

How international is the European legal order?

Retracing Tuori's steps in the exploration of European legal pluralism

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As Kaarlo Tuori has often emphasized, one of the most important challenges the current legal reality in Europe raises for legal theory lies in the integration of autonomous legal orders applying directly to the same people, hence the impact of this European brand of legal pluralism on traditional legal theories. Indeed, as I have argued elsewhere, what is needed in European legal theory is not only a translation of national concepts into European ones to avoid the dangers of rigid statism and of transposition of statist concepts onto post-national legal realities, but also a radical re-interpretation of national legal concepts themselves and hence a radical re-interpretation of national legal theory into an integrated European legal theory.¹

One should be wary, however, of focusing too much on European Union (EU) law and its relationship to national law, thus bracketing out international law or treating it at the most as background law and as the mere reflection of state will.² International law has gradually turned into more than the sum of state wills. The constitutionalization of international law discourse reflects the development of the law of an international community that is often objective, general and sometimes even imperative and has little to do with the traditional voluntarist picture of

* The present paper was first prepared for the discussion panel *Polity* at the Kick-off Seminar *Legal Europe – Coherence and/or Fragmentation* that took place on 31st January and 1st February, 2008, at Helsinki. As such, its primary aim was to react to Kaarlo Tuori's introductory paper and to focus discussion and, although it has now been turned into a mini-*Festschrift* paper, its style has remained much the same: it is brief and provocative and contains almost no references. A more detailed argument pertaining to some of the points made in this paper may be found in Besson 2008a and 2008b. The ideas presented in this short paper were developed within the framework of the Project for a European Philosophy of European Law (PEOPEL, <<http://fns.unifr.ch/peopel>>). I would like to thank Liisa Holopainen and Samuli Hurri for inviting me to contribute to this special edition of NoFo dedicated to Kaarlo Tuori.

¹ See e.g. Besson, 2006a and 2007a. See also Günther 2001 at the global level.

² See on the autonomy of EU law from international law, Weiler & Haltern 1996.

international law.³ As a result, both the objects and subjects of international law have changed and now include individuals in areas previously covered exclusively by national law. This makes it increasingly difficult to distinguish international from national sources of law. The impact of international law on national law has not only increased therefore, but also changed in nature (see Besson 2008a). This has given rise to new discussions of old questions, such as the relationship between national and international law and in particular questions pertaining to the validity, rank and effect of international law in the national legal order.⁴

Interestingly, but also regrettably, however, these discussions have only rarely taken into account the European dimension,⁵ and when they have, this has rarely been done in a theoretical way and it has avoided the topic of the relationship between national, international and European legal orders. The reverse is also true, however. In recent years, European studies have often been characterized by their isolation from international legal scholarship, with the exception of the field of EU's external relations albeit with its specific perspective. Of course, European lawyers have factored (general and special) international law within the sources of EU law, albeit usually at a lower rank than EU primary law. Yet, international lawyers, despite being aware of the emancipation of the European legal order as a special and autonomous regime of international law,⁶ conceive of EU law as a legal order to which general international law applies, in particular secondary rules of international law-making.⁷ The three autonomous layers of the European legal order *lato sensu*⁸ are hardly ever considered at the same time, however, by either European or international lawyers. This question cannot simply be reduced to a

³ See e.g. Weil 1982; Boyle & Chinkin 2007; Besson 2008a.

⁴ See e.g. the essays in Nollkaemper & Nijman 2007.

⁵ See, however, Nollkaemper & De Wet 2007. See also the project *International Law in Domestic Courts*, <<http://ildc.oxfordlawreports.com/public/login>>.

⁶ See Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, 12: 'new legal order of international law'.

⁷ It is important to emphasize indeed that the autonomy of a legal order, i.e. self-determination of one's sources, does not imply that international law cannot apply within it, but only that the modalities of that application are determined by the legal order itself.

⁸ The European legal order *lato sensu* results from the integration of EU law in the 27 national legal orders. See Besson 2004; Maduro 2003. The European Convention of Human Rights, by contrast, belongs to the international legal order even though it applies in the European legal order *lato sensu*. As to EU law, I am using this term in its post-Lisbon meaning which has already largely become a reality.

byzantine quarrel, as the degree of autonomy of the European legal order and both the validity and the primacy of international law in integrated national legal orders in Europe depend on the answer to it.

This blind spot in both European and international scholarship needs to be identified and elucidated, as legal theory can only provide us with useful explanations and insights of the concept of law in Europe if it accounts for all the valid sources of law applicable at the same time in European legal orders, and for the relationships between them (see, for example, Besson 2008b). The recent *Kadi* saga⁹ certainly is a testimony of the complementarity between legal orders. In addition, it tells us a lot about the EU's perception of its own legal order and of its relationship to international law, but also ultimately of its relationship to national law and of national law's relationship to international law. Finally, when one adds conflicts of jurisdiction to conflicts of legal norms,¹⁰ as has been the case with the recent *Bosphorus*¹¹ (European Court of Human Rights [ECHR]/European Court of Justice [ECJ]) and *Mox*¹² (ECJ/International arbitral tribunals) cases, a clear understanding of the contours of European legal pluralism and of the solutions to normative conflicts becomes even more necessary.¹³

Accordingly, if European legal theory cannot be explained without focusing on national law as well and revisiting national legal theory, the same should be said about the increasing role of international law in national law and hence also in European law, and about the relationship between these three (or more) legal orders. Of course, the scope of this essay precludes doing all the necessary work for

⁹ See Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II 3639; Case C-402/05 P *Yassin Abdullah Kadi v Council and Commission*, Advocate General (AG) Maduro's opinion, 16 January 2008.

¹⁰ Some jurisdictions will have the competence to judge on the same cases according to the same norms, while others will have a more focused brief (e.g. human rights).

¹¹ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* [GC], no. 45036/98, ECHR 2005-IV; case C-84/95 *Bosphorus Airways v Minister of Transport* [1996] ECR I-3953.

¹² Case C-459/03 *Commission v Ireland* [2006] ECR I-4635; UNCLOS Arbitral tribunal, *MOX Plant case* (Ireland v United Kingdom) [2002] 41 ILM 405.

¹³ For reasons of clarity, I will in principle leave out conflicts of jurisdictions from the ambit of the paper, but it is important to separate both questions as recent answers often tend to conflate both issues (see e.g. AG Maduro, *Kadi*, par. 44). Also, the proliferation of jurisdictions may give rise to rules of comity and mutual respect that have to do with the risks of multiple adjudication rather than necessarily with solving conflicts of legal norms or orders raised by legal pluralism. On this topic, and instead of many other references, see in particular Shany 2004 and 2007; D'Argent 2007; Higgins 2006; Lavranos 2005.

this new research agenda. Instead, I will react to Kaarlo Tuori's introductory paper¹⁴ and the research plan of the Centre of Excellence in Foundations of European Law and Polity,¹⁵ hoping to factor in the international dimension. In the following, I will retrace Kaarlo Tuori's steps in his introductory paper and focus on three issues: first, I will try to clarify the *notion* of legal pluralism a little further; second, based on the first issue, I will look in more detail into the European specific kind of legal pluralism and venture a *diagnosis* of what is really at stake; and finally, I will discuss ways of preventing, and providing *remedies* to the normative conflicts that inevitably arise in circumstances of European legal pluralism and discuss the role of coherence in particular.

1. The notion of legal pluralism

Before opposing pluralism to unity, the Centre of Excellence's research agenda opposes fragmentation to coherence and seems somehow to straddle both oppositions. In this essay, I shall concentrate exclusively on pluralism and coherence, but will first briefly explain why.¹⁶

Both fragmentation and coherence are polysemic concepts. Therefore the research agenda rightly considers the possibility of facing both fragmentation and coherence or either of them in the European legal order. Indeed, there seems to be a difference of genre between fragmentation and coherence. While the former describes a legal reality and in particular the lack of normative hierarchy within a legal order or between two or more legal orders, the latter can be used to indicate both a state or reality of non-fragmentation by virtue of the existence of a coherent framework, and a normative requirement to react to fragmentation.¹⁷ In fact, it is

¹⁴ Tuori, Kaarlo: European Law and Polity: Pluralism and/or Unity?, 31st January, 2008, Draft paper, on file with author.

¹⁵ See <www.helsinki.fi/katti/foundations/Index/Research_Plan.pdf>.

¹⁶ I am not looking here at moral pluralism or social or epistemological pluralism, but only at legal pluralism. Of course, legal pluralism can be a consequence of the former, but not necessarily. Moreover, I am not looking at non-official forms of law and social norms and hence am not considering those forms of pluralism of social norms (see e.g. Moore 1978; De Sousa Santos 1995). See e.g. Günther 2001; Twining 2000; Griffiths 1986 on these distinctions.

¹⁷ Fragmentation may also result from the use of coherence in the context of European integration and in particular from the harmonization of national laws in a specific area.

arguably used more frequently as a normative requirement and remedy to the former than to describe a legal reality. As a result, depending on one's position, there could be fragmentation *or* coherence, but also fragmentation *and* coherence or fragmentation *without* coherence.

Although pluralism and unity are just as polysemic, they should not be paired with the opposition between fragmentation and coherence. Coherence does not mean unity and this is precisely why it is used in a context of a plurality of coexisting legal orders. Moreover, unity refers to a legal state or reality rather than also to a normative reaction to that reality. Therefore, coherence seems to be a more open concept for our purposes. What about pluralism then? I favour pluralism over fragmentation, as the latter conveys the idea of a whole that has been broken into fragments or of fragments that could be put together again to create a whole. Pluralism is more neutral in respect to the desirable state of the law and the relationship between legal orders.¹⁸

Of course pluralism itself is an ambiguous concept. At least two dimensions of meaning need to be distinguished. In the first dimension, pluralism can be used to refer to the plurality or multiplicity of valid legal norms in one legal order or, in a global context, to a multiplicity of legal orders. Usually, these plural norms coincide in the same social sphere and overlap on the same issues, people and territory (see, for example, Griffiths 1986, 8; Twining 2000, 8). Interestingly, the term pluralism is used in international law to refer to the plurality of norms, sources or regimes within international law (internal) as much as to the plurality of legal orders outside international law (external). When pluralism means the plurality of legal orders, it is usually used to distinguish itself from monism. As such, it constitutes an elaborate and interlocking version of dualism. However, in this meaning of pluralism, legal validity does not depend on the transposition of norms in each other's legal orders contrary to a dualist legal order. Pluralism in this meaning of the term pertains to the *validity* of legal norms and claims that the law's validity can have many autonomous sources within the same territory or community.

The term can also be used, however, in another way, that is, referring to the equivalence of legal norms or sources, either in the same legal order or between different legal orders. In this sense, pluralism is opposed to hierarchy and pertains to the *rank* of legal norms stemming from the same legal order or from different legal orders overlapping in a given territory or community. Even within this

¹⁸ Of course, legal pluralism has gradually turned into a normative as well as descriptive concept. See e.g. Twining 2000, 84.

category, the absence of pluralism and the rank between legal norms can have many origins: the existence of a rank among the sources of law or that of a rank among specific norms. Hierarchies of specific norms can be either formal (for example art. 103 of the UN Charter) or material and content-based (for example *jus cogens*). As I have argued elsewhere, however, the constitutionalization of general international law demonstrates a tendency towards a hierarchization of international legal sources to match developing hierarchies of norms, in particular formal or material hierarchies of norms. The same phenomenon has already taken place within the EU legal order.

It is particularly important to identify the two pairs of meanings of the concept of pluralism: first, pluralism *qua* validity or pluralism *qua* rank, and, secondly, within either of them, pluralism of norms/sources or pluralism of orders.

All of these meanings do not need to constitute the same difficulty for legal theory. It is one thing for lawyers and legal subjects in a legal order to recognize the legal norms of another legal order as valid and hence as authoritative norms in one's legal order, and another to discuss which ones should take priority in case of conflict. Neither do the remedies need to be the same in all cases. Thus, normative coherence is a remedy to the absence of a hierarchy of norms or rules of conflict, either between norms in the same legal order or between norms from different legal orders. It is not so relevant, however, when the question pertains to the validity of one legal order's norms in another legal order. In these cases, however, pluralism remains an important difficulty, as has been demonstrated by the debate about the relationship between separate substantive regimes of international law. Of course, in general, pluralism *qua* validity often only really matters when questions of conflict between norms and hence issues of rank arise. And this is what makes the distinction difficult to draw in practice.

2. European legal pluralism

2.1 *First impressions and mutual perspectives*

Legal pluralism in both its dimensions of meaning matters even more in an integrated legal order like the European legal order than it does elsewhere. Indeed, in the European legal order *lato sensu*, the national and the EU legal orders overlap to such an extent in terms of their objects and subjects that they can be said to be integrated. Integration amounts to another difficult concept, worth defining as it is

allegedly what distinguishes the European legal order from an international one and hence what explains Europe's special brand of legal pluralism.

2.1.1 European integrated legal order An integrated legal order, one could say, is a legal order that mostly exists as such, i.e. as an autonomous legal order, when it is imbricated into another one in terms of objects and subjects. The latter retains its autonomous existence, however. Therefore, the European legal order consists, for most part, of 27 distinct integrated legal orders. This is what Advocate General Maduro means when he states in *Kadi* that the ECJ considered in *Van Gend en Loos* that 'the Treaty has created a municipal legal order of transnational dimensions, of which it forms the "basic constitutional charter"'.¹⁹

Of course, integration in the European legal order *lato sensu* only goes in one direction.²⁰ National legal orders integrate European law rather than the other way around. Interlegality, to borrow Kaarlo Tuori's words, is therefore one-sided in the European Union.²¹ The same may be claimed of international law, as certain international legal norms could be said to be integrated in national legal orders in the EU at least in areas previously resorting to national law only and pertaining to individuals directly. In these areas of international law, the effects of international legal norms within national legal orders are very similar to those of EU law. One could, for instance, mention other special regimes in international law such as the WTO, whose relationship to EU law and to the national laws of EU Member States reveals the complexity of global legal integration. This creates, as a result, a multi-centred integration of legal orders in Europe with a European legal order *lato sensu* being itself integrated in each one of the 27 internationally integrated legal orders. Bilateral pluralism, as one may call the plurality of national and EU legal orders, could therefore with time give rise to multilateral pluralism in view of the development of the international legal order *qua* integrated legal order.

Significantly for us, integration does not mean that the national legal orders have become one within the European legal order *lato sensu*. Fifty years of integration have shown that national legal orders have retained their constitutional

¹⁹ AG Maduro, *Kadi*, par. 22. See footnote 9.

²⁰ See, however, Case C-380/05 *Centro Europa 7 v Ministero delle Comunicazione et Autorità per le Garanzie nelle Comunicazione*, Advocate General Maduro's opinion, 12 September 2007, par. 20–22. In its decision of 31 January 2008, the ECJ has not commented upon those passages in the opinion, however.

²¹ On interlegality, see De Sousa Santos 1995; Günther 2001.

autonomy.²² This is, of course, true of areas of national competence, but also of areas of mixed or exclusive competence as national law still has an independent role to play in the European legal order *lato sensu* and regularly affirms its autonomy. At the same time, EU law has emancipated itself from both national and international law as an autonomous legal order: it determines its own sources and despite the absence (so far) of a formal Constitution, it functions as a constitutionalized legal order. This is the case in areas where the European legal order is self-sufficient *qua* EU law (including EC law) and/or regulates the acts of States and not of individuals, for instance. Interestingly, therefore, the autonomy of EU law is autonomy both from national law and from international law because it determines the validity and rank of the norms applicable in its own order.

2.1.2 European integrated legal pluralism Based on these considerations about the integration of legal orders in the European Union, the specificities of the European legal order and its special brand of legal pluralism could be captured as follows. First, European legal pluralism makes it possible to grant immediate validity (without transposition into the national legal order) to the norms of another legal order without, however, imposing monism and diluting the national legal order into the European one *lato sensu* or vice-versa. Of course, this approach differs from the ECJ's traditional conception of imposed monism,²³ but also from that of the dualist Member States whose creed has always been to condition the validity of EU law in the national legal order upon a constitutional recognition of one kind or another.²⁴

If this is right, then, a lot could also be changed about the ways in which national and international law are said to relate, at least in Europe. Indeed, traditionally pacifist and international law-friendly States have been described as monist because they grant immediate validity to international legal norms (without incorporation into national legal norms). On the contrary, dualist States have often been deemed as protectionist, which is surprising given that European integration

²² I am consciously avoiding the discussion of 'constitutional pluralism', as I am assuming the autonomy of a legal order implies a rule of recognition and hence some kind of constitution. As a result, legal pluralism in the sense it is understood in this paper, i.e. pluralism of legal orders, can only be constitutional pluralism. See e.g. Besson 2008b, 2007a and 2006a; Kumm 2007; Maduro 2003; Walker 2002. See also AG Maduro in *Kadi*, par. 21 (see footnote 9), by reference to Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, par. 23.

²³ Case 106/77 *Simmenthal II* [1978] ECR 629, par. 14–15.

²⁴ See e.g. Article 55 French Constitution; Article 23 par. 1 German Basic Law.

itself does not go as far as to require monism. Neither view, however, adequately captures the current relationship between national and international law in Europe (see, for example, Paulus 2007; Kumm 2007).

One of the benefits of the *Kadi* saga has precisely been to clarify some of the requirements of international and European integration in terms of validity, regarding the relationship between international and European law, on the one hand, and between national and international law through European law, on the other. While the Court of First Instance's (CFI) position in the case was clearly monist both in terms of the relationship between national and international law and regarding that between national and European law, Advocate General Maduro's opinion could be interpreted both in dualist and in pluralist terms.²⁵ What matters for us at this stage, however, is that it is clearly not monist, neither with respect to the relationship between national and international law through European law nor with respect to the relationship between European and international law.²⁶ So, the question arises whether this will somehow give rise to, or be interpreted as a change of paradigm in the relationship between national and European law in enhancing the autonomy of national legal orders. Or is it the exact reverse? Once the validity of international law has been settled through EU law, the question arises whether the national legal orders still have a word to say about the validity of international law. Does legal pluralism between European and international law imply pluralism throughout or does it impose monism in the relationship between national and European law?

Second, in a similar vein, the pluralist nature of the European legal order *lato sensu* means that the primacy claimed by EU law over national law, including national constitutional law, does not create a single and definitive hierarchy of norms within the European legal order *lato sensu*. Even if the origin of the norm of

²⁵ It could well be that European legal pluralism, according to the definitions presented in the first section, only implies, in the context of Maduro's opinion, a lack of hierarchy and can be equated to dualism in terms of legal validity. It seems indeed that par. 24 of the opinion in *Kadi* is an expression of the dualist model: 'The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.'

²⁶ Compare this position with Case C-213/03 *Etang de Berre v. Electricité de France* [2004] ECR I 7357, par. 22 et seq.; Case C-181/73 *Haegemann v Belgium* [1974] ECR 449, par. 5.

primacy is clearly European, at least according to the ECJ's case-law,²⁷ national legal orders have always claimed to have kept the *Kompetenz-Kompetenz*.²⁸

Interestingly, the *Kadi* case has reactivated this old question of the relationship between national and international law through European law, on the one hand, and between European and national law, on the other. The question is usually answered by reference to Article 300 par. 6 and 7 of the Treaty establishing the European Community and international law seems to be ranked below EU primary law. Whereas the CFI saw *jus cogens* norms as the only limitation to the primacy of Articles 25 and 103 of the UN Charter in the European legal order *lato sensu*, Maduro's opinion gives primacy to the European constitutional tradition including fundamental rights in general, but only as long as no equivalent level of protection of the same rights may be secured at the international level.²⁹ As a result, thanks to the autonomy of the European legal order, EU Member States could be given the occasion to revisit traditional conceptions of primacy in their relationship to international law and to reconceive that relationship in pluralistic terms. One may also hope, in turn, that this pluralist reading of the relationship between international and European legal order will apply to the relationship between national and European law, which the ECJ does usually regard as monistic with primacy given to EU law over national constitutional law. This change of paradigm is something that might be feared in European circles where European legal pluralism in the relationship between national and European law is not rated favourably, and where the primacy of EU law vis-à-vis international legal norms, and in particular WTO law, remains a sensitive issue.³⁰

²⁷ Case 6/64 *Costa v ENEL* [1964] ECR 585.

²⁸ See e.g. Article 55 French Constitution; Article 23 par. 1 German Basic Law.

²⁹ Here again, it seems that Maduro's opinion oscillates between a dualist kind of primacy and true legal pluralism. In par. 25, there is talk of 'supra-constitutional status' within the European Community legal order (which *per se* is impossible in an autonomous legal order and should be 'constitutional status'), but par. 44 states a pluralist account of the rank between norms stemming from different legal orders based on equivalent protection of fundamental rights.

³⁰ See for example Joined Cases C-300 and 392/98 *Dior* [2000] ECR I-11307, par. 36 et seq.

2.2 *Second thoughts and new directions*

2.2.1 Perspectivism and the concept of law European legal pluralism, even if it is an attractive model of the relationship between autonomous albeit overlapping legal orders, does still raise crucial challenges that need to be taken seriously. The most important one has to do with the concept of law itself and the unicity implied by the idea of legal validity. In short, can we still talk about ‘law’ in conditions of legal pluralism (see Twining 2000, 41)?

A frequent reply to this objection is perspectivism. What matters, according to perspectivism, is that within each legal order, participants have their own perspective about the relationship between legal orders. And these internal relationships are usually inspired by the monist or the dualist model. What matters, however, is that the external perspective matches social practice and adopts a corresponding pluralist model (see, for example, Günther 2001).

Of course, perspectives are inescapable and are an essential part of our legal judgements, whether they are those of the legal practitioner or of the theorist. Whether one opts for a pluralist model of the relationship between legal orders or a monist one, equivalence or hierarchy are merely in the eye of the beholder (see, for example, Richmond 1997). Thus, we know that both the ECJ and national constitutional courts have claimed the ultimate sovereignty of their respective constitutional orders in the past. Perspectives also matter in international law. Thus, the relationship between European and international law is not perceived in the same way by European lawyers and international lawyers (see, for example, d'Argent 2007 and Lavranos 2005).

Even from an internal point of view, however, perspectivism is far from being a sufficient reply to the objection raised above.

To start with, the development of multilateral pluralism makes for complex cases of mutually exclusive perspectives. Indeed, the *ménage à trois* between the international, European and national legal orders implies that one could have cases where the EU's perspective as to the validity and primacy of international law differs from that of national law. These discrepancies between internal perspectives of the relationship between legal orders are bound to affect the viability of internal perspectives. We are currently facing this difficult situation in the *Kadi* case, as national and European perspectives relative to the validity and especially to the rank of international law in the national legal orders might differ, thus questioning the autonomy of national law and the possibility of maintaining an internal perspective

without factoring in the perspectives of others pertaining to the very relationship between legal orders.

Besides the complexity created when looking into the relationship between the three legal orders, perspectivism does not provide us with a satisfactory answer from a general legal perspective either. It flies in the face of the *raison d'être* of an integrated legal order. It is indeed impractical at least in respect to the legal subjects of the European legal order *lato sensu* who need to know which law applies to them and which norm to obey in case of conflict. Things cannot simply be left to jurisdictions to decide upon. The interesting question is indeed whether anything can be done legally to legitimize the legal decisions which inevitably will give reason to one or the other perspective depending on the case. Lawyers are ultimately expected to decide and provide a legal answer to the subjects of the European legal order. The European Court of Justice has often been granted the last word on difficult issues pertaining to the validity and the rank of EU law in national law or, as of last, of international law in the European legal order *lato sensu*. National courts as well have often had to decide about the primacy of EU law over their own constitutional norms. In all these cases, courts are surely guided by legal rules in their decision; they are indeed applying norms from both orders and are therefore relying on their validity and authority in their own legal order before they decide to grant priority to either of them.

From an external point of view, moreover, perspectivism merely begs the question. While it is unavoidable for those practicing law in a given legal order to entertain an internal perspective (whether monist or dualist) (see, for example, Günther 2001), it is not clear why the external perspective over the overlapping legal orders as a whole should necessarily be one of pluralism due to the mere existence of conflicts between internal perspectives about the relationship among legal orders. Too often, European legal pluralism seems to be taken for granted far too readily.

2.2.2 European legal pluralism and validity In any case, how do we know integration or, at least, the immediate validity and primacy of EU law in the national legal order does not equate with monism and does not create a single hierarchical European legal order or, on the contrary, does not amount to a sophisticated kind of dualism? Why should our (largely contradictory) perspectives matter in assessing the validity and primacy of different legal orders? After all, some of us could be wrong about what the law really is.

Of course, based on this last argument, some would argue that there can only be one kind of legal validity per legal order, or else we would no longer be talking about 'law'. We are therefore back to where we started our exploration of the concept of legal pluralism and back to the fundamental opposition between monism and dualism. Monism is clearly not the right choice to capture the regime of validity in the European legal order, however. An elaborate and dynamic version of dualism could account much better for the current reality of mutual recognition among legal orders and their flexible hierarchies.

However, when rules of recognition, to take the Hartian model, conflict in a case of overlapping legal orders, should there necessarily be a meta-rule of recognition which would bridge the legal orders and organize a common validity by means of a single overarching legal order? Kelsenians, certainly, would deny that legal validity can be split (see, for example, Somek 2007; Richmond 1997). The Hartian model, I would like to argue by contrast, can be revised to accommodate the post-national integration of legal orders and the coexistence of many rules of recognition in overlapping circumstances.³¹

While it is true that *per se* neither the Kelsenian *Grundnorm* nor the Hartian *Rule of recognition* can provide (socially³²) plausible (nor even legitimate) accounts of the relationship between national and EU legal orders, or of the relationship between national and international legal orders, this does not mean that these models should be entirely disparaged. Not only would one need to know which accounts could replace them, which is not the case at the moment, but, furthermore, there are areas of competence where national legal orders remain organized as they were before European integration. The same can be said of areas of EU law that are not integrated. Finally, in any case, the Hartian rule of recognition can also be applied effectively to the international legal order, since, as I have argued elsewhere, the rule of recognition does not imply a hierarchy of sources, besides its own highest rank in the legal order, of course.³³

That point made, one may wonder how legal validity could be granted to norms stemming from different legal orders without necessarily having recourse to

³¹ See Besson 2008a; Andenas & Gardner 2001; MacCormick 1999, Ch. 7 and 8. Note, however, that MacCormick's model is ultimately monist as its pluralism is supported by background rules of general international law *qua* ultimate rule of recognition.

³² Contra Somek 2007, I think that social plausibility is required of a legal theory. This does not, of course, mean that there cannot be a difference between legal validity and social practises.

³³ See Besson 2008a. So this should put common concerns about a '*Stufenbau*' at rest.

one legal order's rule of recognition to vest the other legal order's rules with validity. Clearly, the only legitimate bridging norm would have to be legal, and not only a social rule, in each legal order. But how could this be done without threatening these legal orders' respective autonomy?

A re-interpretation of Hart's social concept of law allows for the development of such a legal convention, without, however, creating a meta-rule of recognition in a meta-legal order. That rule would have to be a shared rule co-generated, as a coordinated practice, in both legal orders in full autonomy to solve the *Kompetenz-Kompetenz* quandary. This is arguably the case of the rule of recognition of EU law in national law or that of international law in national law or in the European legal order *lato sensu*. This can only be the case, however, if this rule respects the sovereignty of each of the 27 European peoples both *qua* national and *qua* European people, by guaranteeing inclusive democratic processes at all levels of decisions (see, for example, Besson 2006b and 2008b). And this in turn implies that, when European authorities exercise their granted competences, they respect the democratic principle of subsidiarity. This principle then constitutes the switch, as we will see: the most inclusive forum of all those affected ought to be the one deciding in each case.

The recent reinforcement in the Lisbon Treaty, not only of the representation of States and EU citizens in EU law-making processes, but also of European peoples through the involvement of national parliaments is a sign of the progressive constitution of a *demoi*-cratic rule of recognition in the EU (see, for example, Besson 2008b). Just like Russian dolls, this rule of recognition of EU law includes albeit is not identical to the national rule of recognition. It is both external and internal to the national rule of recognition, and this constitutes the essence of legal pluralism. By reference to the notion of interlegality discussed before, the concept of *intervalidity* could capture the way in which legal validity is granted in a legal pluralist model.

At the international level, by contrast, the integration of legal orders has only started to trigger the imbrication of democratic processes and hence of rules of recognition (see, for example, Besson 2008b and 2008c). As a result, pluralism usually comes closer to a form of dualism in practice, with national constitutional norms vesting international norms with validity in the national legal order. This seems to be confirmed by Maduro's opinion in *Kadi* and his rather dualist approach to the validity and rank of international law in the European legal order *lato sensu*.³⁴

³⁴ AG Maduro, *Kadi*, par. 22 (see footnote 9).

Certain regimes of international law have developed towards the European model, however, as exemplified by the WTO governance model.

2.2.3 European legal pluralism and rank Of course, valid legal norms stemming from different legal orders may conflict. The question then arises as to how to solve those conflicts, hence the question of the rank of European law in the national legal order. Conflicts of norms are common within legal orders and all sorts of formal and material hierarchies of norms, but also hierarchies of sources may be developed as rules of conflict. For reasons of legitimacy, the latter are usually used as process-based shorthand for the former.

Conflicts of norms stemming from different orders may also be resolved according to hierarchies of norms and to hierarchies of sources. Indeed, according to the traditional monist or dualist conception, once they are vested with legal validity in the national legal order, European legal norms are also vested with a rank in the national hierarchy of norms and sources.³⁵ Thus, they are usually ranked below or at the same level as national constitutional norms, including human rights norms. In a pluralist model, however, rank in the national legal order is not pre-determined through the priority of one of the rules of recognition or the insertion into national law. Primacy is usually recognized to EU law but on grounds of a refragable presumption based on a multitude of criteria including human rights protection, democratic inclusion, fairness etc. (see for example Maduro 2003; Kumm 2004 and 2007).

These solutions, however, are focused mostly on adjudication. Moreover, they lack the legitimacy one would expect of tie-break rules in circumstances of reasonable disagreement about the right level of human rights protection, democratic inclusion and fairness. Process-based criteria of the kind one finds within each legal order, and in particular formal normative hierarchies or hierarchies of sources, provide the highest degree of legitimacy and security one may attain in circumstances of social and moral pluralism, especially outside the boundaries of national legal orders.³⁶ It would be contradictory indeed to privilege a content-based test over a process-based test, when the material guarantees protected by the content-based test actually protect those very processes by which one could rank the different norms in conflict (see, for example, Besson 2005 and

³⁵ The only transitive hierarchy that may favour international or European legal norms as much as national legal norms is the priority of *jus cogens* norms. See Besson 2008a.

³⁶ See e.g. on the risks of human rights imperialism, Cohen 2006; Besson 2008b.

2008b). And even more so as process-based tests are used to apply content-based tests in practice. Thus, respect for human rights is usually assessed according to democratic rules, as the ultimate aim of human rights protection is precisely to protect the democratic process.

Given the imbrication of the rules of recognition and their integrated democratic pedigree, issues of rank can easily be resolved by reference to the principle of subsidiarity. The most inclusive forum of all those affected by a decision ought to be the one deciding in each case and hence the norms stemming from that process ought to take priority (see, for example, Besson 2008a and 2008b). Only then will the authority of their legal norms be able to preclude that of national legal norms; indeed, primacy assumes (democratic) authority in the first place (see, for example, Besson 2008b).

Of course, by analogy to what takes place in case of monism or dualism, given the highest democratic pedigree of constitutional norms in the national legal order, primacy should also be established by reference to equivalence in the degree of protection of constitutional rights and principles. This is already largely the case within the European Union, as confirmed by the European Court of Human Rights in the *Bosphorus* decision,³⁷ decisions by the European Court of Justice pertaining to the equivalence of human rights protection,³⁸ but also by national supreme courts in France and Germany in the *Solange I* and *II* tradition.³⁹ However, it is important to emphasize that this can take place only by virtue of the democratic credentials of constitutional rights in national traditions, and arguably also in the EU.

At the international level, however, however, barring a few exceptions, the integration of democratic processes has not taken place yet, thus placing a limit on the comparative pedigree of norms stemming from separate legal orders in terms of their level of democratic inclusion and respect for subsidiarity. If my considerations

³⁷ See *Bosphorus Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* [GC], no. 45036/98, ECHR 2005-IV. It is important to emphasize, however, that other decisions taken in the wake of *Bosphorus* have not applied the test coherently, since they regard the refutation of the presumption of equivalence merely as a question of admissibility: see e.g. *Coopérative des agriculteurs de Mayenne et la coopérative laitière Maine-Anjou v France* (dec), no. 16931/04, ECHR 2006-XV.

³⁸ See e.g. Case C-380/05 *Centro Europa 7 v Ministero delle Comunicazione et Autorità per le Garanzie nelle Comunicazione*, Advocate General Maduro's opinion, 12 September 2007, par. 20–22.

³⁹ See the German Federal Constitutional Court's decisions: *Solange I* BVerfGE 37, 271 (1974); *Solange II* BVerfGE 73, 339 (1986); and *Brunner* BVerfGE 89, 155 (1993).

so far are correct, absent legal integration and hence legal pluralism, issues of rank in a dualist legal order ought to be decided by reference to constitutional norms in the national legal order and in particular by reference to fundamental constitutional rights and principles. This might explain, for instance, why international law is ranked below EU primary law in the hierarchy of sources in EU law. In *Kadi*, however, neither the CFI nor the Advocate General have favoured that approach; while the CFI has argued for the monist primacy of the UN Charter over national and European constitutional norms, Maduro's legal pluralism promotes the human rights equivalence test discussed before. While that solution has the merit of coherence with rules of conflict in the European legal order *lato sensu*, it might amount to little more than wishful thinking in terms of what it implies about the legitimacy of international law and by reference to the well-known risks of human rights imperialism at the international level.⁴⁰

3. European legal coherence

Of course, as in any national legal order, principles of prevention of conflicts apply and prevention of conflict amounts to one of the normative requirements in the law-making processes of integrated legal orders.⁴¹ In fact, legal pluralism is nowadays as much about conflict as it is about relationship between legal orders.

Coherence is one of those normative requirements. It is a normative principle that requires that the reasons given by legal norms be as normatively coherent overall as possible.⁴² As such, it differs from logical consistency. It is one of the constitutive elements of the authority of a legal norm in a given legal order. Coherence applies as a normative requirement to all legal authorities, whether legislative or judicial. It can be synchronic, but also, most importantly, diachronic.

⁴⁰ See Habermas 2007. One may argue that the advantage of Maduro's position for Member States lies more in the interposition of a power screen between them and the UN Security Council than in the level of human rights protection guaranteed by an elaborate constitutional dualism which most Member States in the EU apply anyway. The other advantage of the pluralist model propounded by the opinion was alluded to before in this paper and pertains to new insights into the relationship between national and European law itself.

⁴¹ See on coherence in EU law, Besson 2004; Maduro 2003. See also Kumm 2004 and 2007.

⁴² See on coherence in general, Besson 2005, Ch. 11.

It applies within each legal order, but also between them in integrated legal orders because those orders apply to the same people and hence have to provide those people with a coherent set of reasons for action through their laws.

Of course, coherence should not be regarded as the panacea and it does not dispense from the discussion of the issue of authority of law in general, which in turn requires settling issues of validity and primacy. After all, coherence stems from a deeper legitimacy concern: that of democracy. It is crucial therefore to unpack the legitimacy concerns underlying the normative requirement of coherence and not to stop at coherence. Coherence pertains to the content of valid legal norms in a legal order, and does not tell us anything as to their validity or primacy. This explains the difference, for instance, between functional and normative coherence: the normative coherence of the applicable law as a whole does not mean that micro-coherence in the substance of one legal branch is functionally justified.⁴³

Coherence should not therefore be used as a fig leaf and processes of law-making in the EU need to secure the required guarantees of democratic legitimacy and inclusion of all affected interests. This is why it is not enough that coherence with fundamental rights and other fundamental values guaranteed by national legal orders, the European Convention on Human Rights and other international human rights instruments, is required of EU law to be able to claim authority within national legal orders. Democratic guarantees also need to be made relative to law-making processes if coherent EU law is to claim validity and primacy in national legal orders.

4. The future of European legal pluralism

A legitimate question at this stage of the argument might be the future of European legal pluralism and its intertemporal dimension. If legal autonomy and interlegality are closely related to democratic sovereignty, as I have argued, the answer to the question lies in the future of democracy in a globalized world. As long as the inclusion of those affected is done in a more effective way at the national level, which given the need to implement EU and international law will be of all likelihood the case for a long time, there are reasons for the resilience of national democracies in Europe. The complex *demoi*-cratic setting of EU law-making

⁴³ For an argument against autonomous adaptation of areas of Swiss law to EU law on grounds of functional coherence, see Besson 2008d.

guarantees the inclusion of both States and individuals at EU level in cases where EU law affects individuals more directly and effectively. After all, the subjects of these legal orders overlap, but are not identical given the importance of States as political subjects in European and international law (see, for example, Besson 2008b).

Of course, each legal order *per se* is becoming more hierarchical by virtue of its own democratization. I have argued that this could also be the case in general international law and even horizontally across regimes of international law, at least for norms of international law (see, for example, Besson 2008a). As I said before, however, by reference to the compatibility of the Hartian model of a legal order with a plurality of overlapping legal orders, internal hierarchies of norms and sources are entirely compatible with external pluralism among legal orders. As a matter of fact, the development of internal hierarchies might contribute to simplifying questions of rank between norms stemming from different legal orders by reference to their sources within each legal order. After all, indeed, the transitive nature of the rules of recognition in terms of democratic pedigree should favour the complementarity between internal hierarchies.

The key to European legal pluralism lies therefore in realizing the complexities of European *demoi*-cracy. As of last, this also implies responding to the new challenges raised by the increasing impact of international law on the European legal order and, in the wake of that impact, by international law's rampant legitimacy crisis. Once more, Kaarlo Tuori's seminal work on both democratic constitutionalism and European legal theory has paved the way towards a better understanding of the challenges to come. In this short paper, I hope to have clarified a little further what these could be.

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