

THE LIMITS OF CONSTITUTIONAL PLURALISM

THE CASE OF LOW-INSTANCE MEMBER STATE COURTS

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Constitutional pluralism has been the dominant theory among EU legal scholars concerning the relations between the EU and the Member State legal orders. Constitutional pluralists argue that jurisdictional disputes between the Court of Justice of the European Union (CJEU) and the apex courts of the Member States cannot or should not be finally settled. A final resolution in favour of one or another form of monist conception of the conflicting legal orders would undermine deliberation among the relevant legal actors and decrease the likelihood of sincere engagement with the legal and moral arguments that the other side would regard as hierarchically inferior. The legal actors must instead strive for compatible decisions in terms of outcome, even if the justification for these decisions differs significantly. This paper addresses constitutional pluralism's failure to provide a theory of how low-instance Member State courts should act when they are called to follow conflicting lines of case law issued by the CJEU and their superior Member State court. The case law of each of these courts would typically be binding for lower-instance Member State courts as a consequence of the hierarchical structure of court systems. In the present case, however, CJEU judgments are binding for the referring court, but the referring court is also bound to follow the case law of a Member State's apex court. These disputes cannot be resolved by positivist or normative accounts of constitutional pluralism. They require a theory of adjudication that determines when low-instance courts should recognise a stronger claim of authority to either court.

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I. INTRODUCTION

Constitutional pluralism has been the dominant lens through which European Union (EU) legal scholars have been examining the relation between the EU and Member State legal systems and have been arguing for its development. Although constitutional pluralism is a church of many nations,¹ its unifying claim is that the EU legal system and the legal systems of the Member States are not hierarchically related; neither EU law is subordinate to Member State constitutional law, nor Member State constitutional law subordinate to EU law. Although both sides make conflicting claims to final authority, these claims should be managed not through a final resolution, but through interpretive strategies that enable EU and Member State courts to arrive at noncontradictory conclusions in substance, if not in justification.²

In this paper, I argue that there is reason to believe that constitutional pluralism has reached its limits. Theories of constitutional pluralism are implicitly focused on the relation between the Court of Justice of the EU (CJEU) and the apex courts of the Member States—primarily constitutional courts, but also supreme courts and superior specialised courts, such as superior administrative or civil courts. They conclude that these courts regard themselves as belonging to separate legal systems and that their disputes on final authority are, for this reason, irresolvable as a matter of positive law. They suggest that courts should resolve their disputes on a case-by-case basis, either by being sensitive to judicial politics,³ or on the basis of non-positive legal principles.⁴

This approach ignores the perspective of low-instance Member State courts. This omission is surprising, given that low-instance judges are the primary legal officials who apply EU law. They are, in a sense, both Member State and EU courts, and they are institutionally subordinate to both the CJEU and their superior Member State courts, insofar as they are typically under a duty to follow the case law of both.

¹ JHH Weiler, 'Global and Pluralist Constitutionalism - Some Doubts' in Gráinne de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2012).

² Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003); Mattias Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 *Common Market Law Review* 351; Nicholas Barber, *The Constitutional State* (Oxford University Press 2010) chs 9, 10.

³ Barber (n 3) ch 10; Orlando Scarcello, *Radical Constitutional Pluralism in Europe* (Routledge 2022); Signe Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021) 38–40.

⁴ Maduro (n 3); Mattias Kumm, 'The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012).

This position of serving two masters gives rise to difficulties that cannot be resolved through the various theories of constitutional pluralism. A low-instance court may find itself in the position of having to apply conflicting lines of case law deriving from the CJEU and from a superior Member State court. In such a case, it cannot declare itself absolved of both duties and decide the case for itself. Unbound judicial politics or decision through first-order practical reasoning are not options that are open to it. Its role in the court system requires it to provide justification for choosing between the authority of the CJEU or of its superior Member State court. I demonstrate that constitutional pluralism has little to offer for grounding that justification.

The scenario that I just mentioned is not hypothetical. An implication of the expansion of the jurisprudence of the CJEU in new areas over the past decade is that conflicts between its case law and that of Member State apex courts have become more frequent. Let me offer three recent examples in which low-instance courts and other legal officials have been confronted with conflicting directives issued by the CJEU and a national constitutional court. The first concerns a recent CJEU judgment, according to which Romanian low-instance courts should disregard the case law of the Constitutional Court of Romania to the extent that it is incompatible with EU law, including the interpretation of EU law by the CJEU.⁵ The Constitutional Court of Romania has stated in a press release that a power on the part of low-instance courts to disregard its case law would require an amendment to the Constitution.⁶ It remains to be seen how low-instance courts will react to that conflict, when they are seized to rule on it.

The second example refers to the case law of the CJEU and the Constitutional Tribunal of Poland on judicial independence. In a series of cases, the CJEU has examined judicial appointment and retention measures enacted by the Polish government and has found them to undermine judicial independence in such a way that they fail to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.⁷ It has accordingly held that low-instance courts may not recognise the jurisdiction of judicial formations that fail to ensure effective legal

⁵ See Joined Cases C-357/19, C-379/19, C-547/19, C-811/19, C-840/19 *Euro Box Promotion and Others* at paras 244–262; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19 *Asociația “Forumul Judecătorilor din România”* at paras 242–252.

⁶ Press release of 23 December 2021.

⁷ C-619/18 *Commission v Poland* paras 32–58 and 71–96 (lowering of retirement age of judges); C-791/19 *Commission v Poland* at paras 80–114, 164–177 (composition of the disciplinary chamber); C-204/21 R *Commission v Poland* (composition of the disciplinary chamber, penalty payment proceedings).

protection as interpreted in its case law,⁸ and may disapply legislation that has the same effect.⁹ The Constitutional Tribunal of Poland has declared in a recent judgment that the relevant case law of the CJEU is *ultra vires* and not binding in Poland.¹⁰ A low-instance Polish court will, therefore, be faced with a normative conflict between the case law of the CJEU and that of the Constitutional Tribunal if it has to decide on whether to comply with a decision of the relevant judicial formations.

The third example refers to a normative conflict faced by legal officials other than low-instance courts. It concerns the aftermath of the Federal Constitutional Court of Germany's (FCCG) *PSPP* judgment, in which the FCCG held a judgment of the CJEU and a decision of the European Central Bank (ECB) to be *ultra vires*. In response to that judgment, the European Commission initiated infringement proceedings against Germany by serving a letter of formal notice to the German government. The basis of the proceedings was, among others, Germany's failure to comply with the binding force of CJEU judgments under Article 267 of the Treaty on the Functioning of the EU (TFEU).¹¹ In response to that letter, the German government reaffirmed its commitment to the binding force of CJEU judgments and noted that disagreements between the CJEU and national courts should be resolved through the preliminary reference procedure, which may, depending on the need for clarifying the concerns of both sides, be activated more than once.¹² Although this position does not reject the validity of the *PSPP* judgment, it is also incompatible with the FCCG's declaring the relevant CJEU judgment as *ultra vires*. In effect, it leaves the jurisdictional dispute to be finally settled by the courts in the long term.

I begin, in section II, by providing some analytical clarity on the nature of the disputes between the CJEU and the apex courts that confront low-instance courts. The claim of constitutional courts to constitutional primacy, in particular, can be given an interpretation that is compatible with the primacy of EU law and that is often glossed over in academic debates. In section III, I demonstrate the inadequacy of positivist accounts of constitutional pluralism, which conceive of the disputes between the CJEU and the apex courts as a matter of judicial politics, in assisting the task of low-instance courts. In section IV, I make a similar point about normative accounts of constitutional

⁸ Joined Cases C-585/18, C-624/18 and C-625/18 *AK and Others* at paras 131–170.

⁹ C-824/18 *AB and Others* at paras 140–150.

¹⁰ Judgment K3/21 of the Polish Constitutional Tribunal.

¹¹ Letter of formal notice sent to Germany in case INFR (2021) 2114.

¹² Response to the letter of formal notice sent to the Commission in case INFR (2021) 2114. A similar conciliatory approach has been advocated by Dieter Grimm. See Dieter Grimm, 'The European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision' (1997) 3(2) *Columbia Journal of European Law* 229, 237–238.

pluralism, which propose solutions to the judicial disputes in the EU by reference to first-order principles of legal reasoning.

II. THE PRIMACY OF EU LAW AND THE PRIMACY OF CJEU JUDGMENTS

The last decade has seen an increase in constitutional court judgments that refute the doctrine of primacy of EU law, as this has been articulated by the case law of the CJEU. The doctrine of primacy comprises three claims:

- (1) EU law has primacy over conflicting rules of Member State law, including Member State constitutional law.
- (2) The CJEU is entitled to provide definitive answers to all questions of EU law.
- (3) The CJEU is entitled to determine what constitutes an issue of EU law.¹³

With respect to the validity of CJEU judgments, claims (1) and (3) may appear equivalent, at least insofar as apex courts follow a weak form of constitutional primacy, according to which the Member State Constitution is superior to EU law in the sense that the validity of EU law within a Member State depends on the conformity of that State's accession to the EU, and of any subsequent amendment of the international treaties, on which the EU is based, with its own constitutional requirements. A weak form of constitutional primacy implies that constitutional courts assert constitutional primacy only with respect to the set of constitutional provisions that were valid at the time of accession to the EU, or at the time of any subsequent amendment of primary EU law, and not with respect to subsequent constitutional amendments.

Given this understanding of a weak form of constitutional primacy, claims (1) and (3) may appear equivalent in the following sense: the directives of the CJEU to the referring court on how an EU law is to be interpreted, themselves constitute norms of EU law. So, one could argue that any CJEU judgment trumps Member State constitutional law by virtue of its being a norm of EU law. But this is too quick. Norms issued by the CJEU that lie outside its competence fail to qualify as EU legal norms in the first place. Accordingly, they are not authorised by the Member State Constitutions. In the case of a court, competence is equivalent to jurisdiction.

¹³ NW Barber, 'The Two Europes' in Maria Cahill, Richard Ekins and NW Barber (eds), *The Rise and Fall of the European Constitution* (Hart 2019) 93.

Here are three senses in which a norm that determines how a law is to be interpreted in a given case may lie outside a court's jurisdiction:

- (a) the law in question does not fall within the set of laws over which the court has jurisdiction to interpret;
- (b) the law in question falls within the relevant set of laws but is indeterminate, and the court cannot resolve the indeterminacy through accepted methods of interpretation—the concrete case is non-justiciable;¹⁴ or
- (c) the law in question is determinable through accepted methods of interpretation but the court diverges from them.

The EU Treaties confer jurisdiction to the CJEU with regard to the interpretation of the Treaties themselves, as well as the validity and interpretation of acts of EU legal officials.¹⁵ This sweeping conferral of jurisdiction seems to exclude the possibility that the CJEU lacks jurisdiction to provide an interpretation on indeterminate laws.

Nevertheless, this assessment strikes at a widely-held objection: a principle to the effect that the conferral of a jurisdiction to interpret a set of laws also implies the conferral of a jurisdiction to interpret indeterminate laws within that set may be legitimate only with regard to state courts and not with regard to international courts, the jurisdiction of which should only extend to what has been explicitly conferred to them by the international agreement that constituted them.¹⁶

There is another objection: in the absence of explicit standards enumerated in an international agreement, it is argued that the relevant standards for reaching a

¹⁴ I assume here that a law has a determinate core when there is consensus within the relevant legal community about its ordinary meaning. Of course, what is the ordinary meaning of a law may itself sometimes be a controversial question. But that does not mean that we can never reach consensus about the ordinary meaning of a law in certain cases. Take the example of speeding limits. Most of the time, there is little controversy about the meaning of a sign that prohibits driving above 50kms. See Paolo Sandro, *The Making of Constitutional Democracy: From Creation to Application of Law* (Hart Publishing 2021) ch 5.

¹⁵ See Article 267 TFEU.

¹⁶ For a similar argument with respect to whether the EU Treaties confer to the CJEU the competence to determine its own jurisdiction (*Kompetenz-Kompetenz*), see Theodor Schilling, 'Rejoinder: The Autonomy of the Community Legal Order – In Particular: The *Kompetenz-Kompetenz* of the CJEU' in Theodor Schilling, JHH Weiler and Ulrich Haltern, *Who, in law, is the ultimate judicial umpire of European Community competences? The Schilling-Weiler/Halter debate* (Harvard Jean Monnet Working Paper Series 96/10, 1996). On the legitimate authority of international courts, see Andreas Follesdal, 'Survey Article: The Legitimacy of International Courts' (2020) 28(4) *Journal of Political Philosophy* 476.

determinate legal outcome ought to be derived from methods of interpretation, legal characterisation, and legal reasoning that are accepted in the Member States. I take this to be the position of the Federal Constitutional Court of Germany in the *PSPP* judgment, in which it declared an CJEU judgment was *ultra vires* due to an allegedly manifest failure on part of the CJEU to apply the proportionality test in the way that it is applied in the German legal system.¹⁷ This approach reads down general conferrals of jurisdiction to an international court, so that an international court's rulings are binding for a state only if its interpretations conform with nationally accepted standards of determining how to apply a legal rule. This approach denies an international court the power to autonomously develop such standards.¹⁸ It also denies the legitimacy of applying standards that have been developed within a community of legal scholars that extends beyond the relevant Member State, insofar as these standards diverge from those accepted by the Member State legal community.

Of course, apex courts may subscribe to a strong form of constitutional primacy that regards any constitutional norm, including the judgment of a constitutional court, to be superior to any EU legal norm. If they do, claims (1) and (3) are separable. In this case, CJEU judgments may be disregarded by Member State courts irrespective of whether or not they fall within the CJEU's jurisdiction. The only relevant factor for their validity would be whether they conflict with the Member State Constitution, including subsequent constitutional amendments or constitutional interpretations. One may associate the *French Data Network* judgment of the Council of State of France with this position.¹⁹ This judgment found that the Council of State may not comply with a CJEU judgment when compliance with it would undermine a constitutional requirement—in the case at hand, national security—that does not enjoy equivalent protection in EU law—a position similar to the FCCG's famous *Solange* proviso, only applied in this case to national interests rather than fundamental rights. Although *French Data Network* does not declare the CJEU judgment *ultra vires*, it effectively

¹⁷ BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 [*PSPP* judgment] paras 123–179.

¹⁸ Does this approach amount to a strong form of constitutional supremacy? This would be the case if nationally accepted standards of determining how to apply a legal rule were equivalent to constitutional norms. This may well be the case if these standards are constitutionally entrenched or are regarded to be subject to the discretion of the constitutional or supreme adjudicator of the legal system. Yet the same standards are typically regarded as standards of legal science which do not neatly fit within a rule-based legal system. See Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) 86. Of course, this reply would provide no determinate answer to the question of jurisdiction.

¹⁹ Conseil d'État, décision no 393099, lecture du 21 avril 2021.

renders the application of EU law contingent on conformity with fundamental national interests.

Whether apex courts generally subscribe to a weak or strong form of constitutional primacy is ambiguous. The position of the FCCG that EU law enjoys primacy within the limits of its constitutional empowerment is open to interpretation according to a weak form of constitutional primacy.²⁰ I assume that this is a position that can plausibly be attributed to the majority of the apex courts, unless one were to think that these courts attribute no autonomous legal validity to EU law.

Apex courts that subscribe to a weak form of constitutional primacy, at least with respect to EU law, have focused on two matters: firstly, the constitutional limits on the kind of international agreements that can be validly concluded by a Member State; and secondly, on CJEU judgments that are considered to go beyond its jurisdiction.²¹ In other words, apex courts have either placed limits on the future development of EU law, or have argued that an act of an EU organ is invalid according to what they take to be EU standards of legality or due to lack thereof.

This paper focuses on disputes between apex courts, on the one hand, and the CJEU, on the other, with respect to the latter's jurisdiction, in terms of—

- (a) which court has jurisdiction to determine what constitutes a matter of EU law;
- (b) which court has jurisdiction to determine what legal standards are relevant for applying an EU act; and
- (c) which court has jurisdiction to issue final judgment when an EU act is indeterminate.

²⁰ See, for example, BVerfG, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 [*Lisbon Judgment*] at para 332. Gertrude Lübbe-Wolff provides an alternative reading of the Constitution of Germany and of the practice of the Federal Constitutional Court, according to which obligations under both international and EU law are only valid as long as the relevant constitutional provisions support their validity. Incorporated international treaties have the status of ordinary statutory law, whereas valid EU law has a status equivalent to the Constitution only because the Constitution explicitly permits integration into the EU and recognises the precedence of EU law over national law. Gertrude Lübbe-Wolff, 'Who Has the Last Word? National and Transnational Courts - Conflict and Cooperation' (2011) 30 Yearbook of European Law 86, 86–89. Admittedly, this is a possible reading of the Constitution of Germany, although one that would deprive international law of any autonomous legal status.

²¹ On the first category of cases, see the various judgments on the Lisbon Treaty. On the second category, see the *PSPP* judgment and judgment K3/21 of the Polish Constitutional Court. The Constitutional Court of Romania and the Supreme Court of Denmark have rejected the notion that national courts have the power to disapply Member State law that is in conflict with EU law (see the press release of 23 December 2021 and *Dansk Industri (on behalf of Ajos A/S) v. Estate of Karsten Eigil Rasmussen* [*Ajos judgment*], respectively). As the power in question originates in the case law of the CJEU, I take these judgments to belong to the second category.

I will refer to these disputes as jurisdictional disputes.

III. THE INADEQUANCY OF POSITIVIST ACCOUNTS OF CONSTITUTIONAL PLURALISM

Positivist accounts of constitutional pluralism deny that jurisdictional disputes between the CJEU and the apex courts have a legal solution. They argue that the CJEU and the apex courts operate within different legal systems. Call this the 'different legal systems' thesis.

The different legal systems thesis endorses an understanding of legal system along the lines of legal pluralism. Legal pluralism holds that valid legal norms may belong to several legal systems. It contrasts with legal monism, which holds all valid legal norms belong to the same legal system. In this section, I demonstrate why legal pluralist theories should not motivate one to conclude that there is no point in asking the question of how low-instance courts should decide when confronted with jurisdictional disputes between the CJEU and the apex courts. Section A presents the positivist accounts of constitutional pluralism and section B draws on recent debates in legal theory to argue that these accounts are either inapplicable or normatively undesirable as solutions to the problems that confront low-instance courts.

A. LEGAL PLURALISM

Legal pluralist theories subscribe to either a descriptive or a normative theory of legal positivism. These theories differ in their conception of legal validity. Descriptive theories of legal positivism reconstruct legal systems by reference to observable patterns of behaviour within a society. Validity takes the meaning of social existence. Valid legal norms under descriptive legal positivism exist as a matter of social fact; they are part of a system of norms that is efficacious within a community. Their standard of success is non-evaluative description: if successful, they provide an adequate description of law as a social phenomenon. By contrast, validity under normative legal positivism takes the meaning of a duty to obey positive law when certain conditions obtain.

Theoretical accounts of the different legal systems thesis have been influenced by the legal positivism of HLA Hart. Hart identifies what counts as a valid norm

within a community by reference to a social rule, the rule of recognition, that is endorsed, minimally, by the community's legal officials.²²

Nicholas Barber has employed Hartian legal positivism as a framework to analyse the relation between EU law and Member State law. He refers to legal pluralism in two senses. The first is the standard account that valid law can exist in several legal systems.²³ The second is that a single legal system may be internally pluralist by containing inconsistent rules of recognition: legal officials may disagree on what is the ultimate source of law.²⁴ Disagreement about the rule of recognition is often followed by disagreement about the legal system's rule of institutional primacy, namely which group of legal officials should have the final authority to determine the rule of recognition.²⁵ Barber argues that EU law and Member State law constitute separate legal systems for three reasons: many areas of Member State law are completely unaffected by EU law; the CJEU claims a jurisdiction that extends beyond the territory of any single Member State; and the CJEU does not regard Member State legal systems as subsets of the EU legal system.²⁶ Although separate, the two systems are overlapping and pluralist, in the sense that an important segment of the legal officials in both systems—namely, low-instance national courts that apply EU law—are faced with inconsistent rules of recognition articulated by the CJEU and the apex courts.²⁷

²² HLA Hart, *The Concept of Law* (3rd edn, Clarendon Press 2012).

²³ Barber (n 3) 146–148.

²⁴ *ibid* 156–158. This is a surprising admission, since it seems to undermine Hart's theory that Barber nevertheless appears to embrace. If legal officials adopt inconsistent rules of recognition, the rule of recognition cannot be a criterion of the legal system's unity. Barber appears to adopt a criterion of unity based on the common political identification of legal officials. See below. For a criticism of Hart's theory on the basis of disagreement among legal officials that is concerned with a different legal theoretical aim, see Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) ch 1.

²⁵ Barber (n 3) 160–161, 165–166. In the case of the EU, the disagreement about the rule of institutional supremacy refers to the supremacy of the CJEU or the apex courts. It is important to note, however, that disagreement might also involve legal officials who are not members of a court. The debate on judicial or legislative supremacy in the US, for example, can be understood as a case of disagreement about the rule of institutional supremacy. Of course, it is unlikely that a rule of institutional supremacy would amount to a permission to the relevant institution to recognise anything it wills as law. More plausibly, a rule of institutional supremacy would be qualified by the ordinary meaning of the legal provisions that ground its competence and the provisions it is called to interpret or apply (if any).

²⁶ *ibid* 168.

²⁷ *ibid* 168–169. George Letsas argues that having some legal officials belong to two legal systems is inconsistent with Raz's theory. If the courts constitute a criterion of identity of a legal system, they can belong to only one of those systems. George Letsas, 'Harmonic Law - The Case against Pluralism' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 90. Similar to Schmitt's constitutional theory that I examine below, Raz's theory seems to imply that conclusive judgements about the identity of legal systems can only be made on the assumption that there is no ambiguity on the ultimate political allegiance of most legal officials.

In a more recent contribution to the theory of legal systems in the EU context, Orlando Scarcello criticises Neil MacCormick for steering away from his initial radical pluralist position, which regarded EU law and Member State law as two separate legal systems with inconsistent rules of recognition, to a position MacCormick termed pluralism under international law.²⁸ Pluralism under international law abandons a central tenet of descriptive legal positivism, namely the aim of providing a descriptively accurate, value-neutral account of law based on the attitudes of the relevant community's legal officials, in favour of a normative aspiration, that is, to subject as many disputes as possible to legal resolution rather than political bargain.²⁹ It is, in effect, a version of legal monism that calls for legal resolution by reference to general principles of international law.³⁰ Scarcello defends radical pluralism not only on the basis of better fit with legal practice, but also as a normative thesis about the limits to which jurisprudence should limit itself.³¹ Like Barber, he regards inconsistent rules of recognition to be more pervasive even within unitary states than Hart assumed.³²

Both Barber's and Scarcello's accounts are silent on how some legal officials are related to a particular legal system and thus become the ones whose practice is relevant for determining the system's rule(s) of recognition. I assume that they both subscribe to something like Raz's thesis on the dependence of the legal system on a community's political system.³³ In several writings, Raz has argued that shared political attitudes among legal officials and legal subjects are relevant for explaining several aspects of a legal system, such as its continuity despite the irregular enactment of fundamental rules, its distinction between legal creation and legal application, and the determination of the competent authorities for articulating the system's criteria of recognition.³⁴ More fundamentally, political identification is often effective in

²⁸ Scarcello (n 4) 48.

²⁹ *ibid* 60, 70.

³⁰ MacCormick's position fails insofar as the general principles of international law may not provide a solution to the jurisdictional disputes between the CJEU and the apex courts. They may not even aid these courts in arriving at a common substantive outcome. Not only is it likely that disputes between the CJEU and the apex courts may relate to matters that do not involve general principles of international law; general principles of international law, such as the principle of good faith that MacCormick highlights, are also themselves likely to be indeterminate. *ibid* 70.

³¹ *ibid* 72.

³² *ibid* 75–76.

³³ For an elaboration of this thesis that is adjusted to the EU context, see Julie Dickson, 'Towards a Theory of European Union Legal Systems' in Pavlos Eleftheriadis and Julie Dickson (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012).

³⁴ Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd edn, Clarendon Press; Oxford University Press 1980) 188–189, 221; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 100. See also Joseph Raz, 'The Future of State Sovereignty'

explaining the *de facto* authority of law and, by extension, of a community's legal officials.³⁵

The thesis of the dependence of the legal system on a community's political system is also relevant to a normative legal positivist tradition that has inspired advocates of the different legal systems thesis. Carl Schmitt's constitutional theory draws a necessary connection between the authority of a state constitution and the decision of the underlying community to order its political existence in accordance with it. A state constitution (and, by extension, the legal norms that are validated by it) is legitimate only to the extent that it expresses such a decision.³⁶ Schmitt is not interested in semantic debates on what is law or what is a legal system. What he may have been willing to consider a legal norm or a legal system may not necessarily fit this framework. Nevertheless, his constitutional theory can be translated into a theory of a legal system. This theory differs from Hartian legal positivism in that it outlines the conditions for a legal system to have normative validity, that is, for it to be worthy of the obedience of its subjects. Normative validity here derives from the community's decision on its political existence and its underlying political unity. The implication is that political existence precedes normativity; accordingly, normative claims can be valid only among the members of a genuine political community.³⁷ Disputes across genuine political communities cannot be legitimately resolved through law. Schmitt's constitutional theory is then to be understood as a type of (normative) legal pluralism.

Schmitt's theory underpins Signe Rehling Larsen's account of constitutional pluralism in her recent contribution to the constitutional theory of the EU.³⁸ On this account, the EU is characterised as a federation. Rehling Larsen follows Schmitt's conception of the federation, according to which one of federation's defining features is ambiguity on the locus of sovereignty, whether it resides in the people of one of the constituent units or in the people of the federation as a whole.³⁹ On this reading, the conflicting claims to final authority between the CJEU and the apex courts reflect conflicting claims to what should be the genuine political community. Thus, they are claims that cannot be resolved through law.⁴⁰

in Wojciech Sadurski, Michael Sevel and Kevin Walton (eds), *Legitimacy: The State and Beyond* (Oxford University Press 2019) 79–80.

³⁵ Raz, *The Authority of Law* (n 35) 259; Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 97–99.

³⁶ Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press 2008) 136.

³⁷ *ibid.*

³⁸ Larsen (n 4) 38–40.

³⁹ Schmitt (n 37) 388–392.

⁴⁰ Schmitt's theory also underpins Martin Loughlin's rejection of constitutional pluralism as an oxymoron. Here the claim is that the EU lacks a constitution in the sense of a community's decision to

B. PERSPECTIVISM IN LEGAL THEORY

Our assessment of descriptive legal positivism and Schmitt's constitutional theory will depend on what we take the ends of legal theory to be. It is not necessarily the case that legal theory must have a single unifying end. Instead, different ways of thinking about legal problems may be helpful for different purposes.

The end for which one engages in legal theory determines the perspective one adopts with respect to the problems that a legal theory seeks to address. By referring to different perspectives, I do not mean that legal theorists cannot engage meaningfully in theoretical debates with one another, as if a legal theorist is only expressing subjective views. Instead, perspectivism emphasises that truth in legal theory is only relative to particular problems that theorists seek to address.⁴¹ Losing sight of what the shared problems are risks conflating perspectives about law and resulting in participants talking past one other.

Perspectivism in legal theory has been recognised in recent calls for eliminating theoretical inquiry about the nature of law *simpliciter*.⁴² Instead, legal theorists should adopt conceptual pluralism in the pursuit of a range of different questions.⁴³ The reason for this is that determinations of the nature of law are driven by intuitions about what law is that are implicitly directed at answering different questions.⁴⁴ As a consequence, the intuitions of disagreeing theorists clash in ways that cannot be resolved through debate: any counterexample to one's conception of law can be denied for not really being an instance of the thing in question.⁴⁵ Intuitions on what falls within the domain of law that are drawn from how moral principles figure in the interpretation of legal rules by courts can be rejected on the basis of intuitions that are drawn from instances of conflict between moral principles and legal rules that are applied by legal subjects. If legal subjects are not legally permitted to invoke moral

order its political existence. According to Loughlin, the facts on the ground are such that it cannot be plausibly argued that the EU Treaties perform the role of such a decision: the set of beliefs among EU citizens that would support the loyalties that underpin the authority of the Member States are absent. Martin Loughlin, 'Constitutional Pluralism: An Oxymoron?' (2014) 3 *Global Constitutionalism* 9, 19, 22–24.

⁴¹ Hillary Nye, 'Does Law "Exist"? Eliminativism in Legal Philosophy' (2022) 15 *Washington University Jurisprudence Review* 29, 56. See also Brian Leiter, *Nietzsche on Morality* (2nd edn, Routledge 2015) 16.

⁴² Lewis A Kornhauser, 'Doing Without the Concept of Law' [2015] *SSRN Electronic Journal*; Nye (n 42). Hillary Nye correctly rejects the phrase "eliminativism about law" as inaccurate. What the recent eliminativist discourse seeks to eliminate is talk about the nature of law *simpliciter*, rather than law as a distinguishable entity. See fn 88 in Nye's article.

⁴³ Nye (n 42) 56.

⁴⁴ *ibid* 37–44.

⁴⁵ *ibid* 45.

principles to violate speed limits, one argument goes, then moral principles cannot necessarily constitute part of the law for the purposes of adjudication, either.⁴⁶

Theorists along the legal positivist and nonpositivist divide in jurisprudence find themselves in what seems to be perpetual deadlock. I argue, in agreement with the eliminativists, that this is because their self-understanding as participants in a common debate about the nature of law glosses over distinct legal theoretical perspectives. Of course, these perspectives can be as many and as narrow as the problems that a legal theorist aims to address. For ease of reference, my primary focus here is on the distinction between an analytical and a practical perspective.

The analytical perspective directs its attention to what makes law distinctive from other social and normative phenomena. It seeks to explain law's distinctness without evaluating its merit. It is not committed to providing guidance on how the law should develop. I understand descriptive legal positivism in the tradition of HLA Hart to be best understood as a theory that adopts the analytical perspective.⁴⁷

By contrast, the practical perspective is oriented towards how participants in practices that are related to the law ought to resolve practical problems all things

⁴⁶ See Hasan Dindjer, 'The New Legal Anti-Positivism' (2020) 26 *Legal Theory* 181, 187–191.

⁴⁷ Hart explicitly adopts this view about his theory in the Postscript to *The Concept of Law*. Hart (n 23) 239–240. An objection to characterising Hart's view as sociological is that his method for determining what is law is based on intuition rather than empirical research, for example in the form of collecting data relating to most people's understanding of what is law. See Ronald Dworkin, *Justice in Robes* (Harvard University Press 2008) 166–167, 214; Pavlos Eleftheriadis, *A Union of Peoples* (Oxford University Press 2020) 60. Eleftheriadis argues that, if Hart's theory were sociological, then it could not aspire to provide truths about the nature of law, but could only arrive at truths about the concept of law of a particular society at a particular time. It is of course true that any sociological theory is better grounded when it is based on reliable empirical evidence about the beliefs of the members of the community that it is concerned with rather than when it is based on a theorist's informed intuitions about what these beliefs are. But that does not mean that a sociological theory is defined as such by virtue of its method; it is its concern with explaining a particular social institution that makes it sociological. It is not clear why Hart's theory is best understood as a theory about the nature of law in the abstract—law as might exist in some metaphysical realm of ideas—and not as a theory about the features of a particular social institution that maps to what most people (or the "average educated person") in our society and time understand as law. After all, sociology, too, is the product of a particular time and place. This seems to have been, at least, Raz's understanding of his own theory. Joseph Raz, 'Can There Be a Theory of Law?' in William Edmundson and Martin Golding (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell 2005). Such a theory can of course be criticised both insofar as the evidence it considers is not reliable (for example, it is based on the theorist's intuitions, and we have reason to think that these intuitions are not representative of the society in question, or of that society's legal officials) and insofar as the way the evidence is arranged fails to make them internally coherent. But it would be uncharitable to wave it off as bad metaphysics. For a critique of Raz's method of conceptual analysis, see Hillary Nye, 'A Critique of the Concept–Nature Nexus in Joseph Raz's Methodology' (2017) 37 *Oxford Journal of Legal Studies* 48.

considered.⁴⁸ Legal subjects who make use of legal rules and established standards ask whether these norms aid them in planning their lives, coordinating their interactions, and avoiding conflict. Legal officials examine how legal norms frame and orient the exercise of their competence. This perspective goes beyond looking for determinate answers in positive law. In cases of indeterminacy, participants in the legal practice seek to determine how reasons for action, including the reasons that make socially existing legal norms worthy of compliance, guide their decision within the scope of actions that law underdetermines. The practical perspective is reflected in Ronald Dworkin's nonpositivism. A central tenet of Dworkin's position is that legal theory should concern itself with how judges should decide cases.⁴⁹ The question of how low-instance courts should decide in the case of jurisdictional disputes between the CJEU and the apex courts presupposes the practical perspective.

Of course, the boundaries between practical reasoning in general and practical reasoning with a distinctly legal interest are by no means clear. The same principles that plausibly form part of the law when wielded by judges to decide cases strike us more as part of general practical reasoning when they influence the decisions of legal subjects or law-makers—hence the speed limit counterexample that I mentioned. Ambiguity on the boundary between practical reasoning and practical reasoning with a distinctly legal interest explains disagreements among nonpositivists. Whereas Dworkin adopts a court-centric solution, focusing on the practice of courts, Mark Greenberg adopts a pedigree solution that defines the distinctly legal theoretical interest of certain kinds of practical reasoning on the basis of the origin of some reasons in the relevant actions of legal institutions.⁵⁰ Scott Hershovitz disputes that debating on where the boundary between law and non-law is drawn has much practical significance.⁵¹

The distinction between a practical and an analytical perspective depends not only on the identity of the person whose perspective is relevant—for example, on whether one is a legal official or a sociologist—but also on whether one is oriented towards the resolution of a practical problem or towards the nonevaluative description of a legal phenomenon. Thus, a court may adopt the analytical perspective

⁴⁸ A different conception of a perspective that is oriented towards practical problems is the realist perspective. The realist perspective is concerned with how participants in law-related practices are likely to resolve practical problems. This conception is associated with the legal realists, especially as far as the decisions of legal officials are concerned.

⁴⁹ See Dworkin, *Law's Empire* (n 25) 1–3.

⁵⁰ Compare Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 405–409 with Mark Greenberg, 'The Moral Impact Theory of Law' (2014) 123 *Yale Law Journal* 1288.

⁵¹ Scott Hershovitz, 'The End of Jurisprudence' (2015) 124 *Yale Law Journal* 1160.

when it describes what is the law of another state for the purpose of applying foreign law. In this case, practical reasons that call for deference to the jurisdiction of another state motivate domestic courts to avoid engaging with first-order practical reasoning insofar as foreign law, as interpreted by the relevant state's institutions, determines how domestic courts ought to decide. In the case of the application of EU law, Member State courts typically adopt the analytical perspective: they engage in determining what EU law, as interpreted by the CJEU, requires, without assessing in most cases the merits of the solution of EU law.

The adoption of the analytical perspective by courts is even broader. A tradition of normative legal positivism that owes much to Jeremy Bentham and has also been associated with HLA Hart⁵² and Hans Kelsen⁵³ conceives of the legal reasoning of courts as a two-stage exercise. At the first stage, courts ought to comply with the requirements of positive law. Identifying these requirements implies an exercise similar to that of the sociologist or the detached value theorist. Only insofar as positive law is indeterminate are courts permitted to proceed to the second stage, in which they engage in practical reasoning within the bounds of indeterminacy. This two-stage exercise is justified by practical reasons that call for deference to the lawmaker, for example because such deference promotes the values of security of expectations, certainty, social peace, and, if the law-maker is a popularly elected deliberative body, democracy.⁵⁴

Descriptive legal positivism is a group of legal theories that have been developed from the analytical perspective. Legal pluralism in line with descriptive legal positivism also adopts the analytical perspective. On the basis of that perspective, it is plausible to distinguish among a plurality of legal systems: the set of beliefs that support the *de facto* authority of legal officials are likely to differ from one political community to another. An accurate description of social reality cannot ignore this factor. Descriptive legal positivism is not the kind of theory that is oriented to the resolution of practical issues. All a descriptive legal positivist can say with respect to the jurisdictional disputes between the CJEU and the apex courts is that the disputes will be resolved when the legal officials of the Member States come to regard themselves as part of a common political system and form a shared general attitude on final authority. Consequently, the conclusion that the EU and the Member States

⁵² 'Hart's Postscript and the Point of Political Philosophy', in Ronald Dworkin, *Justice in Robes* (Harvard University Press 2008) 178–183.

⁵³ Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press 2007).

⁵⁴ See Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) 7, 166–167; Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2008) 55, 97–98; Vinx (n 54) 119–125.

belong to different legal systems from the analytical perspective need not daunt us in asking how low-instance courts should decide between conflicting lines of case law issued by the CJEU and the apex courts. For the analytical perspective that motivates this conclusion, the decisions of low-instance courts are just a matter of judicial politics until they come to form a practice in favour of the final authority of the CJEU or the apex courts. The analytical perspective is valuable but not oriented to developing a judicial methodology for the resolution of cases that are underdetermined by positive law. In the case of these disputes, it is clearly the practical perspective that is relevant.

Contrary to descriptive legal positivism, Schmitt's constitutional theory occupies an ambivalent position between the analytical and the practical perspective. This theory accommodates the perspective of participants, insofar as it provides a justification for the normativity of established legal practice and some guidance on how legal subjects and officials ought to act where legal practice is indeterminate. It provides a clear answer on how disputes between the CJEU and the apex courts ought to be resolved: they ought to be resolved in favour of the institution that is authorised by the constitution of a genuine political community. True, if the EU is a federation according to Schmitt's constitutional theory, both the EU and the Member States will be claiming to constitute such a community. Ultimately, however, the question of which claim best reflects social reality can be determined empirically. The resolution of the jurisdictional disputes follows directly from that determination. One may read the German Federal Constitutional Court's assertion of final authority in the *Lisbon Judgment* along these lines.⁵⁵

A reason to reject Schmitt's constitutional theory is that it presupposes either that universally valid normative claims are impossible, or that the sovereignty of the political community always trumps other normative claims. Accordingly, it denies, in effect, the possibility of legitimate international law insofar as it is autonomous of the law of a genuine political community. Whatever other objections might be raised against this position, it also runs counter to a plausible reading of the case law of the apex courts, according to which most of them adhere to a weak form of constitutional primacy.

⁵⁵ See Lars Vinx, 'The Incoherence of Strong Popular Sovereignty' (2013) 11 *ICON* 101.

IV. THE INADEQUACY OF NORMATIVE ACCOUNTS OF CONSTITUTIONAL PLURALISM

In this section, I review theories of constitutional pluralism that adopt the practical perspective with respect to the jurisdictional disputes between the CJEU and the apex courts. Call these theories of normative constitutional pluralism. Section A examines the theories of Miguel Poiares Maduro and Mattias Kumm, while section B points to their limits with respect to adjudication before low-instance courts.

A. NORMATIVE CONSTITUTIONAL PLURALISM

Normative constitutional pluralists develop theories of how the CJEU and the apex courts should manage their jurisdictional disputes. Kumm, for example, conceives of the main question of normative constitutional pluralism as one concerning the circumstances under which it is appropriate to conceive of the relationship between different legal orders in pluralist terms, rather than thinking about them in terms of hierarchical integration.⁵⁶ He expressly adopts the practical perspective of a judge of the CJEU or of an apex court to respond to that question.⁵⁷ Maduro has proposed four principles on how the CJEU and national courts should decide cases without resolving the dispute on final jurisdictional authority. He refers to these as principles of contrapunctual law.⁵⁸ What is common to both of them is that they do away with a model of legal reasoning that is based exclusively on identifying hierarchical relations between legal norms. They strive to provide models for attaining coherence between EU and Member State constitutional law that do not rely on hierarchy.

Maduro argues that the dependence of the enforcement of CJEU judgments on the disposition of Member State courts to comply with them implies that, in interpreting EU law, the CJEU must be sensitive to the views and perceived institutional limitations of Member State courts and, by extension, to the distinct legal

⁵⁶ Kumm, 'The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection' (n 5) 218.

⁵⁷ *ibid* 219. In doing so, Kumm assumes that it is only the practical perspective of these legal officials that is relevant for determining jurisdictional disputes between the CJEU and apex courts. He refers to the refusal of an apex court to follow an CJEU judgment, or the refusal of the CJEU to follow the decision of an international organisation, as a "refusal of a legal order to recognize itself as hierarchically integrated into a more comprehensive legal order". *ibid* 220. This thesis challenges this assumption. The jurisdictional disputes between the CJEU and the apex courts are ultimately determined, in the absence of resolution by legislative action, by the reasons low-instance courts have for attributing final authority to one or the other court in the majority of cases.

⁵⁸ Maduro (n 3) 524–531.

cultures of the Member States.⁵⁹ This requirement is not only a consequence of the CJEU's limited means of enforcing its judgments, but also a means of promoting the representation and participation of multiple actors in the development of EU law. Promoting these values has normative traction in that it enhances the legitimacy of EU law.⁶⁰ Maduro conceives of this contingent effectiveness of CJEU judgments as a form of checks and balances that limits the CJEU's capacity to adopt controversial interpretations of the law.⁶¹ He argues for coherence in substantive outcomes without institutional closure by rejecting a logic of command and obedience in the relations between the CJEU and Member State courts.⁶² Coherence is to be achieved on the basis of principled dialogue that is guided by the exchange of universalisable reasons for decision rather than by dictation from the top.⁶³ This dialogue should promote a better understanding of the relative institutional weaknesses and virtues of the CJEU and Member State courts, leading, presumably, to the development of a shared doctrine of institutional deference in Europe.⁶⁴

Kumm raises similar points. He identifies three considerations that are relevant to determining how one should conceive of the relationship between the CJEU and the constitutional courts: democratic legitimacy, which precludes the incremental transfer of competences from the Member States to the EU contrary to plausible interpretations of the EU Treaties;⁶⁵ the rule of law at the European level, which favours the uniform application of EU law and which Kumm associates with the values of regularity, predictability, and procedural due process;⁶⁶ and fundamental constitutional principles, which should not be automatically trumped by allegedly

⁵⁹ *ibid* 511–517.

⁶⁰ *ibid* 518.

⁶¹ *ibid* 522.

⁶² *ibid* 526–529.

⁶³ *ibid* 529–530. Maduro's article was published before the rise of constitutional identity review by some constitutional courts. Insofar as constitutional identity review is employed to deny the effect of EU law, rather than to place limits on further European integration, it is not clear that it can satisfy the condition of universalisability. Identity claims may not be intelligible to those who do not share that identity.

⁶⁴ *ibid* 530–531. One might argue that the principles that Maduro proposes are prudential principles of conflict management among different actors rather than principles of law. Alexander Somek, 'Monism: A Tale of the Undead' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 377–378. This does not appear to be Maduro's conception: he refers to such principles as "harmonic principles of contrapunctual law". Perhaps more importantly, I suspect that the characterisation of the relevant principles as prudential rather than legal derives from a failure to draw a distinction between an analytical and a practical perspective when talking about law.

⁶⁵ Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice' (n 3) 359.

⁶⁶ *ibid* 355.

hierarchically superior EU legal rules.⁶⁷ Kumm proposes three principles for how the CJEU and constitutional courts should resolve disputes with each other. His focus lies mainly on adjudication before constitutional courts and the Federal Constitutional Court of Germany, in particular. The principle of constitutional fit permits both the CJEU and constitutional courts to use their respective constitutions—the EU treaties or a Member State constitution—as a starting point for their deliberations. It motivates courts to seek coherence in substantive outcomes from within their own legal orders, without grounding coherence in arguments about hierarchy.⁶⁸ The principle of expanding the rule of law beyond the state supports deference to the CJEU for the purpose of ensuring predictability and regularity in the application of EU legislation.⁶⁹ The principle of liberal-democratic governance requires that constitutional courts diverge from CJEU judgments insofar as such divergence is likely to promote democratic government and the protection of fundamental rights at the EU level, either through an adaptation of the CJEU approach to adjudication, or by encouraging further democratic reform in the EU.⁷⁰ The reasons underlying such divergence must, as in Maduro’s proposal, be universalisable.⁷¹ In a more recent paper, Kumm has extended this normative framework to account for permissible divergence of the CJEU from international law, focusing, in particular, on the *Kadi* judgment.⁷²

Kumm is more explicit than Maduro about his legal theoretical commitments in a way that allows one to situate his position within broader debates in legal theory. He argues that how judges ought to choose, all things considered, between diverging hierarchical models of legal rules ultimately depends on the weight of the moral principles that apply to the case on which they are called to rule. His position is premised on a Dworkinian legal theory that ultimately relates sound adjudication to the courts’ engaging in sound all-things-considered moral judgement. Such a theory does not imply that adjudication is unconstrained by institutional considerations.⁷³ Any plausible account of the practice of adjudication will give great presumptive

⁶⁷ *ibid* 364–365. Writing in 1999, Kumm considers that the possibility for conflict of EU legislation with fundamental constitutional principles is relatively low. He perceives a “solid fundamental liberal constitutionalist consensus in Europe, that makes fundamental clashes in values unlikely”. *ibid* 361. Of course, one can no longer rely on such a consensus.

⁶⁸ Kumm, ‘Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice’ (n 3) 375.

⁶⁹ *ibid* 375–376.

⁷⁰ *ibid* 376, 378–384.

⁷¹ *ibid* 381.

⁷² Kumm, ‘The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection’ (n 5).

⁷³ See Dworkin, *Justice for Hedgehogs* (n 51) ch 19.

weight to adherence to legal rules.⁷⁴ Although a hierarchical model of legal rules does not settle conclusively how judges ought to decide cases, deference to the determinate core of established legal rules will typically be supported by strong reasons of, for example, certainty, security of expectations, and democracy.

The value of deference to legal rules will also support formulating conflict rules between the CJEU and the apex courts. These rules establish presumptions of jurisdictional primacy in favour of the CJEU or the apex courts in relatively determinate classes of cases. Kumm formulates two such rules: one grants *prima facie* jurisdictional primacy to the CJEU; the other grants *prima facie* jurisdictional primacy to the apex courts in cases of conflict of EU law with clear and specific constitutional rules that pertain to constitutional essentials.⁷⁵ The first rule refers to cases in which the principle of expanding the rule of law beyond the state appears to have the greatest weight, whereas the second rule refers to cases in which the principle of liberal-democratic governance appears to be most salient.

B. THE LIMITS OF NORMATIVE CONSTITUTIONAL PLURALISM

Normative constitutional pluralism provides a variety of more or less structured models for guiding the relations between the CJEU and the apex courts. Nevertheless, its explicit or implicit focus on the perspectives of the CJEU and the apex courts limits its relevance for the resolution of jurisdictional disputes by other legal officials, most importantly by low-instance courts. The normative considerations that are relevant for low-instance courts are arguably different from those that are relevant for the apex courts. Low-instance courts are also EU courts. They are hierarchically subordinate to the CJEU as they are subordinate to the apex courts of their Member States. This follows from the direct effect of EU law and the CJEU's claim that EU legal norms, namely the principles of independence and impartiality, as interpreted by the CJEU,

⁷⁴ Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262, 282–288.

⁷⁵ Although Kumm emphasises the need that the conflicting constitutional rule constitute a constitutional essential, one wonders whether the authority of a constitutional court to diverge from an act of EU law is better grounded not on the importance of the constitutional rule but at the time of its adoption. Any clear and specific constitutional rule that was in force prior to a Member State's accession to the EU and remained in force after accession cannot plausibly conflict with clear and specific provisions in the EU Treaties, unless the accession were unconstitutional. Accordingly, any clear and specific rule of secondary EU law that conflicts with a pre-existing clear and specific constitutional rule of a Member State must be *ultra vires*. A conflict between a clear and specific constitutional rule and the best interpretation of a salient moral principle cannot be resolved on the basis of a hierarchical model of legal rules.

with respect to national courts and court chambers, partly condition the validity of those courts' jurisdiction.⁷⁶

The dual hierarchical subordination of low-instance courts to the CJEU and to apex courts gives rise to normative conflicts insofar as CJEU judgments are binding for a low-instance referring court, but the referring court is also bound to follow the conflicting case law of a superior court of its Member State. These conflicts cannot be resolved by achieving coherence in substantive outcomes, as Maduro argues with respect to the disputes between the CJEU and the apex courts.⁷⁷ Their resolution cannot be based on a piecemeal solution that assesses the merits of the conflicting CJEU and Member State court judgments on a case-by-case basis. Low-instance courts are typically required to defer to the case law of superior courts, insofar as that case law determines the matter before them.

The different institutional position of low-instance courts also calls for a different model of determining jurisdiction than the one proposed by Kumm for the constitutional courts of the Member States. It is not evident that the considerations that are relevant for whether constitutional courts should assert their jurisdiction over the CJEU should also apply when low-instance courts decide whether to accept the jurisdiction of a constitutional court or that of the CJEU. Institutional considerations may support the adoption by low-instance courts of a more rigid model for deciding between jurisdictional disputes than ought to be adopted by an apex court.

⁷⁶ See, for example, C-791/19 *Commission v Poland* at paras 164–177 (composition of the disciplinary chamber); Joined Cases C-624/18 and C-625/18 *AK and Others* para 171; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19, C-840/19 *Euro Box Promotion and Others* para 144. See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) ch 8.

⁷⁷ Ana Bobić suggests a modified version of constitutional pluralism, according to which the authority of Member State constitutional courts is undermined when they engage in what she terms destructive constitutional conflicts. A destructive constitutional conflict arises when a constitutional court's dispute with the CJEU is not premised on a shared framework of values encapsulated in Article 2 TEU. In this case, both EU institutions and ordinary courts are justified in taking action against the constitutional court, either in the form of, for example infringement proceedings initiated by the Commission against the Member State, or by disapplying the judgments that are incompatible with the CJEU, respectively. Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022) ch 4. Bobić's account of constitutional pluralism is able to accommodate the perspective of low-instance courts to some extent. Nevertheless, it need not be the case that a conflict between the case law of the CJEU and the apex courts which confronts a low-instance court will always be a conflict relating to the values enshrined in Article 2 TEU. The conflict may also arise from the sheer indeterminacy of the provisions that the courts are called to interpret. The controversy concerning the *PSPP* judgment is arguably a case in point, though the conflict did not confront low-instance courts, but the German government.

V. CONCLUSION

In this paper, I went through a detailed examination of theories of constitutional pluralism to demonstrate their inadequacy for guiding the decision-making of low-instance courts, where they are faced with conflicting lines of case law issued by the CJEU and the apex courts. The position of low-instance courts in the institutional structure of the EU requires that they limit themselves to resolving such disputes on the basis of a doctrine that regards one court or the other to have a stronger claim to final authority, at least with respect to certain classes of cases. Low-instance courts cannot resolve such disputes on the basis of what they think to be substantively the best outcome. I have said nothing of what such a doctrine should be. Establishing its necessity is sufficient to bring my point across: that new legal challenges in the EU call for a theory of adjudication that transcends the constitutional pluralist paradigm.