal assessed that the European Convention on Human Rights is also unconstitutional in Poland, see Polish Constitutional Tribunal of 10 March 2022 K 7/21. The judges of the Polish Constitutional Tribunal have a personal stake in the dispute. It is their court’s legitimacy that is being disputed. That they are judges on their own cause is an unfortunate as well as inescapable aspect of this case.

¹³ *Xero Flor v Poland* cit. para. 287.

¹⁴ See European Commission, ‘Rule of Law: Commission Launches Infringement Procedure against Poland for Violations of EU Law by its Constitutional Tribunal’ (22 December 2021) ec.europa.eu.

¹⁵ Case C-204/21R *Commission v Poland* ECLI:EU:C:2021:878.

¹⁶ Case C-204/21R *Commission v Poland* ECLI:EU:C:2021:593.

A similar direction has been taken by Hungary and its Constitutional Court.¹⁷ In 2015 Hungary refused to comply with the EU Decision establishing a refugee resettlement quota within the Member States, which required all member states to share a small number of refugees.¹⁸ The Hungarian Constitutional Court concluded that it had a right to “examine whether [EU law] results in a violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State) and the constitutional self-identity of Hungary”.¹⁹ Its judgment spoke at length about Hungary’s “rights” to protect both its “sovereignty” and its “identity” which is supposedly at risk from EU membership.

The Polish and Hungarian courts pose, therefore, a theoretical as well as a practical challenge to the European Union. They dispute the status of the EU treaties themselves and the accommodation of state sovereignty under the institutional design of the Treaties. I do not mean to discuss here the nature of the political challenge or comment on the generally illiberal rhetoric adopted by the two governments. I am strictly focused on the principle of primacy as a doctrine of law. Is the doctrine of unconditional primacy legally binding in Poland and Hungary, and if so for what reason?

III. PRIMACY OF WHAT?

What is the disagreement between Poland and the EU about? The Tribunal’s first order is that there is some incompatibility between the Polish Constitution and the EU Treaties. The Tribunal concentrates on arts 1 and 4(3) TEU. These articles set out some very general programmatic statements about the EU, such as: “This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen”. How can that be contrary to the Polish Constitution? The relevant articles are arts 2, 8 and 90(1) of the Polish Constitution. They include the declaration that Poland is “a democratic state ruled by law and implementing the principles of social justice” (art. 2), a principle that “The Constitution shall be the supreme law of the Republic of Poland” (art. 8) and a declaration that Poland may delegate to international organisations certain public competences (art. 90(1)). There is immediately an air of unreality to this supposed conflict between these broad principles. There is no evident conflict here. The relevant provisions say more or less the same thing.

¹⁷ See RD Kelemen and L Pech, ‘The Uses and Abuses of Constitutional Pluralism’ (2019) *CYELS* 59, 66–70; G Halmi, ‘Abuse of Constitutional Identity: The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law’ (2018) *Review of Central and East European Law* 23.

¹⁸ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

¹⁹ Hungarian Constitutional Court, Decision 22/2016, para. 54, hunconcourt.hu. For a discussion of this judgment see JC Lawrence, ‘Constitutional Pluralism’s Unspoken Normative Core’ (2019) *Yearbook of European Legal Studies* 24, 33–37 and G Halmi, ‘National(ist) Constitutional Identity? Hungary’s Road to Abuse Constitutional Pluralism’ (EUI Working Papers LAW 08-2017).

Could the problem arise from the way they are being interpreted? The Tribunal seems to be saying so. It says that the Treaty is incompatible with the Constitution when it allows “European Union authorities” to act outside “the scope of the competences conferred upon them by the Republic of Poland in the Treaties”. However, this is a non-sequitur. The Treaty never allows action outside the scope of the powers it creates. If the exercise of some powers goes beyond the competences conferred by the Treaties, then this exercise is a violation of EU law and the Treaties themselves. A Treaty cannot allow its own violation. The word “it” in the phrase “when it allows” switches imperceptibly from a Treaty to the Court of Justice. It cannot be the Treaties that allow their own violation.

The same applies for the other parts of the first order, where the Tribunal adds that the Treaties are unconstitutional whenever they make it the case that: “the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application”.²⁰ The Treaties say no such thing. And it is striking here that the Tribunal makes no reference to the provision of the Polish Constitution that allows for the incorporation of EU law into Polish law, with full constitutional recognition. Art. 9 of the Constitution provides that: “The Republic of Poland shall respect international law binding upon it”. Nor is there any reference made to art. 91(1), which makes this obligation more specific by requiring that “an international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute” and that a ratified international agreement “upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes”. This is a primacy principle under the Polish Constitution. In other words, EU law has primacy over Polish statutes under the Polish Constitution and not merely on account of the EU treaties. Remarkably, these provisions were not even mentioned by the Constitutional Tribunal in judgment K 3/21.

The Tribunal’s second and third orders were more specific. They concerned art. 19(1) TEU, which provides that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. The Tribunal suggests that this contradicts various provisions of the Polish Constitution to the extent that it “grants national courts (common courts, administrative courts, military courts and the Supreme Court) the power to [...] [examine] the legality of the act of appointing a judge by the President of the Republic of Poland” and otherwise to supervise matters dealing with judicial independence. Once again, it is very difficult to comprehend where the conflict lies. Art. 19 is a general principle of the rule of law, requiring the protection of judicial independence. It does not contradict the equivalent provisions of the Polish Constitution, which state exactly the same principle. Art. 178(1) of the Polish Constitution states: “Judges, within the exercise of their office, shall be independent and subject only to the

²⁰ Constitutional Tribunal of Poland of 7 October 2021 K 3/21 cit.

Constitution and statutes". Is that contrary to art.19 TEU? It is not. So the problem here is not with the principle, but with its interpretation and application by the CJEU.

We thus return to the difficulties that Poland has had with the Court of Justice of the EU over judicial independence.²¹ In 2015 the political Party of Law and Justice (or PiS) won parliamentary elections. It immediately sought to reform Poland's judicial system. These reforms were widely seen to interfere with judicial independence and to create undue pressure on sitting and future judges. Numerous judgments of the CJEU have challenged the laws and practices of the Polish Government.²² On 13 January 2016 the European Commission launched the rule of law framework in relation to Poland.²³ The Council of Europe also took action in relation to the same concerns.²⁴ The Court of Justice of the EU heard various preliminary references in relation to the Polish judicial reforms and gave various rulings implicitly or explicitly criticising the Polish government.²⁵ In May 2021 the European Court of Human Rights also weighed in the ongoing disputes between the Polish Government and its critics. In the case *Xero Flor v Poland* the Court ruled that Poland had acted in violation of art. 6(1) ECHR because one of the judges of the Constitutional Tribunal had been appointed in violation of the Polish Constitution.²⁶ Two months later, in July 2021 the Grand Chamber of the Court of Justice delivered another judgment in a related case, this time in a direct action by the Commission against Poland. It found that the new disciplinary regime for judges in violation of art. 19(1) TEU.²⁷ It is against this background that the Polish Constitutional Tribunal delivered its judgment in case K 3/21 on 9 October 2021.

On the basis of this discussion, we need to distinguish between what the court says and what it could possibly mean. The Tribunal appears to be saying that there is a conflict of general or abstract principles of institutional design, or something like this:

²¹ See W Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); W Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' (2018) *Hague Journal on the Rule of Law* 63; L Pech and K Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) *CYELS* 3; and L Pech, P Wachowiec and D Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (in)action' (2021) *Hague Journal on the Rule of Law* 1.

²² At the time of writing there are 27 such cases, dating from 2018 to 2022, according to the website: Safeguarding The Rule of Law in the European Union, *Rule of Law Cases – Poland* euruleoflaw.eu.

²³ See Proposal COM(2017) 835 final for a Council Decision of 20 December 2017 on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.

²⁴ Council of Europe Resolution 2316 (2020), PACE, *The Functioning of Democratic Institutions in Poland*.

²⁵ See e.g. case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531; case C-192/18 *Commission v Poland (Independence of ordinary courts)* ECLI:EU:C:2019:924; joined cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* ECLI:EU:C:2019:982.

²⁶ *Xero Flor v Poland* cit. See also ECtHR *Reczkowicz v Poland* App n. 43447/19 [22 July 2021]. Bizarrely, the Constitutional Tribunal's response was to rule a month later in an interim judgment that the judgment of the European Court of Human Rights was "a non-existent judgment"; see Constitutional Tribunal of Poland decision of 15 June 2021 30/A/2021, P 7/20. In judgment K 7/21 of the Constitutional Tribunal of Poland cit., it was ruled that art. 6 of the ECHR is inconsistent with the Polish Constitution.

²⁷ Case C-791/19 *Commission v Poland* ECLI:EU:C:2021:596.

i) conflict of principles: principle A contradicts principle B, because they cannot be both satisfied at the same time in facts x. If principle A applies, it excludes principle B. This is what the Tribunal appears to be saying that there is a conflict between principles of the EU treaties and principles of Polish constitutional law. But if one reads the judgment closely, it appears that the conflict it identifies is somewhere else. The principle of judicial independence is the same in both Poland and EU law.

It is possible, therefore, that we may have to understand the conflict as a conflict in the exercise of competences or a conflict of “jurisdiction”. It may be that Poland and Hungary are objecting to the idea of obeying directions by the CJEU as a foreign or in any event inappropriate institution. So, a conflict of jurisdiction may be described as follows:

ii) conflict of jurisdiction: institution 1 believes it has jurisdiction in deciding a question x, but institution 2 thinks that it alone can decide question x.

A further possibility is that the Polish Tribunal is saying that the CJEU is acting within its jurisdiction, but in a way that is unacceptable in substance. This will be a conflict of judgments:

iii) conflict of judgments: institution 1 makes the judgment that principle A means *p* in facts x, but institution 2 makes the judgment that the same principle, *i.e.* principle A, means *q* in facts x. If one judgment is given primacy, it applies to facts x, to the exclusion of the rival judgment.

What the Polish Tribunal is describing is a proposition close to *iii*). We have a conflict of judgments, not a conflict of principles, or conflict of jurisdiction. What are we to do about it?

IV. PLURALISM IN ACTION

In March 2018 the Polish Government published a White Paper on precisely this question. The paper set out its views on judicial reform as an expression of pluralism in action.²⁸ We find there an ambitious theoretical argument which gives further, if indirect, support to judgment K 3/21 on the basis of a theory of “constitutional pluralism”. This is, on its face, a surprising choice of theory.

Pluralism is both a serious theoretical approach to transnational law as well as a strongly pro-European one. It has always been directed at ensuring the openness of a legal order in order to overcome what appear to be strong theoretical hurdles to EU law’s primacy. Yet, the Polish government has taken a different view. It believes that pluralism supports defiance. Pluralists say that the tension between the EU and member state courts can be described as a conflict of legal systems, which can be resolved by adopting a pragmatic view about the nature and scope of legal orders. This reading of EU law finds

²⁸ Government of Poland, ‘White Paper on the Reform of the Polish Judiciary’ (7 March 2010) English version available at www.statewatch.org. For a very helpful discussion of the White Paper see RD Kelemen and L Pech, ‘The Uses and Abuses of Constitutional Pluralism’ cit. 69–72.

some support in the CJEU ruling in *Costa* which used explicitly the term “legal system” for EU law: “By contrast with ordinary international treaties, the EEU Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply”.²⁹ I pause here to add that the English words legal system were not used. The original term was the French term *ordre juridique* which was translated into “legal system” in the 1970s after Britain and Ireland joined the then European Communities. The choice of words is important because the idea of legal system comes with very strong theoretical background.

In his well-known analysis of the relations between EU law and domestic law Neil MacCormick presupposed that the EU is a legal system which overlaps but also conflicts with the legal system of the member states. He presupposed a theory of “systemic validity”, according to which a proposition of law is true because it is valid under a hierarchy of rules or norms set up by the legal system.³⁰ MacCormick believed that the decisions of the Court of Justice of the EU have asserted “the constituent (and thus constitutional) character of the foundation treaties for the ‘new legal order’ that they brought into being” so that the *acquis communautaire* is “valid primarily on account of the higher law of the Communities in its character as constitutional law”.³¹ He described the problem this creates in relation to domestic laws as one where the “interlocking of 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”.³² MacCormick then argued that under a doctrine of pluralism, “there can coexist distinct but genuinely normative legal orders”, which “can generate different answers to the same question”.³³

After a long discussion of the problem MacCormick concluded that one possible account of this standoff is a theory of “radical pluralism”, which entailed that: “it is possible that the European Court interprets [EU] law so as to assert some right or obligation as binding in favour of a person within the jurisdiction of the highest court of a member state, while that court in turn denies that such a right or obligation is valid in terms of the national constitution”.³⁴ MacCormick then argued that under the radical pluralist position “not every legal problem can be solved legally”.³⁵

²⁹ Case C-6/64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66.

³⁰ MacCormick’s own analysis of law came to diverge somewhat from this tradition. In later work MacCormick spoke of law as an “institutional normative order” which incorporates “as aspiration to order” and, possibly, a concern with justice. See N MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007) 11–19. See also N MacCormick, ‘A Moralistic Case for A-Moralistic Law’ (1985) *Valparaiso University Law Review* 1.

³¹ N MacCormick, *Questioning Sovereignty* cit. 101.

³² *Ibid.* 102.

³³ *Ibid.* 102.

³⁴ *Ibid.* 119.

³⁵ *Ibid.* 117. See also for similar conclusions M Poiras Maduro, ‘Europe and the Constitution: What If This Is as Good as It Gets?’ in M Wind and J Weiler (eds), *European Constitutionalism Beyond the State*

This analysis focuses on the relation between legal systems, not just principles and judgments. We may say that the conflict is reconstructed by the pluralist account as follows:

conflict of legal systems: there is legal system 1 which requires A in facts x, and there is legal system 2 which requires B in facts x. Both systems apply to facts x (because the systems “overlap” or for some other reason). The conflict is not only in the contents of the relevant principles, but also in the structure and shape of the framework that determine the validity of principles and judgments under each legal system.

If, in MacCormick’s scheme, the European Union can be seen to be legal system 1 and a member state as legal system 2, then their requirements may not always be aligned in practice. They could issue conflicting judgments about what to do. Under the pluralist theories, what the courts ought to do depends on the requirements of the legal system of which they are part. Each system would recognise something as law in its own way. A conflict of judgments by different legal systems could be resolved, the pluralists say, by giving some kind of primacy to one legal system over another.

Primacy, for this analysis, concerns the ranking of legal systems. The EU has created a new legal system, which now stands to some kind of hierarchical relationship to the legal systems of the member states.³⁶ Following this line of thought, MacCormick concluded that a pluralist analysis is “clearly preferable to the monistic one that envisages a hierarchical relationship in the rank order international law – Community law – member state law”.³⁷ So it follows that there is no “all purpose subordination of member state law to Community law”.³⁸ He said that “these are interacting systems” and not systems linked by ranking.

The Polish White Paper explicitly endorses this analysis. In its preamble it endorses “fundamental European values like the principle of constitutional pluralism and the need to account for the totalitarian past”.³⁹ The paper includes a section entitled “Constitutional Pluralism and the Rule of Law” (paras 169-183) where it sets out its view

(Cambridge University Press 2003) 74, and N Walker, ‘The Idea of Constitutional Pluralism’ (2002) *ModLRev* 317. For criticisms, see P Eleftheriadis, ‘Pluralism and Integrity’ (2010) *Ratio Juris* 365; J Baquero Cruz, ‘Another Look at Constitutional Pluralism in the European Union’ (2016) *ELJ* 356; RD Kelemen, ‘On the Unsustainability of Constitutional Pluralism’ (2016) *Maastricht Journal of European and Comparative Law* 136; and G Letsas, ‘Harmonic Law: The Case Against Pluralism’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 77.

³⁶ It must be obvious also that the problem disappears under a theory of European “monism”, according to which the EU might be a single legal system. See for example R Schütze, ‘On “Federal” Ground: The European Union as an (Inter)national Phenomenon’ (2009) *CMLRev* 1069. I discuss this argument below.

³⁷ N MacCormick, *Questioning Sovereignty* cit. 117.

³⁸ *Ibid.* 117. For “monism” there is, strictly speaking, no “subordination” since the matter is seen from within the EU law “legal system” only. For further analysis see P Eleftheriadis, ‘The Law of Laws’ (2010) *Transnational Legal Theory* 597, 602–612 and A Somek, ‘Monism: A Tale of the Undead’ in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 343.

³⁹ Government of Poland, ‘White Paper on the Reform of the Polish Judiciary’ cit. 5.

that “the legal system of the European Union is based on constitutional pluralism of the member states”. At para. 174 the paper refers to the work of Neil MacCormick and describes how the Polish legal system cannot be subordinated to the EU’s legal system:

“The basis for [MacCormick’s] theory is a belief that the EU – being something more than a typical international organisation, yet something less than a federation of states – a hierarchical system of the sources of law as proposed by Hans Kelsen may not suffice to describe our legal reality. Each of the legal systems – national and European – has different sources for its legitimisation (they are different but have many tangent points). It is thus impossible to completely subordinate one system to another – as impossible as completely separating them”.

This is indeed what MacCormick said. He suggests that the relationship between EU and national law is one of two different legal systems. The White Paper then goes on to argue that since the Polish legal system cannot be completely subordinated to that of the EU, it follows that: “the EU and its Member States should mutually respect themselves and remain open to withdraw some of their actions if they would too much interfere in the areas reserved for the other party – even if both of the parties would believe that there are some legal grounds for action” (para. 175).

If this argument is correct, then any conflicting judgments by institutions belonging to different legal systems will not conflict: strictly speaking, they are talking past each other. There will be one constitutional obligation under the EU legal system and another one under the Polish legal system. Only the latter applies in Poland.

Is that view tenable? I believe it is. Pluralism supports the Polish courts. It does so because it says that they are doing nothing wrong in law – at least in Poland. In order to see how this works, we need to look more closely at MacCormick’s arguments. In his celebrated essay “Beyond the Sovereign State” MacCormick uncovered the theoretical difficulties with the idea of European law as a transnational “legal system”.⁴⁰ By carefully exploring the possibilities of applying standard positivist analysis first to the European Union as a distinct “legal system” and then to each state, MacCormick showed that a supposed coexistence of two legal systems would create insurmountable problems. If it exists, a European legal system will make demands for supremacy under its own rule of recognition. A state legal system will continue in existence, however, and it will make its own demands. Some theorists argue that this creates no conflict, because European courts and national courts will always be doing the same thing by occupying two roles at the same time, *i.e.* as European judges and as state judges. MacCormick understood, however, that a rule of recognition is not merely a practice of doing something but it is also a *reason* for doing something.

⁴⁰ N MacCormick, ‘Beyond the Sovereign State’ (1993) ModLRev 1. One of the reasons MacCormick’s argument was so influential was that MacCormick was at the time one of the most distinguished defenders of Hart’s legal theory. See for example N MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) and N MacCormick, *H. L. A. Hart* (Stanford University Press 1981).

A rule of recognition in Hart's system is a rule under which courts use a standard by which to identify the law. If a court operates under two such standards, then neither of them can be a rule of recognition in the proper sense. None of them would operate as the relevant standard for identifying the law in that place. Strictly speaking, the situation described here would be one where there was no general standard, and no "rule of recognition". It is for this reason that Hart said that a rule of recognition must first of all be effective in the relevant population in the relevant place.

MacCormick accepted all of this theoretical background. He went on to observe that given our conventional understanding of law as state-based, one might have expected that the domestic constitutional rules would have prevailed. Yet, this did not happen. Domestic courts complied with the doctrine of a "new legal order". It thus appeared to MacCormick that the states had modified their understanding of their own legal system through social practice. They modified their "rule of recognition". If so, then no European state was sovereign, because no state enjoyed full political powers within its jurisdiction. MacCormick wrote that in his view, the theory of law is messy enough and sophisticated enough so that it "allows of the possibility that different systems can overlap and interact, without necessarily requiring that one be subordinate or hierarchically inferior to the other or to some third system".⁴¹ He accepted the uncertainty as a necessary condition of pluralism, which he then developed as he proposed "radical pluralism" as one way forward.⁴²

MacCormick's discussion finds support in the *Concept of Law* in a passage where Hart says that in cases where officials disagree on the contents of the rule of recognition we have a "substandard, abnormal case containing within it the threat that the legal system will dissolve".⁴³ Hart acknowledges that a legal order can carry on with some such ambiguity, but only until the expected collapse of the legal order, or until "the population became divided and 'law and order' broke down".⁴⁴ The original legal system might continue to exist for a while but not indefinitely.

MacCormick applied this thought to the European Union, without however accepting Hart's pessimism about instability as a necessary consequence. MacCormick said – against Hart – that such conflicts are "not logically embarrassing" because "strictly, the answers are from the point of view of different systems".⁴⁵ In his view there was nothing more for a lawyer to say. So MacCormick concluded: "not every legal problem can be solved legally".⁴⁶

What is the upshot of this analysis? The Polish White Paper draws a clear conclusion. It suggests at para. 170 that "constitutional identity, a core value of each national community, determines not only the most fundamental values and resulting tasks for state authorities,

⁴¹ N MacCormick, 'Beyond the Sovereign State' cit. 8.

⁴² N MacCormick, *Questioning Sovereignty* cit. 97-101.

⁴³ HLA Hart, *Concept of Law* (Oxford University Press 1994, 2nd edn) 122-123.

⁴⁴ *Ibid.* 122-123.

⁴⁵ N MacCormick, *Questioning Sovereignty* cit. 119.

⁴⁶ *Ibid.* 119.

but also sets the limit for regulatory intervention by the European Union". The analysis concludes that: "The right to introduce its own sovereign institutional solutions concerning the judiciary is a pillar of each national constitutional system in Europe" (para. 176).⁴⁷

This argument, however, is incoherent. MacCormick's conclusion that there is no legal answer is being used to suggest that there is a legal answer, namely Poland's right to independence. But MacCormick's argument does not vindicate Poland's position. It cannot say that the constitutional identity of Poland must be legally respected by the EU due to a legal principle of "self-restraint", which "should never be disturbed".⁴⁸ If there is no legal solution to the conflict, neither Poland nor the EU can have a legal obligation to do anything. If the relevant obligations belong to different legal systems, they cannot conflict. It follows that there is no legal wrong in denying Poland what it wants or in denying the EU what it wants. Each system has its own answer. We have reached an impasse.

Nevertheless, it must be obvious that if there is no legal way out from the impasse identified by radical pluralism, Poland is the political winner. It gets what it wants in real life, because it has the last word. Since there is no appeal from the Constitutional Tribunal, before the CJEU or any other court the judgment cannot be overturned. It stays in place, at least until the EU exercises some kind of political pressure. As is well known, the EU relies on domestic institutions for the enforcement of EU law. But if, due to legal pluralism, EU law has become ineffective in Warsaw, there is also no legal ground – in Poland – for asking the Polish Constitutional Tribunal to change course in compliance with the EU. This is all there is to it. And if judgment K 3/21 is the last word on the subject, then EU law has been politically, if not legally, defeated.⁴⁹

V. THE INCOHERENCE OF PLURALISM

I conclude that radical pluralism assists the defiant state. But this victory, is short-lived. It does not matter what radical pluralism entails, because it is an incoherent theory that we ought to reject. What the defiant states are doing is simply unlawful. It is unlawful from *all* relevant points of view, not just from the point of view of a hypothetical EU legal system. It is as much unlawful in Brussels as it is in Warsaw.

In order to see this point, we need to revisit some of the fundamental concepts and categories deployed by MacCormick. Some of his assumptions are mistaken. MacCormick's mistakes, as I now see them, are in these three propositions:

⁴⁷ Government of Poland, 'White Paper on the Reform of the Polish Judiciary' cit. 83.

⁴⁸ *Ibid.* 83.

⁴⁹ Pech and Kelemen have correctly observed that the reasoning of the Polish and Hungarian governments uses the idea of "national identity" explicitly and the idea of "constitutional pluralism" implicitly by deploying the "dual concepts of constitutional pluralism and identity as a very useful veneer to disguise their defiance of EU law"; RD Kelemen and L Pech, 'The Uses and Abuses of Constitutional Pluralism' cit. 69. They are right that the veneer is very useful: pluralism is a convenient theory for authoritarians because it says that defiance is lawful.

- i) that legal systems may conflict,
- ii) that they may overlap and
- iii) that pluralism provides some common framework for legal systems.

The problems here arise from the idea of a legal system as defined by MacCormick and the legal positivists. There is some ambiguity in that theory, since Kelsen, Hart and Raz adopt slightly different accounts. But the most common theory is that put forward by Hart, which is endorsed explicitly by MacCormick and by most pluralist scholars. I will therefore rely on Hart's account for what follows.

Hart's concept of legal system requires that at the foundation of law there is a significant causal event. The law emerges from the social fact of the common coordination or coincidence of views among legal subjects and officials, which creates – as a matter of fact – the rule of recognition. This rule serves as the foundation of the legal system. Because it is a social and not a legal rule, the rule of recognition does not depend on any legal technicalities. So when EU law and state law appear to be comparable legal systems, they are seen as rival hierarchies of rules with some kind of rule of recognition at their foundation. In my view, this is a highly misleading theory.⁵⁰ The problem is this: the only way of recognising transnational law is on the basis of a *substantive* theory of its content. EU law is a political and institutional project of international cooperation, which embodies a “practical ideal of collective action in the international domain for the sake of justice and peace”.⁵¹

V.1. LEGAL SYSTEMS DO NOT CONFLICT

The very first point we need to make against the pluralist theories is that legal systems defined in Hart's sense, which is the sense used by almost all pluralist theories, cannot “conflict”. When MacCormick says that the problem of EU law arises because of a “superfluity of legal answers” he is making a mistake: there is no such superfluity.⁵² According to Hart's analysis, each one of us looks at the law from the point of view of only one “legal system”, the one where we happen to be in fact.

The thought that systems may conflict proceeds easily from the idea that two judgments may conflict, for example the judgment that A is tax resident, so that he has to pay income tax, or that he is not tax resident, and is not liable to tax there. The legal system of France may take the first view, and the legal system of Britain may take the second view. One may say that not only the judgments conflict, but that also the systems

⁵⁰ For this point in more detail in relation to the ideas of “law” and “legal system” (and rejection of the positivist position in transnational and international law) see P Eleftheriadis, ‘The Law of Laws’ cit. 602–605.

⁵¹ *Ibid.* 612. See also P Eleftheriadis, ‘The Moral Distinctiveness of the European Union’ (2012) *ICON* 695.

⁵² N MacCormick, *Questioning Sovereignty* cit. 119. The same point is made by Samantha Besson when she says: “When conflicts between legal orders occur, the solution lies in the principles governing the relations between legal orders. In a nutshell, these can be organized according to the principle of monism [...], dualism [...] and pluralism”; see S Besson, ‘Theorizing the Sources of International Law’ in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 163, 184.

conflict. This is perhaps clearer if the same person is claimed as tax resident by two different tax jurisdictions, so that one may be deemed tax resident in system 1 as well as system 2. The systems are, thus, rivals, to the extent they both wish to tax the same amount of earnings. But it would be wrong to say that these tax obligations conflict in law. They may conflict in fact, because the tax payer does not wish to pay both. But they do not conflict *in law*, if each system does not recognise the other's obligations. From each system, there is one obligation, not two. So there is no legal conflict from the point of view of either system. Strictly speaking these obligations do not co-exist. Competing requirements may conflict in practice, if it comes to that. But they do not conflict as laws. Each system makes its own assessments from within its own framework.

Each system has one answer. There is, thus, no "superfluity" of rules in any system, as MacCormick says. The rules apply in their own terms in only one system at a time. The problem arises because one may be subject to both systems at once, for example by having two homes, for example.

This insight can perhaps be illustrated by an analogy with the rules of a natural language. I may admire Socrates as a philosopher, so that I say to my friend as we both stand in front of the philosophy section at Blackwells in Oxford:

i) Socrates is the greatest philosopher.

But I may also happen to have the same thought in Paris, where I visit my friend at Sciences Po. While we stand at a bookshop, I say to him, in my moderately competent French:

ii) Socrate est le plus grand philosophe.

These statements have the same meaning, but they constructed with different materials. They follow different rules of a natural language. Under the English rules sentence *ii)* is full of errors and mistakes in vocabulary and grammar (for example, the English say "philosopher", not "philosophe", they say "the greatest" not "le plus grand"). If a student used those linguistic forms in Oxford, he would stand to be corrected. Similarly, if a student uttered sentence *i)* at a seminar in Paris, he would probably be criticised.

Is one linguistic form wrong and the other right? The question is nonsensical. Each linguistic expression makes sense within its framework. We cannot therefore say that the rules of grammar, vocabulary and spelling supposedly "conflict" because they result in different sounding sentences. This would be an absurdity. Languages are not rivals. Which language is appropriate for each occasion depends on the social realities of the person speaking.

The same thought, I believe, applies to law. Each law makes sense within each own framework. The point was captured well by Joseph Raz: "Since all legal systems claim to be supreme with respect to their subject-community, none can acknowledge any claim to supremacy over the same community which may be made by another legal system".⁵³ It follows that there can only be one legal system in place. If so, a legal system cannot

⁵³ J Raz, *Practical Reason and Norms* (Oxford University Press 1999) 152.

recognise that another legal system conflicts with it. It simply does not exist *qua* legal system. If conflicting claims exist, they will be understood only as some kind of social structure of power, in the form perhaps of voluntary organisations, trade unions, churches, sects, or criminal syndicates that challenge the law and have to be dealt with in some way.

This is exactly what Hart said about legal systems. He did so when he discussed the example of Belgian law applying to German occupied Belgium, during the Second World War. The potential conflict, he noted, arises from the fact that occupied Belgium is in fact under German law, whereas the Belgian government may claim jurisdiction under the established constitutional order. The Belgian legal order was overturned by the invasion, but it is still in force according to Belgian law. Hart says that in such cases “the questions are questions of law which arise within some system of law (municipal or international) and are settled by reference to the rules or principles of that system”.⁵⁴

This point was misunderstood by MacCormick. He said that conflicts are “not logically embarrassing” because “strictly, the answers are from the point of view of different systems”.⁵⁵ This is correct: the answers belong to different systems. But MacCormick does not see the step that must follow. If legal propositions are internal to each legal system then propositions that arise under different systems cannot conflict. For legal judgments to conflict, they must be part of the same legal system. Kelsen explained this point well when he said: “If an insoluble conflict existed between international and national law, and if therefore a dualistic construction were indispensable, one could not regard international law as ‘law’ or even as a binding normative order, valid simultaneously with national law (assuming that the latter is regarded as a system of valid norms)”.⁵⁶

Hart also discusses a related matter, namely the possibility that a legal system begins to split into different directions. He discusses this possibility with another example which he takes from British colonial laws from the facts of the South African case of *Harris v Dönges* of 1954, where the legislature set up a rival court to compete with the ordinary courts, with whom the government disagreed.⁵⁷ The new court, called the “High Court of Parliament” created new ultimate criteria to be used in identifying the law and started operation in competition with the ordinary courts.⁵⁸ For a while the rival courts invalidated each other’s judgments. After a while the government lost its nerve and gave way. Hart notes that since for a period of time we had two rival views of the criteria of valid law for a period of time, “the normal conditions of official, and especially of judicial, harmony, under which alone it is possible to identify the system’s rule of recognition,

⁵⁴ HLA Hart, *Concept of Law* cit. 216.

⁵⁵ N MacCormick, *Questioning Sovereignty* cit. 119.

⁵⁶ H Kelsen, *Pure Theory of Law* (University of California Press 1967) 329.

⁵⁷ *Harris v Dönges (Minister of the Interior)* [1952] 1 TLR; (1952) 2 SA 428; in the Appellate Division of the South African Supreme Court.

⁵⁸ HLA Hart, *Concept of Law* cit. 122.

would have been suspended”.⁵⁹ Hart believes that such a conflict can be tolerable only for a time and not indefinitely. He says: “All we could do would be to describe the situation as we have done and note it as a substandard, abnormal case containing within it the threat that the legal system will dissolve”.⁶⁰ This is a “substandard” case for him, not a normal one. It is important to note that Hart describes this as a conflict within the same legal system, not as a conflict of two rival legal systems. And he insists that is a pathological case that undermines law’s foundations.

Joseph Raz took the same view. It is part of the very nature of a legal system, he says, that it aims to be comprehensive and exclusive. If this is not the case, then rival rules of recognition will be competing for domination, which ensures that there is no law at all in such a place. Raz’s own view is that a legal system is connected to the law-applying institutions we find in modern states: “Every state — by which is meant a form of political system and not a juristic person — has one legal system that constitutes the law of that state, and every municipal legal system is the law of one state”.⁶¹ There is no room for competing legal systems in the same place. Raz disagrees with Hart on the method by which this comprehensive claim is achieved. He puts less emphasis on the existence of a rule of recognition and more emphasis on the conduct of law-applying officials. Raz argues that “the unity of a legal system does not depend on having only one rule of recognition”. Instead, “the unity of the system depends on the fact that it contains only rules which certain primary organs are bound to apply”.⁶² Be that as it may, legal officials cannot maintain a single legal system while they apply rules that endorse rival constitutional frameworks.⁶³

MacCormick’s analysis fails in precisely the ways identified by Hart and Raz. A legal dispute can only take place within the *same* legal system. If EU law claims priority for the Treaties, it must do so as a successor legal system of the legal systems of the member states. In no other way can primacy make sense. Within Hart’s analysis, which forms the basis of MacCormick’s analysis, the idea that one legal system conflicts with another is a simple absurdity. It is equally absurd to say that legal systems can be ordered in some hierarchy. If they are so ordered, they are not distinct legal systems.

V.2. LEGAL SYSTEMS DO NOT “OVERLAP”

The second mistake MacCormick made was in suggesting that legal systems overlap. MacCormick is not the only theorists making this assumption. That legal systems overlap is occasionally accepted by legal scholars who follow Hart. Even Raz writes loosely, for

⁵⁹ *Ibid.* 122.

⁶⁰ *Ibid.* 123.

⁶¹ J Raz, *The Authority of Law* (Clarendon Press 1979) 98–99.

⁶² J Raz, *Practical Reason and Norms* cit. 147.

⁶³ For the differences between Hart and Raz and their significance for the positivist analysis of EU law see G Letsas, ‘Harmonic Law’ cit. 84–91.

example, that “legal systems can co-exist, can be practised by one community”, although he admits that this “undesirable” and lead to an “unstable situation”.⁶⁴ By this he means, I believe, that a legal system may adopt some of the rules of the other system. Nevertheless, Raz does not believe that this is sustainable in the long run so that he ultimately adopts the opposite position.

It is not possible, he says a few paragraphs down, that a legal system recognises another “system’s claim to supremacy”. He writes: “Since all legal systems claim to be supreme with respect to their subject-community, none can acknowledge any claim to supremacy over the same community which may be made by another legal system”.⁶⁵ This is the more coherent position and this is the position held by Hart. This is because the question of the legal system, just like the test of the relevant natural language, is for Hart and Raz purely one of social fact, which gives rise to a rule of recognition and through it the “union of primary and secondary rules” that creates a proper legal system.

The test of social facts of convergent behaviour are impossible to be met by two systems at the same time and place. A legal system exists as the union of primary and secondary rules only if, first, ordinary citizens obey its rules and, second, if officials accept its secondary rules as critical common standards of official behaviour.⁶⁶ Accordingly, a legal system will exist in the EU, only if it has its own rule of recognition for the whole of Europe, followed by way of common dispositions of European legal officials as well the obedience of citizens.⁶⁷ If such a social rule exists, it will make it impossible for another rule to also be true for the same place. Since a legal system requires obedience by ordinary citizens and “acceptance by officials of secondary rules as critical common standards of official behaviour”, the required obedience cannot be true of rival systems in the same place at the same time.⁶⁸

Hart explained this very clearly. He discussed the possibility that a colonial legal order may declare unilateral independence from Britain who was, however, resisting the change. In such a scenario, the United Kingdom legal system would believe and act as if it was the legal system of the colony, whereas the colony would consider itself independent and the local officials would follow local law. The matter would be resolved by the relevant social facts. But there is no overlap between the two legal systems at any particular time. The rival claims do not “overlap”, since they are strongly denied by each system. There was no doubt in Hart’s mind that only one legal system exists in fact. Hart’s

⁶⁴ J Raz, *Practical Reason and Norms* cit. 152.

⁶⁵ *Ibid.* 152.

⁶⁶ HLA Hart, *The Concept of Law* cit. 117.

⁶⁷ This is indeed the beginning of MacCormick’s analysis of EU law. See N MacCormick, *Questioning Sovereignty* cit. 101 and 106–107.

⁶⁸ HLA Hart, *The Concept of Law* cit. 117. So effectiveness is an essential characteristic. Hart said that in the extreme case a legal system may exist even when the citizens obey without any critical attitude it and the internal point of view is limited to the “official world”.

account of this case shows clearly that there is no “overlap” of legal systems or of the judgments they lead to:

“in this case propositions of English law seem to conflict with fact. The law of the colony is not recognised in English courts as being what it is in fact: an independent legal system with its own local, ultimate rule of recognition. As a matter of fact there will be two legal systems, where English law will insist that there is only one. But, just because one assertion is a statement of fact and the other a proposition of (English) law, the two do not logically conflict. To make the position clear we can, if we like, say that the statement of fact is true and the proposition of English law is ‘correct in English law’”.⁶⁹

In Hart’s theory, a legal system exists only if it inspires in fact social obedience to the required degree. Such obedience cannot be true of two different systems in the same place at the same time. Legal systems cannot overlap.

V.3. PLURALISM CANNOT PROVIDE A FRAMEWORK FOR CONSENSUS

Finally, legal pluralism does not provide a framework for coordination. According to Hart’s theory the question of which legal system applies in each case is a matter of social fact. If this is so, there cannot be any legal principle of moderation, consensus or coordination replacing the various claims of each system (and this is the whole problem). Remember that each system claims to apply to the exclusion of all others. This means that there cannot be an overall legal arrangement between them.

This point is often misunderstood by pluralist theorists. MacCormick wrote as if radical pluralism provided some kind of resolution for conflicts by transforming relations from hierarchical to horizontal. He said that under pluralism “relations between states *inter se* and between states and Community are interactive rather than hierarchical” and that “hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another”.⁷⁰ This is a view adopted by other pluralists theorists, for example Nick Barber and Nico Krisch.⁷¹ I understand the intuitive appeal of this argument. Ultimately, however, it is self-contradictory.

Here is why. There may well be good reasons for dialogue and cooperation, which the relevant courts respond to.⁷² But there cannot be a *legal* principle of interaction or cooperation between legal systems. There is nothing to replace the internal hierarchies of each legal system. So there cannot be any *legal* transformation of the conflict. It is therefore a mistake to say a pluralist framework provides any principles of “mutual

⁶⁹ *Ibid.* 121.

⁷⁰ N MacCormick, *Beyond Sovereignty* cit. 117.

⁷¹ NW Barber, *The Constitutional State* (Oxford University Press 2010) 145–71, and N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) 69.

⁷² See for example A Arnall, ‘Judicial Dialogue in the European Union’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* cit. 109–133.

validity" for legal orders, as Samantha Besson suggests.⁷³ Pluralism cannot do any such thing. Under any theory of pluralism that presupposes Hart's idea of a "legal system", whatever the Polish courts do is lawful in Warsaw (under the "legal system" of Poland) and whatever European courts do is lawful in Brussels or Luxembourg (under the 'legal system' of the EU). As we saw above, in his account of Belgian law under occupation Hart said that the first step in applying the law is the identification of the socially relevant system because: "the questions are questions of law which arise within some system of law (municipal or international) and are settled by reference to the rules or principles of that system".⁷⁴ MacCormick suggestions that pluralism has some kind of transformative effect, so that hierarchy gives way to coordination ignores this aspect of Hart's theory.

VI. FEDERAL MONISM

I have argued thus far that pluralism cannot provide any resolution for the conflicts identified by MacCormick, once we accept that the EU is its own "legal system". Is there a way of rescuing the idea that the EU legal system is now its own legal system?

One possible response is offered by Robert Schütze. In various highly original and well-argued works Schütze has rejected the radical pluralist model proposed by MacCormick and has argued that the new EU legal system encompasses a broader doctrinal legal framework under a theory of monism. He calls "federalist" but he is careful to note its "dual" foundation in both the treaties and domestic law. This new framework includes the member states, whose legal systems must now be in some way subordinate. This means that we should see EU law through the lenses of some kind of European monism which accommodates the institutional complexity of the EU and the division of labour between states and the EU under a federal framework.

Schütze writes that "in the eyes of the European Court and the majority of European scholars, the normative force of European law derives no longer from the normative foundations of international law. The ultimate normative base within the European Union – its 'originality hypothesis' or 'Grundnorm' – is the Rome Treaty as such. [...] While 'international' in formation, the European Treaties have assumed 'national' characteristics".⁷⁵ This means that there is no reason to consider that EU law is to be compared to international law. The problem with this move, however, Schütze correctly observes, is that EU law was created by a treaty of public international law which does not have, at least at the point of its conclusion, a "constitutional" significance.⁷⁶ For the Treaties to be considered a constitutional document something must have happened in the intervening years. What could that be?

⁷³ See S Besson, 'Theorizing the Sources of International Law' cit. 184.

⁷⁴ HLA Hart, *The Concept of Law* cit. 216.

⁷⁵ R Schütze, 'On "Federal" Ground' cit. 1082.

⁷⁶ *Ibid.* 1079.

Schütze says that the treaties were “elevated” into a position of constitutional status by a combination of a series of social events. The first is the emergence of the case law of the Court of Justice, which “emancipated” EU law from international law through a series of judgments. Schütze observes that the important elements in this case law were that the Court asserted that a member state cannot invoke the breach of EU law by another state to justify a derogation from it, that EU law is supreme over all national law including constitutional law, and that EU law applies directly for the benefit of individuals in the member states.⁷⁷ Since these substantive features are now part of EU law and are recognised by the “European Court and the majority of European scholars”, it follows that “the normative force of European law derives no longer from the normative foundations of international law”.⁷⁸ Instead, the “ultimate normative base within the European Union – its ‘originality hypothesis’ or ‘Grundnorm’ – is the Rome Treaty as such”.⁷⁹

Schütze finds support for this conclusion in the case law of the CJEU that speaks of the Treaties as a “basic constitutional charter”.⁸⁰ He then draws the conclusions from this analysis that the member states have thus lost their “competence-competence”, by which he means that they “are no longer competent unilaterally to determine the limits of their own competences themselves”.⁸¹ Similarly, we must conclude that the European Parliament now represents, not the individuals peoples separately, but “a – constitutionally posited – European people”.⁸² Schütze concludes that the European Union is something that lies between a state and an international organisation, which he calls a federation of states and which is close to what MacCormick called a European commonwealth.

This argument is made with great care. Its message of doctrinal coherence is very attractive. It does a very good job of interpreting the case law in a meaningful way. Yet, in my opinion it cannot succeed. Schütze’s analysis underestimates the role reserved for states under the treaties. The Treaties are clearly expressed in a way that leaves no doubt that there has never been an intention to abandon international law as the foundation of the European Union. Art. 1 TEU states that the “High Contracting Parties establish among themselves” the European Union, “on which the Member States confer competences to attain objectives they have in common”. These are not the words of a *Grundnorm*.

Schütze also argues that member states have lost their competence to “unilaterally” determine the limits of their own competences themselves.⁸³ This is not true. It is correct that any amendment to the treaties must be supported by unanimity. So the states are masters of the Treaties only when they act collectively. But this does not mean that are not

⁷⁷ *Ibid.* 1081–1082.

⁷⁸ *Ibid.* 1082.

⁷⁹ *Ibid.* 1082.

⁸⁰ Case C-294/83 *Les Verts v Parliament* ECLI:EU:C:1986:166 para. 23 and Opinion 1/91 *Accord EEE- I* ECLI:EU:C:1991:490.

⁸¹ R Schütze, ‘On “Federal” Ground’ cit. 1083.

⁸² *Ibid.* 1085.

⁸³ *Ibid.* 1083.

sovereign. Nothing can change without their consent. Moreover, the example of the United Kingdom shows that by using art. 50 a member state can unilaterally leave the European Union. As the *Wightman* judgment shows, EU law leaves the sovereignty of the member states entirely intact.⁸⁴ Schütze also argues that member states cannot modify their obligations *inter se* through the conclusion of subsequent international treaties. This is not entirely correct either. Member states have concluded *inter se* treaties in the area of freedom of movement (Schengen), on the Eurozone (e.g. ESM) and on the Stability and Growth Pact.

Finally, the most important concepts of EU law are not derived by the treaties at all. What is a “court” or a “government” or a “citizen” or “member of European Parliament” in EU terms is determined fully by domestic laws and constitutions, not by the Treaties. Moreover, the very constitutional process of the European Union, the process of the amendment of the Treaties which is in a way the highest “constitutional” power in the EU is purely a matter for the states. It almost entirely escapes EU law since it is conducted according to the rules of public international law, as specified by art. 48 TEU. No institution of the EU has any decisive role in the amendment of the treaties. Decisions are to be made by a “conference of representatives of the governments of the Member States” and they take effect only if a new treaty is ratified by the member states as general public international law requires. In all these ways, the Treaties resist the interpretation of a “federal” union, such as that proposed by Schütze. Even the Court of Justice of the EU seems to recognise this fact. It speaks of the “dialogue” between European and domestic courts, accepting that there is no hierarchical relationship between the CJEU and the domestic courts.

Finally, the EU treaties themselves depend on their interpretation on public international law (something entirely familiar with all treaties). One example may suffice. If one looks at the text of art. 52 TEU today (most recently reaffirmed in 2012 through the Treaty of the accession of Croatia), one will see that among the members of the EU there is one “United Kingdom of Great Britain and Northern Ireland”. But this article has to be read alongside the EU-UK Withdrawal Agreement, which was made under art. 50 TEU in 2019 and has taken the UK out of the EU with effect from 2020.⁸⁵ In this simple doctrinal sense, the TEU is not an independent source of law within a federal legal order, but a Treaty like all others. It is part of public international law like all other similar treaties and its meaning depends a network of principles and institutions that jointly make up a legal order for the European Union and its member states.

Although I agree with Schütze that some overarching principle is necessary, so that monism is much preferable to pluralism if we are friends of integration, I do not agree that such a principle has been created through a Kelsenian master rule. The EU legal order does not have the institutional features that put together a coherent institutional model with a master rule at the top. Doctrinally, the situation is the other way round: it is

⁸⁴ Case C-621/18 *Wightman v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999.

⁸⁵ Agreement 2019/C 384 I/01 of 12 November 2019 on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

the domestic constitutions that meet the tests of constitutionalism and on which EU law continuously depends for its enforcement and its ultimate success.

When one looks at the treaties seriously, they read very much like, well, treaties. They are not foundations of a new legal order. They are agreements among states. If they provide a coherent framework, this must be one interpreted – at least in my view – in internationalist terms.⁸⁶

VII. SOCIAL MONISM

There is yet another argument for monism. Justin Lindeboom tries to avoid the problems we have just identified in Schütze's argument. He offers a rival monism, which goes beyond the text of the treaties of the content of any laws (and therefore departs from the Kelsenian framework). If I understand the argument correctly, Lindeboom argues that the EU has challenged the structure of the European legal order on a different basis. Instead of focusing on doctrinal arguments, in the way of MacCormick and Schütze, Lindeboom focuses on the social practices underlying the creation of a new chain of obedience. This argument closer to Hart's original argument, by following some things said by Raz about the nature of the legal system.

Lindeboom opens his discussion by noting that: "Hart and his followers conceptualise law as a species of a social system which is founded on the social practice of institutionalised officials".⁸⁷ And he describes the EU legal system as an institutional order of precisely this kind, where domestic officials follow – in practice – the directions of the CJEU: "If EU law is to be a directly effective legal system in the Member States' legal-institutional arena, clearly the practice of the national courts must establish a social rule to that end".⁸⁸ It follows that for Lindeboom, "an autonomous EU Rule of Recognition must not be conflated with any written norm in the Treaties [...]".⁸⁹ So it does not matter that the treaties read like treaties and not like a constitutional master rule. The rule of recognition is not the highest legal rule, but only the "social rule that designates this or that norm or set of norms as the highest source of the legal system".⁹⁰ So what makes

⁸⁶ This is my argument in P Eleftheriadis, *A Union of Peoples* cit. It is also the argument, I believe, in MacCormick's *Questioning Sovereignty*, where he briefly speaks of "pluralism under international law", as I explain below.

⁸⁷ J Lindeboom, 'Why EU Law Claims Supremacy' (2018) OJLS 328, 336. My account below may not reflect every aspect of the argument made by Lindeboom. Towards the end of the article, Lindeboom endorses the analysis of legal system of MacCormick (see *ibid.* 353) and states: "There is nothing in legal positivism to resist the idea that concurrent legal systems have concurrent claims to supremacy. In fact, some classical works on descriptive constitutional pluralism in Europe can be viewed as restatements of traditional legal systems theory". This takes us back to pluralism. So my monist reading of Lindeboom's argument may be an exaggeration. In any event, for purposes of exposition I will describe Lindeboom's argument as primarily an argument for monism.

⁸⁸ J Lindeboom, 'Why EU Law Claims Supremacy' cit. 339.

⁸⁹ *Ibid.* 339.

⁹⁰ *Ibid.* 340.

the EU a legal system is not what the treaties or the case law say, but how the officials behave. Lindeboom's conclusion is a resounding affirmation of the EU as an independent and autonomous legal system: "Rather than perceiving EU law as something 'supranational', 'international' or 'sui generis', the CJEU simply perceives the EU legal system—following its own construction to this end—as an autonomous legal system mimicking national law, claiming supremacy not because it deems itself hierarchically positioned above national law, but because this is an inherent part of the imitation".⁹¹

I consider this to be a monist reading, to the extent that it assumes that EU law approximates a domestic legal order as a matter of fact. Lindeboom says, reflecting Hart's insights, that such a system can emerge spontaneously with a complete break with the past: "If law is a social construct primarily rooted in the behaviour of a particular group of people, it can emerge spontaneously".⁹² He accepts that "something cannot be law if it is not generally obeyed".⁹³ This is precisely the spirit of Hart's theory, which explicitly states that the existence of a rule of recognition, as well as its demise, are non-legal matters that depend entirely on matters of fact, not matters of law. For such a social theory of the legal system the doctrinal details are immaterial. This means a social, extra-legal transformation, which brings about a real revolution in the foundation of the legal system.

Lindeboom thus adopts a social and or content-independent analysis of the legal system, according to which law is a "social system which is founded on the social practice of institutionalised officials".⁹⁴ Lindeboom attributes this theory to Hart, but he misses the fact that Hart also included the conduct of legal subjects as a relevant test and not merely the officials (as we saw above in some detail). Lindeboom actually applies Raz's theory, which he relies upon explicitly throughout his argument. Lindeboom adopts Raz's three criteria for the existence of a legal system: namely that its has to be a social, normative system which *i)* is comprehensive, *ii)* claims supremacy and *iii)* is an open system.⁹⁵

Lindeboom argues that EU law meets those tests and is sufficiently similar to a domestic legal system. He finds support for these conclusions in the CJEU's case that shows that "the Court effectively purports to mimic national legal systems".⁹⁶ On the basis of this case law Lindeboom argues that EU law is comprehensive, in that it claims "unspecified jurisdiction for itself", refuses to acknowledge any limit to its jurisdiction and adopts a doctrine of "*Kompetenz-Kompetenz*", so that it claims to be "total law".⁹⁷ Like Schütze,

⁹¹ *Ibid.* 355.

⁹² *Ibid.* 338.

⁹³ *Ibid.* 338.

⁹⁴ *Ibid.* 336.

⁹⁵ *Ibid.* 336, where he refers to J Raz, *Practical Reason and Norms* cit. 151–154.

⁹⁶ J Lindeboom, 'Why EU Law Claims Supremacy' cit. 340.

⁹⁷ *Ibid.* 345. In the same article, however, we read the precise opposite observation, namely that EU law "has an explicitly purposive nature in light of its specific policy objectives and limited competences" (see *ibid.* 338) and that "one of the major idiosyncrasies of EU law qua law is that it only possesses limited competences in the pursuance of specific objectives" (see *ibid.* 344).

Lindeboom argues that EU law can be explained by the EU's "federal nature" and that from a "legal-philosophical viewpoint, the EU legal system is perhaps not that different from national law".⁹⁸ But Lindeboom relies for this argument not on the treaties themselves, but on the court of justice as an institution.⁹⁹ Under this more or less Razian theory the transformation of the EU legal order into a proper legal system happened not because the treaties changed nature, but because the Court of Justice of the EU gradually became the highest legal office, or institution, with the power to determine by way of an authoritative legal judgment what the law means – and occasionally make new positive law.

Lindeboom thus argues that the EU has successfully claimed to be "total law" because the CJEU claims exclusive power to determine the limits of the powers of the EU and the states under a doctrine that holds that while the competences of the EU are limited in nature, it is solely for the CJEU to establish whether a particular matter falls within the scope of EU law. So Lindeboom concludes that "It has been the CJEU's jurisprudence that has transformed the EU into an EU legal system, not the EU legal system forcing the CJEU to acknowledge its existence as such".¹⁰⁰

What about the national courts? What is their role now? This is, however, where the argument begins to unravel. Lindeboom accepts that "if EU law is to be a directly effective legal system in the Member States' legal-institutional area, clearly the practice of the national courts must establish a social rule to that end".¹⁰¹ No such rule can be found, however. The fact is that most of them do not accept that the EU treaties have absolute and unconditional supremacy over constitutions. They do not accept that the CJEU is the supreme court in the European Union. A typical statement is that of para. 101 of the *Weiss* judgment of the German Constitutional Court, where it is said that matters of "constitutional identity" are beyond EU law: "The democratic legitimation by the people of public authority exercised in Germany belongs to the essential contents of the principle of the sovereignty of the people and thus forms part of the Basic Law's constitutional identity protected in Art. 79(3) GG; it is therefore beyond the reach of European integration in accordance with Art. 23(1) third sentence in conjunction with Art. 79(3) GG".¹⁰²

This is one of many similar challenges to the absolute supremacy of EU law by national courts. What do they mean? Don't they show that the social foundation of a EU legal system is radically incomplete? Unfortunately, Lindeboom does not deal with this fundamental challenge to his argument in any detail. He brushes it aside with the remark that national courts have in fact "heeded" the CJEU's invitation. He is perhaps right about *Weiss*, in that the German court did not carry out its threat to ignore the CJEU. But in what

⁹⁸ J Lindeboom, 'Why EU Law Claims Supremacy' cit. 350–351.

⁹⁹ See also J Lindeboom, 'The Autonomy of EU Law: A Hartian View' (2021) *European Journal of Legal Studies* 271.

¹⁰⁰ J Lindeboom, 'Why EU Law Claims Supremacy' cit. 350.

¹⁰¹ *Ibid.* 339.

¹⁰² Federal Constitutional Court of Germany of 5 May 2020 2 BvR 859/15 *Weiss and Others* para. 101.

sense does the German Court accept that it is bound by the Treaties as higher or the only applicable law? So far we can see the German Court flatly rejects the idea that the treaties are the rule of recognition in Germany. And the case law of other courts is equally clear that the treaties are not a European constitution.

There is perhaps an effective response to this objection from the practice of national courts. Lindeboom's argument, we must remember is not doctrinal. It follows the Razian social and factual analysis of the legal system as the product of social forces beyond and before the law. The argument focuses on the practice of courts, not their doctrines, on what they do and not on what they say. And as it turns out most courts – with the exception perhaps of some Polish and Hungarian courts – do accept in practice the elevated status of EU law and of the CJEU. So Lindeboom argues that a court's theoretical objections are less significant than their practical compliance. It wouldn't matter if this compliance was actually in contradiction with the official constitution:

“Whether the social practice of national courts supports the existence of an autonomous EU norm of adjudication as applied to them is an empirical question, as is the question of whether an autonomous EU Rule of Recognition is practised by national courts. However, the dual hats of national courts as such do not threaten the CJEU's conceptualisation of the EU legal system as being no different from the national legal systems”.¹⁰³

Lindeboom thus argues that national courts operate as European courts *in fact*. Given their practical compliance with EU law for the most part it is at least arguable, he suggests, that “perhaps contrary to the self-perception of many national courts, when national courts apply EU law they are actually functioning as courts of the EU legal system as opposed to their national legal system”.¹⁰⁴ The official constitutional theory does not matter. It is the social practice that matters. And since the social practice complies with the CJEU, the national courts have become *de facto* instruments of a single EU led, European legal system, which has in fact taken over the member states.

It is important to stress here that this is still a theory of monism. There is one legal system, that of the EU. The EU legal system and the member state legal systems apply “concurrently” and “by the same officials” at least in fact. Pluralism applies perhaps at a second, but less important level, the level of (superficial, legal) doctrine. But, as we saw, the reality of a legal system is social, not doctrinal. So all that is needed for unity is the fact of social convergence, irrespective of legal technicalities. This reminds us of Hart's statement: “in this field nothing succeeds like success”. That's the whole point of Raz's analysis of the legal system as social fact.

Here, however, lies the theory's greatest weakness. If the idea of a legal system depends solely on facts of obedience and not on legal doctrine and argument, then it is defeated by acts of *disobedience*. If the EU legal system cannot determine that acts of

¹⁰³ J Lindeboom, 'Why EU Law Claims Supremacy' cit. 352.

¹⁰⁴ *Ibid.* 351.

defiance by member states are unlawful it has no response to the rebellions by Poland and Hungary. Defiance wins.

If we conceive of the existence of a legal system socially – in the way Lindeboom prefers – then the social departure from the idea of a European legal system is also a *de facto* amendment of the boundaries of that legal system. An act of active disobedience or defiance can take those pursuing it outside the legal system of the EU. What can such a social theory of the EU legal system say to the Polish Constitutional Tribunal and the Polish government, that are defying EU law? Nothing. As we saw above the nerve of the Razian theory is that a legal system is created because of the practices of mutually supporting legal officials, or judges. But if those legal officials stop acting in that way, the legal system disappears. This does not require any constitutional or theoretical unity at all (and Raz explicitly allows that a single legal system may have more than one rule of recognition). He argues that the unity of a legal system does not depend on having only one rule of recognition. Instead, the unity of the system depends on the fact that it contains only rules which certain primary organs are bound to apply.¹⁰⁵ But if these “primary organs” change course, the legal system ceases to exist. Raz further argues that: “the primary organs which are to be regarded as belonging to one system are those which mutually recognize the authoritativeness of their determinations”.¹⁰⁶ It is the actions of these organs that matter for the continuing existence of a legal system.¹⁰⁷

But if the identity of a legal system is a matter of the conduct of the officials that work within it, then the defiant action of the Polish judges must have effectively redrawn the boundaries of the EU legal system. Lindeboom in effect gives the Polish acts of defiance a constitution-making character. His argument is thus self-defeating: rather than assert the primacy of EU law *against* defiance, it accepts its demise *because of* defiance. Under a doctrine of social monism such that is being proposed by the legal positivists that follow Hart and Raz, we have no defence against the fact that the exercise of power by some popular government (be it in Poland or Hungary or elsewhere) destroys and cancels the legal system.

In fact, under this legal positivist view of law, the worse a government behaves the freer it will be of legal obligations. When the social facts change, monism must go with them. Any defiant court and any defiant government will be able to destroy the current

¹⁰⁵ J Raz, *Practical Reason and Norms* cit. 147. Lindeboom endorses that with these words: “There is nothing in the concept of a legal system that suggests it is constrained to a single geographical area, nor that any geographical area can have only one legal system”, see J Lindeboom, ‘Why EU Law Claims Supremacy’ cit. 342.

¹⁰⁶ J Raz, *Practical Reason and Norms* cit. 147.

¹⁰⁷ Indeed, Lindeboom ends his essay by making the claim that law is irrelevant, he writes that “Opinion 2/13 is quite typical of law as we know it: pretentious and rife with an inflated sense of its own importance” (citing John Gardner). But if this is so, then legal scholarship is just some kind of parlour game with no practical significance – which may well have been John Gardner’s view, I do not know. If find this view not only patronising but also evidently false. It is not a view of law shared by judges, practitioners or citizens, who act on the basis of law and criticise each other when one fails to be guided by it. The idea that law is a game or a hobby seems entirely absurd to anyone who has ever walked into a court of law or a parliament or a jail.

legal order. In the case of Poland and Hungary, we may thus have to say that because of the actions of primary organs, the scope of the EU legal system has changed and the content of EU membership has been redrawn. The old social basis has evaporated and a new one has taken over. Lindeboom's social theory of the constitution cannot explain why the EU is right to insist that Poland and Hungary should obey EU law.

VIII. PRIMACY: A PRAGMATIC VIEW

If the arguments above are correct, MacCormick was wrong on several points: Hartian legal systems do not conflict, they do not overlap, and cannot be ranked or held equivalent to one another under an overall pluralist framework. We cannot understand how EU law has become part of domestic law with the idea that it is a new legal system. Of course, MacCormick said those things because they corresponded to common sense impressions we have about the way in which EU law and domestic law relate. Yet these phenomena cannot be described through Hart's idea of the legal system. Such an idea cannot accommodate an EU legal system next to the national systems. So we must try something new, rejecting perhaps MacCormick's most fundamental assumption: the there is an EU legal system in Hart's sense. What follows from such a change of focus? What could replace it?

We may approach this from the vantage point of a theory that rejects legal positivism altogether. This theory would do away with the idea of a legal system. Neither the member states nor the Union are legal systems in Hart's sense of the union of primary and secondary rules. We may follow here Dworkin's theory of law as a moral project, which tells us that the institutional framework of the state is held together by series of interconnected moral judgments, including judgments about the legitimacy of historical institutions.¹⁰⁸ Dworkin connects legal judgment with legitimacy and explains that governments are legitimate "if their laws and policies can nevertheless reasonably interpreted as recognizing that the fate of each citizen is of equal importance and that each has a responsibility to create his own life".¹⁰⁹ A similar moral argument may be made about EU law – and I have offered such a detailed argument elsewhere.¹¹⁰ But we do not need to turn to Dworkin's abstract theories in order to understand the primacy of EU law. We do not need to fully climb this mountain, just in order to understand this point.

We can simply say that the European Union is not a legal system, remaining agnostic on the nature of the domestic jurisdictions as legal systems or otherwise. All we need to say is that domestic law has to be open to European Union law on the basis of the EU treaties as a matter of constitutional principle. Something like this has been accepted by all

¹⁰⁸ I have said more about how we should interpret EU law as a moral project in P Eleftheriadis, *A Union of Peoples* cit.

¹⁰⁹ R Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 322.

¹¹⁰ I find this argument compelling, but I do not need to make the point here. See for example P Eleftheriadis, *Legal Rights* (Oxford University Press 2008) and P Eleftheriadis, *A Union of Peoples* cit. ch. 4.

domestic courts, which have recognised the authority of the EU treaties and their primacy, on the basis of the domestic constitution. We can thus leave aside the larger theoretical questions to one side and accept that the introduction of the EU treaties did not have the “structural” effects identified by the theories offered by MacCormick and Schütze.

We can then just make a simple distinction between “structural” theories and “interpretive” theories of EU law. The structural theories proceed, like MacCormick and Schütze, on the basis that the Treaties have created a new “legal system”. This causes all the problems we identified above. If we say that the EU has not created a new “legal system” and the changes it has brought have not transformed the structure of domestic legal orders, we can approach the question of primacy with doctrinal minimalism. We may say that the treaties are nothing out of the ordinary. They are common treaties of public international law, that are incorporated into the legal orders of the member states according to established constitutional processes. It is the domestic constitution, however, that demands that such treaties are given primacy, direct effect and autonomous meaning in domestic jurisdictions. This interpretive view of the treaties is, to my mind, the standard way of accepting EU law in all member states according to the supreme courts of the member states.¹¹¹ We do not need any general theory to make these points. Like the practitioners, we say that EU law is part of ordinary constitutional doctrine in all member states.

This is also the approach of the Court of Justice. When we look at the case law of the Court, we find that it has never accepted the theory of two legal systems with their own rules of recognition. It has never accepted the structural interpretation of EU law in either its pluralist or monist versions. It has instead put forward a substantive account of the autonomy of EU law that makes minimal theoretical commitments and simply invites domestic jurisdictions to interpret their own legal orders in light of the principles of the Treaties. This has been the case since the very first cases of primacy. If we recall, in *Costa* the Court said: “By contrast with ordinary international treaties, the EEU Treaty has created its own legal system [*ordre juridique propre*] which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States [*integre au système juridique des états membres*] and which their courts are bound to apply”.¹¹²

The meaning of *ordre juridique* in this context cannot be that of a new legal system. The second sentence clearly denies it. If EU law becomes an “integral part” of the legal system of the member states, then it is not a novel or competing legal system. That would be impossible, since on the account of the legal system offered by Hart and MacCormick, a legal system cannot be part of another. If so, the translation of the term *ordre juridique* to legal system was an unfortunate error, which misled many theorists of law in looking up the ideas of Hart and Raz. The Court did not endorse those ideas. All the court says is that EU law must be interpreted, immediately and without further incorporation, as an

¹¹¹ I argue for this point in P Eleftheriadis, *A Union of Peoples* cit. ch. 3.

¹¹² *Flaminio Costa v ENEL* cit.

“integral part” of the domestic legal order. But this means only one thing: that the EU does not constitute a separate legal system.

The CJEU has deployed a modest substantive account of a legal order as an element of the constitutional order of all member states. EU law, in this account, is a set of general constitutional principles of equal recognition and reciprocity that transform the domestic constitutional order without amending its structure. The legal orders of the member states adopt cosmopolitan principles, without changing their nature as independent sovereign constitutions. So EU law does not make claims to structural supremacy. EU principles become constitutional fundamentals from within the established constitutional orders. There is continuity, not a breach with the past. The relevant cosmopolitan principles are constitutional principles that take effect domestically just like any other constitutional principle.¹¹³

I outline below how a transnational legal order works alongside the domestic legal orders on the basis of some cosmopolitan principles in this pragmatic way, summarising some things I have written in the past.¹¹⁴

VIII.1. EUROPE'S LEGAL ORDER

The standard approach to the legal order in all member states of the EU is constitutional. We take the fundamental structures of the legal order to be matters of law, explicitly set out in constitutional law. Under this model, the state is not a product of power or social convergence or a momentary expression of approval, as the legal positivists say, but is a framework of principles, institutions and judgments that are legally binding as constitutional law. These constitutional principles make sense as a coherent intellectual framework that offers concrete practical guidance.¹¹⁵ We may call this a “constitutional legal order”. A constitutional legal order exists on account of its substantive contents. It is obvious that such a legal order can be state-based as well as international. It can, indeed, be non-territorial, for example in the way of an ecclesiastical legal order may bind

¹¹³ For the argument that the EU does not have a “legal system” in the Hartian sense see also the interesting analysis offered by K Culver and M Giudice, ‘Not a System But an Order: An Inter-Institutional View of European Union Law’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* cit. 68, they say that “in our view, supra-state law is not best explained by tracing its existence up some chain of validity or authority ultimately resting with a Member State’s constitution and its assertion of supremacy”. My only criticism of this argument is that it does not recognise – at least not explicitly – that it rejects the Hartian framework entirely as a theory of law.

¹¹⁴ The same point is very well argued by G Letsas, ‘Harmonic Law’ cit. 107, an essay from which I have benefited greatly. Letsas writes that “non-positivism [...] changed radically the old paradigm by rejecting altogether the view that law is a system of rules”.

¹¹⁵ I have argued for this view in some detail in P Eleftheriadis, ‘Power and Principle in Constitutional Law’ (2016) *Netherlands Journal of Legal Philosophy* 37. A similar view is taken by Julie Dickson who is arguing that “in order to be a legal system [...] I propose that something has to make a claim to normative self-determination”, see J Dickson, ‘Towards a Theory of European Union Legal Systems’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* cit. 50.

different people sharing the same faith and the same institutions across territories in different countries or continents. I believe that this how judges look at EU law: as a coherent order of principles that bind in substance, precisely in the way of constitutional law. This idea is a kind of monism, because it shows that international institutions can be law-making and law applying in the same way as domestic ones. But it is best described as a form of dualism about law, because it draws a clear distinction between the idea of a comprehensive legal order (or jurisdiction) which is only appropriate to states, and the idea of transnational or international law as the law of nations, which is created in order to link separate states with bonds of law.¹¹⁶ This view of law is animated by substantive cosmopolitan principles of international justice and legitimacy.

There are many ways of putting this point. In a recent wide-ranging essay in the *European Journal of International Law* the American legal theorist Liam Murphy has put forward an idea of a substantive legal order for international institutions as an alternative to Hart's theory of international law, while respecting much of its theoretical orientation. Murphy made this proposal after seeing a truth that MacCormick did not see, namely that Hart's analysis was unable to account for transnational and international law as *law*.¹¹⁷ Hart argued that international law does not have a rule or recognition or convergent behaviour among the relevant officials and was just a bundle of disorganised set of primary rules, whose existence did not depend on validity. Hart said of international law: "[t]he rules of the simple structure are, like the basic rule of the more advanced systems, binding if they are accepted and function as such".¹¹⁸ International law was an unsystematic collection of norms, from which the domestic legal system could borrow freely.

Murphy observes, against Hart, that international law does make sense as a legal order, even if it lacks a rule of recognition and a set of compliant officials. Even if this was not clear at the time of the *Concept of Law* was written, it is clear now. International law has internal legal principles that create a structure of powers and institutions, within which legal obligations make sense as principles of law, not as manifestations of power or managerial directions.

Murphy thus proposes that international law may be systematic in the sense that it is "a set of rules that have direct, rather than derived, validity" which are "connected in that they refer to each other and develop in the context of the existence of the others".¹¹⁹ Murphy notes that international law has its own well established structural rules, such as the rule *lex specialis derogat lex generali*. He argues that such internal or practical connections may "enable us to say, in a sense entirely different and much more

¹¹⁶ See P Eleftheriadis, *A Union of Peoples* cit. 131–143.

¹¹⁷ L Murphy, 'Law Beyond the State: Some Philosophical Questions' (2017) EJIL 203.

¹¹⁸ HLA Hart, *Concept of Law* cit. 235.

¹¹⁹ L Murphy, 'Law Beyond the State' cit. 212.

important than Hart's that this group of legal rules makes up a legal system".¹²⁰ In this sense it is possible that various sub-areas of international law may be taken to be distinct legal orders, built on the basis of some adjudicating institution, such as the WTO, the Law of the Sea or EU Law.¹²¹ And we can remember here that primacy is a principle of international law as well. Art. 27 of the Vienna Convention on the Law of Treaties provides that a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty to which it is a party.¹²² Gerald Fitzmaurice summarised this general point when he said that the principle of supremacy is "one of the great principles of international law, informing the whole system and applying to every branch of it".¹²³

If international law is a legal order in this sense, it can work as the legal ground for the relations among states and between states and international bodies. We can then say that the mutual relations between the domestic legal orders are properly *legal*, so that there is in place a law of laws that organises their mutual relations. Under this model legal orders, recognise each other as law and there are "normative contacts between the two, at least to the extent that they exhibit some sort of mutual recognition and respect as legal orders and not simply as structures of power and authority".¹²⁴ The key to this idea which we may call internationalism is that each order recognises the status of other orders as authoritative in law because of their content.¹²⁵

Even Hart seemed to have been open to this suggestion, namely that the self-constitution of a legal order is legal and not factual. He accepted that judges must construct the foundation of a legal system on the basis of principles of law and not on observations of fact. He said that when judges are faced with fundamental constitutional questions, they do not look to social facts or dispositions that supposedly create the rule of recognition by way of some social process, but decide the case according to law, assuming that fundamental matters are also legal matters. Judges look for the most persuasive interpretation of the available public law materials and precedents. When he turned his attention to the "uncertainties" about the rule of recognition in the United Kingdom (and

¹²⁰ *Ibid.* 212.

¹²¹ This is, as Murphy notes, the view taken by the International Law Commission UN Doc. A/61.10 of 2006 Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, para. 251: "International law is a legal system. Its rules and principles (*i.e.* its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time".

¹²² For an excellent discussion of the complex issues raised by the supremacy of international law today see A Nollkaemper, 'A Rethinking the Supremacy of International Law' (2010) *Zeitschrift für Öffentliches Rechts* 65.

¹²³ G Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) *Collected Courses of the Hague Academy of International Law* 85.

¹²⁴ P Eleftheriadis, 'The Law of Laws' cit. 609.

¹²⁵ For this point in detail see P Eleftheriadis, *A Union of Peoples* cit. ch. 3.

the distinction between continuing or self-embracing parliamentary sovereignty), Hart accepted that the matter can be decided by a court so that: "The Courts will have made determinate at this point the ultimate rule by which valid law is identified".¹²⁶

Hart noticed immediately the air of paradox: "At first sight the spectacle seems paradoxical: here are courts exercising creative powers which settle the ultimate criteria by which the validity of the very laws, which confer upon them jurisdiction as judges, must itself be tested".¹²⁷ But the paradox disappears, Hart says, "if we remember that though every rule may be doubtful at some points, it is indeed a necessary condition of a legal system existing, that not every rule is open to doubt on all points".¹²⁸

This statement is extraordinary because Hart states that the fundamental constitutional rule may be a *legal* rule like all others and not factual assertions, as implied by his doctrine of a rule of recognition. Hart then adds this equally surprising statement: "The possibility of courts having authority at any given time to decide these limiting questions concerning the ultimate criteria of validity, depends merely on the fact that, at that time, the application of those criteria to a vast area of law, including the rules which confer that authority, raises no doubts, though their precise scope and ambit do".¹²⁹ The statement is surprising, because Hart once again considers fundamental constitutional matters to be ordinary legal matters.

VIII.2. MACCORMICK'S INTERNATIONALISM

Whatever the meaning of Hart's ambiguous statements about constitutional law, a substantive idea of an international legal order, may be the most appropriate starting point for the status of EU law.¹³⁰ This was indeed MacCormick's final view. It is often missed by commentators that MacCormick offered a second theory, which he called "pluralism under international law".¹³¹ Under this theory, MacCormick said, the potential conflict between EU law and domestic law would be resolved under a higher set of principles of international law that harmonised the rival claims. MacCormick, was aware that this model was not pluralist in the same way since it managed legal orders under a common framework of law. It could also be taken to be a form of monism "in Kelsen's sense", MacCormick said.¹³²

MacCormick says at the end of his long discussion that he finds pluralism under international law the more attractive theory. Unfortunately, he did not discuss this proposal in any detail. He said that the internationalist theory was pluralistic in that it

¹²⁶ HLA Hart, *The Concept of Law* cit. 152.

¹²⁷ *Ibid.* 152.

¹²⁸ *Ibid.* 152.

¹²⁹ *Ibid.* 152.

¹³⁰ See further P Eleftheriadis, *A Union of Peoples* cit. 48–79.

¹³¹ N MacCormick, *Questioning Sovereignty* cit. 120.

¹³² *Ibid.* 121.

denied the constitutional dependency of a state by any other state or its validation by Union law. He accepted that under this theory too “for each state, the internal validity of Community law in the sense mandated by the ‘supremacy’ doctrine results from the state’s amendment of constitutional and sub-constitutional law to the extent required to give direct effect and applicability to Community law”.¹³³ MacCormick thus accepted that these were true legal obligations that had to be interpreted by both the European and the domestic courts, neither of whom should be taking unilateral decisions, in order to avoid the slow fragmentation of Union law.¹³⁴

What MacCormick did not see was that placing state law and EU law under international law requires a rejection of Hart’s theory of the legal system. For if the foundation of a legal order is the law in a self-reflective manner, then there is no room for Hart’s idea of the legal system as a social fact.¹³⁵ International law is not a matter of fact. It is law, in the proper sense of the term. And if international law is the law of laws for the EU, then its rules are not to be incorporated one by one by each member state jurisdiction, but accepted on their own terms.¹³⁶ International law is an independent framework which has its own principles, institutions and judgments and which exists independently of EU law. It has a variety of sources, ranging from *ius cogens*, to custom, treaties and laws made by international institutions. It also has courts that have the power to adjudicate disputes among states. These principles and institutions apply among states, even though they occasionally create rights for individuals within states (e.g. prize law, international investment arbitration, the law of human rights).

IX. CONCLUSION: THE PRINCIPLE OF PRIMACY

The case law of the Court of Justice of the EU has developed a conception of EU law as a legal order under international law, without any reference to the idea of separate legal systems. It tells us that EU law is part of domestic law and does not lie outside it. EU law is part of the domestic legal order. By suggesting in a number of cases that the member states have freely entered into the international treaties that have set up the Union, the CJEU clearly draws on this international law basis. The Court correctly concludes that a Member State “cannot, therefore, amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law”, so that any regression in their laws and administration of justice would be a violation of EU law. It cannot because it would be unlawful, all things considered, for it to do so. This is what membership in the EU entails. The principle of primacy is therefore a principle of the priority of some common principles of the EU treaties, in the domestic legal order.

¹³³ *Ibid.* 117.

¹³⁴ *Ibid.* 120.

¹³⁵ See further P Eleftheriadis, ‘Power and Principle in Constitutional Law’ cit. 37–56.

¹³⁶ See P Eleftheriadis, ‘The Law of Laws’ cit.

The Court has always drawn attention to the fact that Poland has willingly joined the other member states by signing and ratifying treaties of public international law.¹³⁷ By focusing on this the Court adopts an inescapably internationalist outlook on the basis of a general dualism about international and national law. For if EU law were a unified constitutional or federal system, Poland's continuing consent would be irrelevant. Poland's consent is relevant, because it remains an independent state under international law. A clear account of these international obligations was given in one of a recent case, case C-791/19 *Commission v Poland*, where the Court of Justice once again took the opportunity to repeat some general principles of the relations between Union law and the member states. The international dimension is one essential part of these general principles because "the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in art. 2 TEU, which respect those values and which undertake to promote them".¹³⁸ The Court further adds that "mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded".¹³⁹ The obligations of the Treaties are relevant to the domestic legal order.

States enter into treaties so that they adjust their domestic executive and legislative powers. They commit to other states to change their internal arrangements and direct their conduct according to their commitments to one another. For example, not to develop nuclear weapons, not to harm the environment, to prosecute war criminals etc. The treaties do not belong to a different social world, say the world of diplomatic conferences as the legal pluralists imply. The Treaties are designed to be applied by state authorities and for that purpose is fully integrated within each domestic legal order. This is the case of the EU Treaties as well, since they make frequent reference to the constitutional law and the procedures of member states, on which they rely for their enforcement.

This is also recognised in the Polish Constitution, of which art. 9 states that ratified international agreements "shall constitute part of the domestic legal order" (para. 1), and that ratified treaties "shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes" (para. 2) and that if an agreement ratified by Poland "establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws" (para. 3). It follows that Poland is bound by the interpretations of EU law offered by the Court of Justice, including of art. 19 TEU and of the Charter of Fundamental Rights, since it recognises the jurisdiction of the CJEU under the treaties. The powers of the CJEU as a specialist court in all

¹³⁷ The Accession Treaty was signed in Athens on 16th April 2003. Poland held a referendum on 7 and 8 June 2003. A majority of voters chose in favour of ratification. The President of the Republic of Poland ratified the Treaty and Poland has been member since 1 May 2004.

¹³⁸ *Commission v Poland* cit. paras 50–51.

¹³⁹ *Ibid.* paras 50–51.

matters that have to do with EU law, are constitutionally recognised and protected as higher law by the Polish Constitution. This was even recognised by the Polish Constitutional Tribunal when Poland joined the EU in 2004.¹⁴⁰ Unfortunately, the Polish Constitutional Tribunal does not refer to this legal argument. Had it looked at art. 91, it would have to say that the Polish Constitution has given the CJEU the power to give judgment in cases such as case C-791/19 *Commission v Poland*. Just like other member states, Poland has adopted the primacy of EU law freely and willingly, under the terms of public international law, which continue to apply while Poland is a member state. Poland accepted primacy in the course of making its democratic constitution in 1997 and in including art. 91 in its text. So case K3/21 was wrongly decided. This is true everywhere in the European Union, both in Brussels and in Warsaw.

Pluralism and monism presuppose, as we have seen, Hart's doctrine of the legal system as a hierarchical order of rules. That theory created, we saw above, many ambiguities and conflicts and could not offer a plausible account of EU law. The Polish government used these ambiguities in order to argue for a purely state-centred account of the relationship between the Union and its member states. Yet, pluralism and monism are erroneous theories. The very idea of a factual "legal system" is misleading. Constitutional practice normally ignores these theories: the constitution does not change each week that the majority's opinions shift.

Most courts and most practitioners have accepted a different theory. They take EU law to be part of the domestic constitutional order. There has been no sudden breach in the constitutional life of the member states. Direct effect tells us that parts of the EU Treaties and some of the secondary law made under them, take effect domestically on the basis of a general constitutional clause incorporating EU law. Primacy tells us that directly effective EU laws take priority over any domestic laws for the sake of the required uniformity of the single market, giving effect to the obligations of the parties to one another and to their own citizens. Autonomy tells us that the judgments of the CJEU are special. This is all there is to it. Each principle supports the others. These principles are accepted on the same ground that all other constitutional principles are established in each member states. They jointly create a Union of Peoples whose authority is accepted as a matter of course.¹⁴¹ The domestic legal orders have not changed radically by adopting these principles. They have adjusted to the cosmopolitan spirit that comes with EU membership. The EU treaties take their place in the legal order of the member states as important but unexceptional episodes in the history of ordinary law-making.

¹⁴⁰ See the Polish Tribunal's earlier case law in cases K 18/04, K 32/09, SK 45/09 and the comments by S Biernat and E Łętowska, 'This Was Not Just Another Ultra Vires Judgment!: Commentary to the Statement of Retired Judges of the Constitutional Tribunal' (27 October 2021) *Verfassungsblog* [verfassungsblog.de](https://www.verfassungsblog.de).

¹⁴¹ I have offered a detailed account of these interpretive principles in P Eleftheriadis, *A Union of Peoples* cit.

