

The Precedence of EU Law from the Perspective of Constitutional Pluralism

René Barents*

The position of EU law in the national legal order – Precedence of EU law – Relationship between legal orders – Foundation of precedence – Autonomous precedence *v.* precedence based on national constitutional law – The concept of an integrated or composed legal order as a false paradigm – The value of constitutional pluralism to explain the relationship between EU law and national law

THE PRECEDENCE PROBLEM

Introduction

The precedence of EU law¹ over conflicting national law (hereafter ‘precedence’) is far from popular. For instance, the precedence clause of Article I-6 European Constitution constituted one of the reasons for the rejection of this treaty by the Dutch people.² The background to this event confirmed that in the context of the globalisation process, by which to an increasing extent the effectiveness of the powers of national states to organise their societies is reduced, the precedence of EU law is viewed as a clear sign of a developing European super-state and thus as a threat to the safe havens of national identity. Even more delicate is the doctrine of the Court of Justice (hereafter ‘ECJ’) on the autonomous foundation of the precedence of EU law. The labelling of the relevant case-law as ‘a conspiracy’,³

* Head of Unit Research and Documentation, European Court of Justice and Professor of European Community Law, Maastricht University. The opinions expressed in this article are strictly personal.

¹ The term ‘EU law’ is used here as a reference to the law of the first pillar of the EU, i.e., Community law. In this article no attention is paid to the relationship between the law of the other two pillars and national law.

² See T.A.J. Toonen, ‘Saying no to a European Constitution: Dutch Revolt, Enigma or Pragmatism’, *Zeitschrift für Staats- und Europawissenschaften* (2005) p. 594 at p. 609.

³ T.C. Hartley, ‘The Constitutional Foundations of the European Union’, 116 *The Law Quarterly Review* (2001) p. 225, 245: ‘overzealous judges and lawyers who believed that they were laying the foundations of a new superstate’.

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‘patently wrong’,⁴ ‘judge-made law violating the Treaty’⁵ and ‘intellectual terrorism’⁶ seems to indicate at least that this doctrine encounters some reservations from constitutional and international lawyers. All this is hardly surprising. The mere fact that EU law, as interpreted by the ECJ, proclaims its autonomous precedence over conflicting national law confirms that because of its objectives and scope, the EU is challenging the centuries-old monopoly of member states over the law applicable in their territory. It is inherent in the sovereign nature of the national state to defend itself against this ‘usurpation’.⁷ In terms of law this means that the national constitution enters the battlefield. Against that background most constitutional courts in the old and new member states have denied, explicitly or implicitly, the autonomous precedence of EU law in their national legal orders by converting it into a legal effect of the constitutional provisions on the ratification of (the European) treaties.⁸ It is worth noting that even in the Netherlands, where due to strong monist traditions as well as the absence of constitutional adjudication the ECJ’s precedence doctrine was generally accepted, the situation is changing.⁹

Preliminary observations

This article examines the divergent views expressed in European and national case-law and literature on the question of the ultimate foundation of the precedence of EU law in the national legal order. Its purpose is to explain why, in the traditional monist-oriented approaches to the relationship between EU and national law, this question can never be answered in a satisfactory manner. Subsequently, it explores whether the concept of constitutional pluralism may offer a more appropriate alternative for coming to terms with this thorny question.¹⁰

⁴ F. Berman, ‘EU Law and International Law. How Far Does Either Belong to the Other?’, in B.S. Markesinis (ed.), *The Clifford Chance Lectures*, Vol. I (Oxford, Oxford University Press 1996) p. 241 at p. 253.

⁵ H.H. Rupp, ‘Grundgesetz und Europäischer Verfassungsvertrag’, *Juristenzeitung* (2005) p. 741 at p. 744.

⁶ A. Pellet, *Les fondements juridiques internationaux du droit communautaire*, *Collected courses of the Academy of European Law*, Vol. V, book 2, p. 193.

⁷ See, *inter alia*, K. Schiemann, ‘Europe and the loss of sovereignty’, 56 *International and Comparative Law Quarterly* (2007) p. 475 et seq.

⁸ See for more details, J. Baquero Cruz, ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’, 14 *European Law Journal* (2008) p. 389 at p. 391-399.

⁹ See A. van den Brink and H. van Meerten, ‘Constitutionele toetsing in Nederland: de Europese dimensie’ [Constitutional adjudication in the Netherlands: the European dimension], *Sociaal-Economische Wetgeving* (2007) p. 217.

¹⁰ See on the concept of (international) legal pluralism in particular W.W. Burke-White, ‘International Legal Pluralism’, 25 *Michigan Journal of International Law* (2004) p. 965; M. Rosenfeld, ‘Rethinking constitutional ordering in an era of legal and ideological pluralism’, 6 *International Journal of*

The article starts with an overview of the concept, nature and legal effects of the precedence of EU law.

However, before examining that topic in more detail, two preliminary observations need to be made. First, in this article the monist expression ‘primacy’ of EU law is avoided. ‘Primacy’ points to the existence of a hierarchy since it refers to a position or condition of being first as in rank. At least implicitly it presupposes that in the national legal order EU law takes the supreme position because of its inherent superiority, supranational features and constitutional nature. However, this is not at all what the precedence doctrine of the ECJ is about. As will be set out below, the EU precedence rule is essentially a collision rule, albeit of a special nature. Like the priority rule in traffic legislation, what matters is the result, not the higher rank or origin of the rule as such.

The second observation relates to the origins of the precedence doctrine. It is usually argued that this doctrine emerged in the well-known judgment *Costa v. Enel*.¹¹ It is true that in this judgment the ECJ postulated the autonomous precedence of EU law over conflicting national law in explicit terms. However, its foundations were already laid down in previous judgments, including the case-law on the ECSC Treaty.¹² This background is important since it demonstrates that the precedence doctrine does not constitute a political invention of an activist ECJ, but rather that it results from the legal nature of the Communities.¹³

THE PRECEDENCE OF EU LAW

Leading principles

In accordance with the case-law of the ECJ, the precedence of EU law can be summarised as follows.

The *basis* of the precedence of EU law over conflicting national law is the autonomous nature of the former. Because of that status the validity, application

Constitutional Law (2008) p. 415. On the notion of constitutional pluralism *see*, in particular, N. Walker, ‘The Idea of Constitutional Pluralism’, 65 *Modern Law Review* (2002) p. 317-359, as well as other publications by this author. For a short but useful overview of the state of affairs of constitutional pluralism, *see* M. Avbelj and J. Komárek, ‘Four Visions of Constitutional Pluralism’, 4 *EuConst* (2008) p. 524-527. On pluralism in the EU context, *see* N. MacCormick, ‘Beyond the Sovereign State’, 56 *Modern Law Review* (1993) p. 1 and ‘The *Maastricht-Urteil*: Sovereignty Now’, 1 *European Law Journal* (1995) p. 259.

¹¹ Case 6/64, *Costa v. ENEL* [1964] *ECR* 1203.

¹² *See*, in particular, Case 6/60 *Humblet v. Belgium* [1960] *ECR* 1129, 1188.

¹³ Already in the 1950s various authors took the view that ECSC law had an autonomous nature, *see* for example, H-J. Schlochauer, ‘Zur Frage der Rechtsnatur der Europäischen Gemeinschaft für Kohle und Stahl’, in W. Schätzel et al. (eds.), *Rechtsfragen der Internationalen Organisation – Festschrift Webberg* (Frankfurt a. M., Klostermann 1956) p. 361 at p. 363.

and interpretation of EU law in the territory of the member states cannot in any way be determined by national or by international law (autonomous precedence).¹⁴

The *objective* of the precedence of EU law is to guarantee its uniform interpretation and application in the territory of the member states and to ensure its full effect.¹⁵

The *scope* of the precedence of EU law is complete and unconditional.¹⁶ All written and unwritten EU law¹⁷ takes precedence over conflicting national law. Therefore, all national authorities are obliged to apply EU law in all situations falling within its scope, irrespective of the status, contents and form of conflicting national rules.¹⁸ It does not matter whether the conflicting national rules were adopted prior to or after the rule of EU law concerned.¹⁹

The *legal effect* of the precedence of EU law becomes relevant in a situation of conflict between a rule of EU law and a rule of national law. A conflict in this sense must be understood as any result which is contrary to EU law. Accordingly, a conflict does not arise only when the application of a rule of national law produces a different result. Even when an EU rule and a national rule have similar contents a conflict may arise, for example by the application of a provision of an EU regulation which, contrary to Article 249 EC, has been transposed into national legislation.

Legal effects of the precedence of EU law

If such a conflict arises, the precedence of EU law has two closely related legal effects. These effects result from the objective of the precedence rule referred to above.

The first effect is that the conflicting national rule has to be set aside. Accordingly, the precedence of EU law implies the prohibition to adopt or to apply any rule of national law that conflicts with EU law.²⁰ In some cases the setting aside of an incompatible national rule is sufficient to resolve a conflict. For example, a technical requirement of which the Commission has not been notified cannot be invoked against the importer of the product concerned. However, in many cases

¹⁴ Case 6/64, *Costa v. ENEL* [1964] ECR 1203; Opinion 1/91, *EEA I* [1991] ECR I-6079, para. 47; Joined cases C-402/05 P and C-415/05 P, *Kadi and Barakaat v. Council and Commission*, judgment of 12 Sept. 2008, nyr, para. 282.

¹⁵ Case 166/73, *Rheinmühlen II* [1974] ECR 19, para. 2.

¹⁶ See, *inter alia*, Case 6/64, *Costa v. ENEL* [1964] ECR 1203; Case 9/65, *San Michele* [1965] ECR 4; Case 48/71, *Commission v. Italy* [1972] 529; Case 34/73, *Variola* [1973] ECR 981.

¹⁷ Rules and principles of national and international law recognised by the Court as constituting an integral part of EU law (general principles of law, fundamental rights, etc.).

¹⁸ Case 11/70, *IHG* [1970] ECR 1125.

¹⁹ Case 106/77, *Simmenthal* [1978] ECR 629.

²⁰ *Ibid.*

in which conflicting rules are set aside the question arises of which rule has to be applied instead. This brings us to the second legal effect of the precedence of EU law. Sometimes conflicts can be resolved by merely applying the rule of EU law with which the national rule is incompatible. For example, a national measure requiring an import licence for the importation of goods from other member states has to be set aside as being contrary to the prohibition to restrict the free movement of goods laid down in Article 28 EC. However, this is more an exception than a general rule. In the majority of cases the result imposed by EU law, i.e., its uniform interpretation and application everywhere in the EU, will require the application of another EU rule or principle to ensure its full effect.²¹ If an operator has suffered damage due to the application of national law contrary to EU law, the latter requires the application of the EU law principle according to which that operator may obtain compensation. It is also possible that the full effect of EU law requires the application of a rule of national law other than the one set aside. For example, if financial charges are levied contrary to EU rules, EU law requires those levies to be repaid. However, in the absence of detailed EU rules, the procedure and conditions for reimbursement are a matter for national law, provided that the well-known principles of assimilation and effectiveness are complied with. Another well-known example relates to the duty to interpret national law in conformity with EU law. What is applied in such a situation is not the national rule in its original meaning but its application according to an interpretation compatible with EU law. Finally, it is even possible that the full effect of EU law requires the setting aside of national law in favour of the law of another member state, for example where the rules on free movement require the member state of destination to take account of or to recognise the application of the law of the member state of origin.

A collision rule

The preceding observations demonstrate that the precedence of EU law is nothing more but also nothing less than a collision rule, intended to guarantee the uniform interpretation and application of this law. Accordingly, the legal effects of the precedence of EU law can be explained in terms of proportionality. What is necessary in any case is a prohibition to apply the conflicting rule of national law. For this purpose it is not required to pronounce either the non-existence of that rule or its nullity.²² Therefore, the difference between the EU precedence rule and traditional collision rules is that the former constitutes a *negative* collision

²¹ Case C-2/97, *IP v. Borsana* [1998] ECR I-8597, para. 26; Case C-344/98, *Masterfoods* [2000] ECR I-11369, para. 49.

²² Joined Cases C-10/97 to C-22/97, *INCOGE* [1998] ECR I-6307, para. 21.

rule. It only determines which rule may not be applied. Accordingly, the corresponding obligation imposed by Article 10 EC to guarantee the full effect of EU law, including the need for effective legal protection, may require in each case the application of a different set of rules of EU or national law. To this, it must be added that the precedence rule does not prevent or solve all possible conflicts. The ECJ's case-law recognises that a member state may be faced with a situation in which the application of the particular rule of EU law is absolutely impossible. In such a situation the member state is bound to co-operate with the Commission to find a solution. Moreover, some questions about the legal effect of the precedence of EU law remain unanswered.²³

PRECEDENCE OF LAW AND LEGAL ORDER

The concept of legal order

The problem of whether the precedence of EU law in the domestic legal order is exclusively a matter of that law (absolute or autonomous precedence) or whether it is ultimately governed by national constitutional law (relative precedence) can be clarified by applying the concept of 'legal order'.²⁴ The analytical value of this concept is that it makes it possible to separate law from its territorial foundation which, in the majority of cases, is the territory of the sovereign state.²⁵ It thus becomes possible to analyse the relationship between conflicting rules of law originating from state and non-state sources in more neutral terms.²⁶

In principle, a legal order constitutes a self-referential system, that is a system in which the creation, validity, application and interpretation of a legal rule depend exclusively on the order of which that rule constitutes a part. Through its self-referential character a legal order maintains its unity and thus its own existence. At least in theory, unity of law is guaranteed by the application of the well-

²³ Such as the question raised in Case C-496/06, *Wiener Wettten* (pending) whether by way of transitional measure it is possible to continue the application of the conflicting national rule in order to avoid a 'legal vacuum'. See J.P. Terhechte, 'Temporäre Durchbrechung des Vorrangs des europäischen Gemeinschaftsrechts beim Vorliegen inakzeptabler Regelungslücken?', *Europarecht* (2006) p. 828-847.

²⁴ The literature on this concept is abundant; see, *inter alia*, M. van de Kerchove and F. Ost, *Le système juridique entre ordre et désordre* (Paris, Presses universitaires de France 1988).

²⁵ See, *inter alia*, J. Barberis, 'Les liens juridiques entre l'Etat et son territoire; perspectives théoriques et évolution du droit international', *Annuaire française de droit international* (1999) p. 132.

²⁶ In this respect there is no need to explore the various theories on the concept of legal order since it is commonly accepted that both national law and EU law can be described in these terms; see, *inter alia*, W. Schroeder, *Das Gemeinschaftsrechtssystem. Eine Untersuchung zu den rechtsdogmatischen, rechtstheoretischen und verfassungsrechtlichen Grundlagen des Systemdenkens im Europäischen Gemeinschaftsrecht* (Tübingen, Mohr Siebeck 2002) p. 14 et seq.

known collision rules which all legal orders have in common, such as the precedence of superior rules over inferior rules, of special rules over general rules and of later rules over earlier rules. Accordingly, unity of law constitutes the basic feature of any legal order.²⁷

If the self-referential character of a legal order is complete, that order is, according to itself, autonomous: the law in that order is only the law of that order.²⁸ Whether or not this character of a legal order is recognised by other legal orders is, at least normatively, irrelevant. For an autonomous legal order, another autonomous legal order is therefore only relevant as a fact.²⁹ This does not necessarily mean that an autonomous legal order is absolutely closed. On the contrary, on the basis of its own rules, a legal order may have an 'open' character in the sense that the law of other legal orders may be applicable in that order.³⁰ An example of such a situation is the clause in a constitution relating to the recognition of customary international law or to the incorporation of treaty law into the national legal order. However, what matters is that all law valid and applicable in that legal order is either created by the mechanisms of that order or, if it concerns law from other orders, these rules are valid and applicable only on the basis of and within the procedural and substantive conditions set by the former legal order.

Collision between legal orders

If the scope of two (or more) legal orders overlaps (partially or completely), the rules of these orders may collide, i.e., rules of different origin and/or different contents are applicable to one situation. Conflicts of that kind can only be resolved if two conditions are fulfilled. The first condition is, of course, the presence of a collision rule. However, the mere fact that legal order A contains a precedence rule is not sufficient to guarantee that in legal order B the law of legal order A enjoys precedence. For that purpose it is also necessary that this precedence rule enjoy precedence in legal order B. Accordingly, the status of the law of order A in order B depends on the nature of the relationship between the two legal orders. In this respect two fundamentally different situations have to be distinguished: a hierarchical (normative) and a heterarchical (factual) relationship between legal orders.

²⁷ Cf. P. Pescatore, 'Droit communautaire et droit national selon la jurisprudence de la Cour de justice des Communautés européennes', *Recueil Dalloz Sirey* 1969 p. 179 at p. 183: 'L'ordre juridique est un, unique, uniforme – ou il n'est pas'.

²⁸ Whether the law of a legal order is autonomous is mainly a matter of interpretation, which will depend in particular on whether the legal order concerned has an independent court system.

²⁹ See, *inter alia*, N. MacCormick, 'On the very idea of a European Constitution: jurisprudential reflections from the European Parliament', 13 *Juridisk Tidskrift vid Stockholms universitet* (2001-2002) p. 529 at p. 531-532.

³⁰ See the German literature on the concept of the 'offene Verfassungsstaat'.

Hierarchical and heterarchical legal orders

In the first situation the relationship between overlapping legal orders is of a hierarchical nature, i.e., legal order B is subordinate to legal order A, as a result of which order A is the 'higher' (delegating) order and order B the 'lower' (delegated) order. Such a situation can be described as an 'integrated', 'composed' or 'layered' legal order. Although legal order B is competent to produce and to apply its own rules, in the event of a conflict between a rule of order B and a rule of order A, the latter enjoys precedence. The legal basis of the precedence is legal order A, of which legal order B constitutes a subordinate part. If there is conflict between rules of order B and order A, the rank of the rule of order B is irrelevant. Because of the hierarchical relationship, even the lowest rule of legal order A may enjoy precedence over the highest rule of legal order B. Accordingly, in legal order B the law of legal order A enjoys autonomous precedence. As a result of that hierarchy both legal orders are characterised by unity of law. An example of such an 'integrated' or 'composed' legal order is a federal state of which the constitution provides for the precedence of federal law over the law of the federated states.³¹

The second situation relates to the existence of two overlapping legal orders each of which, according to itself, is autonomous. Although, as observed above, this does not exclude the existence of legal relationships between these orders (such as treaties), the autonomy of each order precludes a hierarchy between them. Accordingly, in a situation of two overlapping but autonomous legal orders the precedence issue has a totally different dimension. In an autonomous legal order the law of another legal order can never enjoy autonomous precedence. Even if legal order A provides for the autonomous precedence of its law over the law of legal order B, this cannot modify the autonomous status of the law of order B. In such a situation the precedence of the law of order A over the law of order B can only find its basis in the law of the latter order (relative precedence). Since by its very nature the autonomous application in an autonomous legal order of the law of another legal order is excluded, in a situation of two autonomous but overlapping legal orders there is always a potential or real contradiction.

Tertium non datur

The two situations of overlapping legal orders described above are exhaustive and mutually exclusive. If in a legal order the law of another order has autonomous precedence, the former order is not autonomous *vis-à-vis* the latter. That situation is characterised by a hierarchical (and thus a normative) relationship between these orders as a result of which, at least in theory, conflicts between rules of the two

³¹ For example, in the USA (Art. VI US Const.) and in Germany (Art. 31 GG).

orders are prevented. Accordingly, an ‘integrated’ or ‘composed’ legal order is characterised by unity of law. If both orders are autonomous, their relationship is of a heterarchical (and thus factual) nature and, as a result, between these orders no unity of law can exist. Such a situation is characterised by legal pluralism, i.e., the existence of independent sources of law and, accordingly, the possibility of conflicts between the rules of these overlapping orders. As a matter of principle, such conflicts can never be definitely resolved, since there is no supreme arbiter. Obviously, this situation does not preclude an interaction between autonomous legal orders as a result of which they may converge. However, in the absence of a normative hierarchy between the two orders such developments cannot modify their autonomous nature.³²

THE EU LEGAL ORDER AND THE NATIONAL LEGAL ORDER

The paradigm of the integrated legal order

In the following paragraphs, the relationship between the EU legal order and the national legal order is analysed with the aid of the *hierarchical* model described above, i.e., in terms of an ‘integrated’ or ‘composed’ legal order. The purpose of this essentially monist analysis³³ is to examine whether in the hierarchical model, the problem of the ultimate foundation of the precedence of EU law in the national legal order can be solved.

Where there is a hierarchical relationship between the EU and the national legal order there are, by definition, two possibilities.³⁴ Either the national legal order is subordinate to the (higher) legal order of the EU or the EU legal order (in the national territory) is subordinate to the (higher) national legal order.

In the first case, the precedence of EU law over national law has an autonomous character, i.e., in the national legal order EU law enjoys precedence over conflicting national law because of its superior authority and rank. Accordingly, in the domestic legal order EU law is applicable as such. For the autonomous precedence of EU law it is irrelevant whether national constitutions or national con-

³² Autonomy of law is a complicated concept since it is often but wrongly equated with political autonomy or sovereignty. The basic reason for this confusion is the ever-present premise that law and state are identical. See for an extensive treatment of the concept of autonomy of law R. Barents, *The Autonomy of Community Law* (The Hague, Kluwer Law International 2004) chapter 8.

³³ Monism with primacy of international or of national law (pure or relative monism).

³⁴ See also C. Leben, ‘À propos de la nature juridique des Communautés européennes’, 29 *Droits: revue française de théorie, de philosophie et de culture juridiques* (1991) p. 61 at p. 64; H.F. Köck, ‘Grundsätzliches zu Primat und Vorrang des Unions- bzw. Gemeinschaftsrechts im Verhältnis zum mitgliedstaatlichen Recht, oder, als die Frösche keinen König haben wollten’, in *Internationale Gemeinschaft und Menschenrechte. Festschrift für Georg Ress* (Köln, Sührkamp 2005) p. 557-576.

stitutional courts proclaim the contrary. The scope and legal effects of the precedence of EU law are governed exclusively by EU law as interpreted by the ECJ. National authorities and national courts are always obliged to set aside conflicting national rules and to ensure the full effect of EU law. The obvious conclusion is that in its relationship to EU law, the national legal order is not autonomous. On the contrary, each national legal order constitutes a territorial part (sub-order) of the wider EU legal order. Because of its ‘higher’ rank (‘primacy’ of EU law), the intrinsic unity of EU law in the national legal orders is guaranteed and because of its precedence unity of law in the whole of the EU is maintained.

In the second case, the validity and application of EU law in the (autonomous) national legal order and, as a consequence, its precedence ultimately depend on the national constitution and the acts of ratification. Whether or not the precedence of EU law according to that law is based on its own authority is irrelevant. Accordingly, in this situation EU law always enjoys derived precedence. Moreover, since in the national territory EU law is applicable only by virtue of the national constitution, its precedence is subject to the explicit and implicit limits set by or derived from that constitution (‘primacy’ of national law). The consequence of the incorporation of EU law into the national legal order is that, at least in theory, it is partitioned into 27 ‘national’ parts. As a result, each national legal order is characterised by the unity of EU law and national law. However, because of the ultimate subordination of EU law to the national constitution, unity of EU law throughout the EU territory is, as a matter of principle, excluded.³⁵

Autonomous precedence of EU law

What needs to be examined next is which of the two hierarchical options described above offers a sound explanation for the ultimate foundation of the precedence of EU law in the national legal order.³⁶

³⁵ For reasons of space in this article no attention is paid to the relationship between EU law and international law. However, as demonstrated by the judgments of the CFI in Case T-30601, *Yusuf and Al Barakaat v. Council and Commission* [2005] ECR II-3533 and Case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649 and the ECJ judgment in Joined Cases C-402/05 P and C-415/05 P, *Kadi and Barakaat v. Council and Commission*, judgment of 12 Sept. 2008, nyr, the nature of this relationship can also be explained in terms of hierarchy or autonomy. See, in particular, S. Griller, ‘International law, human rights and the European Community’s autonomous legal order: notes on the ECJ decision in Kadi’, 4 *EuConst* (2009) p. 528 et seq.; B. Kunoy and A. Dawes, ‘Plate tectonics in Luxembourg: the Ménage à Trois between EC Law, international law and the European Convention on Human Rights following the UN Sanctions Cases’, 46 *Common Market Law Review* (2009) p. 73-104.

³⁶ See also H. Gaudin, ‘Primauté ‘absolue’ ou primauté ‘relative’’, in H. Gaudin (éd.), *Droit constitutionnel – Droit communautaire. Vers un respect réciproque mutuel?* (Aix-Marseille) p. 97 et seq.; J-P. Jacqué, ‘Droit constitutionnel national et droit communautaire’, in *Diritto comunitario e diritto interno* (Milan, Giuffrè 2008) p. 3-26.

Following the case-law of the ECJ, the first situation ('primacy' of EU law) is usually defended by the 'autonomists' or, as a member of that court has aptly put it, by the 'neocoms'.³⁷ According to this doctrine, EU law, because of its objectives and content, has an intrinsic common character, i.e., its very nature requires that this law is applied in the same manner in all member states, without exception.³⁸ Only on that condition can the objectives of the EU be attained and equal treatment of equal situations within the scope of EU law ensured.³⁹ Autonomous precedence thus constitutes an existential feature of EU law.⁴⁰ As a result, EU law flows from a single source which, by definition, can only be constituted by the European treaties and the mechanisms based thereon. Precedence of EU law is therefore absolute and complete, irrespective of the constitutional nature of the conflicting national rules.⁴¹ To summarise, the uniform character of EU law implies its autonomous character or, in other words, its self-referential and therefore constitutional nature.⁴²

Although, as far as EU law is concerned, this doctrine is internally consistent,⁴³ it is not without serious theoretical problems. As set out above, if between two overlapping orders a hierarchical relationship exists, one of these orders is always subordinate to the other. Accordingly, the ultimate consequence of the 'neo-com' approach is that, vis-à-vis the EU legal order, national legal orders take the position of derived legal orders in the sense that national constitutions have lost their status as the highest source of written law in the national territory.⁴⁴ Member states have thus lost their legal autonomy; they are no longer the sole master over the law valid and applicable in their territory. On this basis, the autonomous application of EU law in the national legal orders could be compared to a natural

³⁷ Cf. A. Tizzano, 'Quelques réflexions sur la doctrine du droit de l'Union européenne: les 'communautaristes' et les autres', XIII *Il diritto dell'Unione europea* (2008) p. 225-235.

³⁸ Case 48/71, *Commission v. Italy* [1972] ECR 529, para. 8; Case 166/73, *Rheinmühlen II* [1974] ECR 19, para. 2; Case C-458/06, *Gourmet Classic*, judgment of 12 June 2008, nyr, para. 20.

³⁹ Cf. the well-known statement of the former president of the ECJ Lecourt: Community law is 'droit commun à tous et transcendant la loi de chacun', in R. Lecourt, *L'Europe des juges* (Brussels, 1976) p. 8.

⁴⁰ Cf. P. Pescatore, 'Aspects judiciaires de l' "acquis communautaire"', *Revue trimestrielle de droit européen* (1981) p. 619 at p. 631-632.

⁴¹ See Gaudin, *supra* n. 36, p. 97 at p. 101; D. Alland, 'A la recherche de la primauté du droit communautaire', 45 *Droits: revue française de théorie, de philosophie et de culture juridiques* (2007) p. 109 at p.112.

⁴² See for more details Barents, *supra* n. 32, chapters 6-9.

⁴³ 'la primauté ne peut être qu'absolue ou ne pas être', see D. Carreau, 'Droit communautaire et droits nationaux : concurrence ou primauté ?', *Revue trimestrielle de droit européen* (1978) p. 381 at p. 385.

⁴⁴ This has been argued by C. Kakouris, 'La relation de l'ordre juridique communautaire avec les ordres juridiques des Etats membres – quelques réflexions parfois peu conformistes', in F. Caportorti et al. (eds.), *Du droit international au droit de l'intégration. Liber Amicorum Pierre Pescatore* (Baden-Baden, Nomos 1987) p. 391.

phenomenon. From a theoretical point of view, the most serious objection to this doctrine is the implication that EU law, by its own authority, has unilaterally modified the nature and scope of national constitutions to the extent that the latter cannot in any way prevent or control the autonomous validity and application of EU law in the national territory.⁴⁵ From a Kelsenian perspective, this model even means that the hypothetical ‘Grundnorm’ of national law can only be found in the EU legal order.⁴⁶ In terms of politics this perception of EU law implies that member states have lost their sovereignty; with a little exaggeration one may say that member states are ‘transformed’ into pre-federated states in a kind of pre-federal model. The theoretical insufficiency of the ‘neocom’ model is demonstrated by the fact that in the literature on EU law the various consequences of the gradual loss of statehood⁴⁷ are, intentionally or not, neglected. Moreover, it remains to be demonstrated that these consequences find a positive resonance in the ECJ’s case-law.⁴⁸

The precedence of EU law according to national constitutional law

The second situation (‘primacy’ of national law) is usually defended amongst constitutional lawyers. The starting point is the autonomy of the national legal order, which is usually founded on a particular constitutional philosophy, the main elements of which are the common will of the people, sovereignty and democratic legitimation of state authority.⁴⁹ The weakness of the ‘neocom’ model referred to above becomes the strength of the national constitutional approach.⁵⁰ From the perspective of constitutional as well as international law it is difficult to argue that, within the scope of EU law, the existence and functioning of member states is

⁴⁵ See J.L. Seurin, ‘Towards a European Constitution?, Problems of Political Integration’, *Public Law* (1994) p. 625; Th. Öhlinger, ‘Die Transformation der Verfassung: die staatliche Verfassung und die europäische Integration’, 124 *Juristische Blätter* (2002), p. 2 at p. 10.

⁴⁶ See W-D. Grussmann, ‘Grundnorm und Supranationalität – Rechtsstrukturelle Sichtweisen der europäischen Integration’, in Th. Von Danwitz et al. (eds.), *Auf dem Wege zu einer europäischen Staatlichkeit* (Stuttgart, 1994) p. 46; Th. Öhlinger, ‘Der Vorrang des Unionsrechts im Lichte des Verfassungsvertrages’, in *Internationale Gemeinschaft und Menschenrechte. Festschrift für Georg Ress* (Köln, 2005) p. 685 at p. 692 et seq.

⁴⁷ See, in particular, S. Haack, *Verlust der Staatlichkeit* (Tübingen, Mohr 2007).

⁴⁸ It is worth mentioning that in Case 33/67, *Kurrer* [1968] *ECR* 179, 193, the Court referred to the Community as being ‘composed of States, each of which retains its own national legal order’.

⁴⁹ See from recent literature, R. Kwiecien, ‘The Primacy of European Constitutional Law Over National Law under the Constitutional Treaty’, 6 *German Law Journal* (2005) p. 1480-1496; P. Bussjäger and G. Heissl, ‘Nationaler Souveränitätsanspruch versus autonome Rechtsordnung? Integrationsschranken im Spannungsverhältnis zur Vorrangjudikatur des EuGH’, 63 *Österreichische Juristen-Zeitung* (2008) p. 307-315.

⁵⁰ As already observed by W.J. Ganshof van der Meersch, ‘Le droit communautaire et ses rapports avec les droits des Etats membres’, in *Les Nouvelles* (Brussels, Bruylant 1969) p. 41 at p. 61.

entirely subordinate to the EU legal order.⁵¹ As observed above, the autonomous precedence of EU law over national law implies nothing less than that member states have lost their monopoly to decide on the law applicable within their territory. Exaggerating a little, one could say that in such a situation EU law could be compared to ‘occupation law’, i.e., law imposed by foreign powers!⁵² It is a general principle of constitutional law that the constitution is the highest source of written law in the national territory.⁵³ Therefore, it is contradictory to argue that if the precedence of EU law finds its foundation in the national constitution, that same constitution allows EU law to take a higher position or is irrelevant for the validity and application of EU law in the national territory.⁵⁴ This would affect the national constitution at its core.⁵⁵ It would lose its status as the highest source of written law, its function to guarantee the constitutional identity of the state and its people and, ultimately, its ‘constitutional’ character.⁵⁶

The consequence of the autonomy of the national legal order is that the application of EU law in the national territory is ultimately governed by the national constitution, either through monist clauses in the constitution or through the more dualist model of a kind of ‘order’ in the act of ratification, addressed to the bodies of the state, to apply EU law. From a national constitutional perspective the precedence of EU law is therefore always a matter of constitutional law. In other words, on this basis the precedence of EU law is ‘nationalised’.⁵⁷ This background also explains that what for EU law constitutes the basis of its precedence in the

⁵¹ See also L.M. Díez-Picazo, ‘What does it mean to be a State within the European Union?’, *Revista italiana di diritto pubblico comunitario* XII (2002) p. 651.

⁵² Cf. H.-H. Rupp, ‘Die Grundrechte und das Europäische Gemeinschaftsrecht’, *Neue Juristische Wochenschrift* (1970) p. 953.

⁵³ See, for example, Art. 8(1) of the Polish Constitution (English text): ‘The Constitution shall be the supreme law of the Republic of Poland’.

⁵⁴ See, *inter alia*, V. Constantinesco, ‘Les rapports entre les traités et la constitution; du droit interne au droit communautaire’, in *Mélanges Coben-Jonathan* (Brussels, 2004), Vol. I, p. 463 at p. 465; J. Rideau, ‘Constitution et droit international dans les Etats membres des Communautés européennes. Réflexions générales et situation française’, *Revue française du droit constitutionnel* (1990) p. 261; M. Bertrand, ‘Réflexions sur le rôle de l’Etat en tant qu’élément du pouvoir’, *2 Annuaire de droit européen* (2004) p. 105 at p. 109.

⁵⁵ Cf. D. Grimm, ‘Die Verfassung im Prozess der Entstaatlichung’, in *Der Staat des Grundgesetzes – Kontinuität und Wandel. Festschrift für Peter Badura* (Köln, 2004) p. 145 at p. 156.

⁵⁶ See also J.-H. Reestman, ‘Primacy of Union Law, comment Articles Draco I-10’, *1 EuConst* (2005) p. 104 at p. 107; J. Namavicius and Z. Namavicius, ‘Souveränität und Integration: verfassungsrechtliche Fragen der Mitgliedschaft Litauens in der Europäischen Union’, *52 Ost-Europarecht* (2006) p. 152 at p. 163; J. Rossetto, ‘Ordre constitutionnel interne et droit communautaire: l’impossible hiérarchie’, in *Le droit administratif: permanences et convergences. Mélanges en l’honneur de Jean-François Lachaume* (Paris, 2007) p. 889 at p. 909.

⁵⁷ Cf. A. Levade, ‘Le Conseil constitutionnel aux prises avec la Constitution européenne’, *Revue du droit public et de la science politique en France et à l’étranger* (2005) p. 19, 32.

national territory is normatively irrelevant for the national legal order. Whether the precedence of EU law is recognised in the case-law of the ECJ or whether it is laid down in a provision of EU law (such as Article I-6 of the European Constitution) cannot make any difference for the foundation of the precedence of EU law in the national constitution.

The national constitutional approach to the precedence of EU law is equally internally consistent. Since the national constitution constitutes the highest source of written law in the national territory, it is obvious that national constitutional courts, in their role as ultimate arbiter, cannot accept the autonomous precedence of EU law since this would amount to a breach of the constitution.⁵⁸ The impossibility of combining the autonomous precedence of EU law with the supreme position of the national constitution is demonstrated by the complicated and partially inconsistent decisions of the French and Spanish constitutional courts on the compatibility of the precedence clause of Article I-6 of the European Constitution with their respective national constitutions.⁵⁹

However, in spite of its internal consistency, this approach has an important theoretical drawback as well. As a matter of principle it implies the denial of the intrinsic unity of EU law, i.e., its common character in all the member states and, as a result, its autonomous nature. Since the application of EU law in the national territory is ultimately subordinate to the national constitution, EU law is partitioned into 27 ‘national’ parts, each under the ultimate command of the national constitution. At least theoretically, this means that EU law cannot be considered to be a legal order at all, since a legal order consisting of independent parts constitutes a logical contradiction. This approach essentially reduces EU law to ‘ordinary’ international law, devoid of any special, in particular constitutional characteristics.⁶⁰ In this respect it is sufficient to refer to the ‘Staatenverbund’ doctrine of the German constitutional court⁶¹ and the feudal paradigm of the member states as ‘Herren der Verträge’ (‘Masters of the Treaties’).

⁵⁸ See, *inter alia*, M. Herdegen, ‘Maastricht and the German Constitutional Court’, 31 *Common Market Law Review* (1994) p. 235 at p. 239; F. Mélin-Soucremanien, ‘La Constitution, le juge et le ‘droit venu d’ailleurs’’, in *Mélanges en l’honneur de Slobodan Milaci* (Brussels, 2008) p. 177; J-P. Jacqué, ‘Droit constitutionnel national, droit communautaire, CEDH, Charte des Nations Unies. L’instabilité des rapports entre ordres juridiques’, *Revue française de droit constitutionnel* (2007) p. 3 at p. 8.

⁵⁹ See, *inter alia*, J. Roux, ‘Le traité établissant une Constitution pour l’Europe à l’épreuve de la Constitution française’, *Revue du droit public et de la science politique en France et à l’étranger* (2005), p. 59-103 and R. Alonso García, ‘The Spanish Constitution and the European Constitution. The Script for a Virtual Collision and Other Observations on the Principle of Primacy’, 6 *German Law Journal* (2005) p. 1001-1024.

⁶⁰ See for more details Barents, *supra* n. 32, chapter 4.

⁶¹ The Maastricht judgment, BVerfGE 89, 155, 186.

THE INADEQUACY OF THE PARADIGM OF THE INTEGRATED LEGAL ORDER

Theoretical problems

The preceding observations demonstrate that the question as to the ultimate foundation of the precedence of EU law in the national legal order cannot be answered by applying the hierarchical model of an ‘integrated’ or ‘composed’ legal order. *First of all*, this essentially monist approach cannot produce a single answer. Since it provides no objective criteria for the choice of the ‘higher’ order, it allows two valid, but mutually exclusive answers. Accordingly, the answer to the precedence question is always ‘either – or’, which from a theoretical point of view is unsound.⁶² As a result, the choice of one or other view is often based on implicit ideological premises and political preferences. *Secondly*, each answer always implies the denial or at least the distortion of the essential legal features of the other, subordinate legal order.⁶³ However, to consider either the national legal order or the EU legal order to be a derived ‘sub-order’ conflicts with the daily legal and political reality of both orders. A recent attempt to revive the model of the composed legal order to explain the relationship between EU law and national law offers a clear demonstration of this effect. Against the background of that concept it is argued that the precedence of EU law is restricted to directly effective provisions.⁶⁴ However, this amounts to a conscious denial of an essential feature of EU law which, moreover, clearly contradicts the case-law of the ECJ. *Thirdly*, the essence of the hierarchical model is always state-centred thinking: the member states either keep their full statehood and, as a consequence, the EU is nothing more than an ‘ordinary’ international organisation, or the member states lose their autonomy to the benefit of the EU. In the latter case the inevitable result is to explain the EU in (constitutional) terms of (future) statehood since unity of law, the hallmark of an integrated legal order, can only exist within the framework of a state-like structure or a federal construction.⁶⁵ In other words, in the binary concept of the ‘integrated’ or ‘composed’ legal order the ‘touch of stateness’ and all its normative and ideological constraints are ever present. In the end it always presupposes a ‘natural’ monopoly of the state over the law applicable in its territory, thus excluding any, even theoretical possibility that law may flow from a source

⁶² See, in particular, J. Baquero Cruz, ‘The Legacy of the *Maastricht-Urteil* and the Pluralist Movement’, 14 *European Law Journal* (2008) p. 389 at p. 408.

⁶³ Cf. Cl. Blumann, ‘Le monopole de l’Etat remis en question’, 2 *Annuaire de droit européen* (2004) p. 77, 79–80.

⁶⁴ L.F.M. Besseling, *A composed European constitution* (Groningen, 2007).

⁶⁵ In particular the ‘federal’ or ‘constitutional’ approach always carries the danger that the EU is not explained in terms of what it actually is but what it should be. The literature on the European Constitution offers many examples of this theoretically unsound approach.

other than the state or an international construction under the exclusive command of states.⁶⁶

The case-law of the ECJ

The monist-oriented paradigm of the ‘integrated’ or ‘composed’ legal order is thus inappropriate to explain the legal basis and the nature of the precedence of EU law in the domestic legal order. However, in spite of these theoretical drawbacks this paradigm continues to enjoy considerable popularity, both with the ‘neocoms’ and their adversaries. As set out above, one of the reasons is that it leaves a free choice. With the aid of this paradigm ‘neocoms’ as well as ‘constitutionalists’ can validly defend positions which are mutually exclusive. Another and perhaps more profound cause is that lawyers tend to think in terms of unity of law within a given territory, a framework which necessarily implies either full statehood at the national level or a state-like (constitutional) structure at the EU level. Finally, the paradigm of the integrated legal order can be found in the case-law of the ECJ, which seems to give it a certain intellectual authority. In its judgments in *Costa v Enel*⁶⁷ and *Walt Wilhelm*,⁶⁸ the Court ruled that EU law is ‘integrated’ in the national legal orders, while according to the ruling in *Simmenthal*⁶⁹ EU law enjoys a higher rank (*‘rang de priorité’*).⁷⁰

The last observation deserves some additional comments. What does the Court’s concept of ‘integration’ of EU law in the national legal order amount to? The obvious interpretation is that in the national legal order EU law enjoys a higher status and therefore has precedence over conflicting national law.⁷¹ However, this formula does not answer the basic question whether the precedence of EU law is relative (derived) or absolute (autonomous). In the former case, EU law cannot have a true common character since its validity and application are ultimately dependent on the national constitution and the acts of ratification. As a consequence, EU law is partitioned into 27 ‘national’ parts, a result which is in total contradiction with the ECJ’s case-law. The other possibility is that in the national territory

⁶⁶ See on the question of unity of ‘state’ and ‘law’, L. Kähler, ‘Abschied vom rechtsphilosophischen Etatismus. Besteht ein notwendiger Zusammenhang zwischen Recht und Staat?’, in G.P. Callies and M. Mahlmann (eds.), *Der Staat der Zukunft*, Archiv für Rechts- und Sozialphilosophie 2000, Beiheft 83, p. 69 et seq.

⁶⁷ Case 6/64, *Costa v. ENEL* [1964] ECR 1203.

⁶⁸ Case 14/68, *Walt Wilhelm* [1969] ECR 1.

⁶⁹ Case 106/77, *Simmenthal* [1978] ECR 629.

⁷⁰ In the English text of the *Simmenthal* judgment this nuance is lost.

⁷¹ Cf. P. Pescatore, *Le droit de l’intégration. Emergence d’un phénomène nouveau dans les relations internationales selon l’expérience des Communautés européennes* (Dordrecht, Sijthof 1972) p. 85; J.-C. Gautron, ‘Un ordre juridique autonome et hiérarchisé’, in J. Rideau (éd.), *De la Communauté de droit à l’Union de droit. Continuité et avatars européennes* (Paris, 2000) p. 25.

EU law is valid and applicable as such, i.e., by virtue of its own authority. Although the ECJ wisely avoided the elaboration of this concept of ‘integration’, there is no doubt that it refers to the latter situation. That this is indeed the meaning of the ambiguous⁷² ‘integration’ formula is apparent from the writings of the members of the ECJ who took part in the drafting of the judgments referred to above.⁷³ However, ‘integration’ in this sense amounts to nothing other than a ‘unilateral’ entry or ‘penetration’ of EU law into the national legal order by virtue of its own authority, irrespective of the authority and content of the national constitution.⁷⁴ This is exactly the opposite of ‘integration’ in the framework of a hierarchical relationship between the two legal orders. Accordingly, the ECJ’s ‘integration’ formula actually constitutes a denial of the concept of ‘integrated’ legal order. It seems to relate more to the mutual interaction of two separate legal orders conveniently labelled as ‘integration’.⁷⁵

Conclusion

The conclusion that the popular concept of an integrated or composed legal order constitutes a false paradigm because it cannot provide for a sound theory to explain the position of EU law in the national legal order is hardly amazing. To approach the relationship between EU law and national law in terms of hierarchy and unity of law amounts to nothing more than the application of a classical and indeed outdated doctrine on the legal effects of international law in the national legal order.⁷⁶ Unity of law and monism are based on a horizontal construction of sovereign states, each of which exercises exclusive authority over the law appli-

⁷² Since the postulated higher rank (*rang de priorité*) of EU law leaves (deliberately) in the dark whether EU law has a higher or lower rank than the national constitution.

⁷³ See Pescatore, *supra* n. 27, p. 179 at p. 180 and N. Catalano and R. Monaco, ‘Le problème de l’applicabilité directe et immédiate des normes des traités instituant les Communautés européennes’, *2ième Colloque international sur le droit européen* (Zwolle, Tjeenk Willink 1968) p. 9–10.

⁷⁴ See J. Mertens de Wilmars, ‘De rechtsbescherming in de EG’ [Judicial redress in the EC], *Rechtskundig Weekblad* (1963) col. 1418; H.P. Ipsen, ‘Über Supranationalität’, in H. Ehmke et al. (eds.), *Festschrift für Ulrich Scheuner zum 70. Geburtstag* (Berlin, 1974) p. 211 at p. 222; R. Kovar, *La contribution de la Cour de justice à l’édification de l’ordre juridique communautaire*, Collected Courses of the Academy of European Law, Vol. IV, Book 1 (1995) p. 15 at p. 47 et seq.; L. Dubouis, ‘Le juge français et le conflit entre norme constitutionnelle et norme européenne’, in *L’Europe et le droit; mélanges en hommage à Jean Boulois* (Paris, 1991) p. 205–219; D. Simon, ‘Les fondements de l’autonomie du droit communautaire’, in *Droit international et droit communautaire, perspectives actuelles* (Paris, 2000) p. 207 at p. 247.

⁷⁵ ‘Integration’ thus seems to refer to a description of a process of intertwining. Such terms can also be found in Case 155/79, *AM&S* [1982] *ECR* 1575, para. 18 and Case C-446/04, *Test Claimants in the FII Group Litigation* [2006] *ECR* I-11753, para. 170.

⁷⁶ Cf. A. von Bogdandy, ‘Pluralism, direct effect, and the ultimate say: on the relationship between international and domestic constitutional law’, 3–4 *International Journal of Constitutional Law* (2008) p. 397 at p. 400.

cable in its territory. This authority is not called into question by the incorporation into the national legal order of classical manifestations of the international legal order ('ordinary' international treaties, customary law), in particular because the recognition of these provisions as being directly effective is a matter for national law. However, because of its scope, content and nature the situation with respect to the EU legal order is fundamentally different, in particular since this order has been able, by virtue of its own court system, to identify and to develop its own constitutional features and, as a result, to determine its status in the national legal order. As a matter of fact, EU law thus challenges the supreme position of the national constitution and the autonomous authority of the state. This situation explains how, because of its normative effects, this paradigm remains popular. According to the feudal '*Herren*' theory referred to above, once a legal order is identified as the 'master', the other order cannot but take the position of the 'serf' and, more importantly, it will keep that status since any other conclusion calls the authority of the master into question.⁷⁷ As set out above, any explanation of the relationship between the EU and national legal order in terms of monism and unity of law always leads to a distortion of the essential characteristics of either the former or the latter legal order. Furthermore, because of its inherent master-serf relationship, the paradigm of the integrated legal order prevents, as a matter of principle, any meaningful dialogue between 'neocoms' and 'constitutionalists'.⁷⁸ Indeed, under the *ancien régime* the claim to be the equal of the sovereign prince constituted a capital crime!

CONSTITUTIONAL PLURALISM

Concept

The question thus arises whether it is possible to cut the Gordian knot, i.e., to explain the relationship between EU law and national law without devaluing either one and, within that context, to clarify the consequences for the actual interaction between these orders. The starting point for such an approach is that both legal orders, each within their scope and according to their respective constitutions, have to be considered to be autonomous and thus self-referential.⁷⁹ Since both orders have their own, independent sources of law, each order determines the scope, content and legal effects of its law, including the effects of that law for

⁷⁷ The principal weakness of this theory is that it fails to explain how the EU as 'serf' can be loyal to 27 independent 'masters'.

⁷⁸ See also Th. Öhlinger, 'Braucht Europa eine Verfassung? Verfassungstheoretische Fragen und Anmerkungen', 10 *Journal für Rechtspolitik* (2002) p. 37, 39.

⁷⁹ See, in particular J. Combacau, 'Le droit international: bric à brac ou système?', 31 *Archives de philosophie de droit (Le système juridique)* (1986) p. 84.

the law of the other order.⁸⁰ Accordingly, since each order has its own independent foundation, i.e., a 'constitution' (in a neutral sense), this model amounts to a situation of 'constitutional' pluralism.

The preceding observations make it clear that constitutional pluralism is first of all a matter of fact, a description of the reality of the co-existence of legal orders, each of which is functioning according to its own rules. It is thus possible to describe the existence of sovereign states, each of which covers a certain territory, as a situation of constitutional pluralism. However, it is equally possible to apply this model to a situation in which the scope of legal orders, in particular their territorial scope, is overlapping or even identical. As far as the relationship between EU law and national law is concerned, constitutional pluralism recognises that, as a matter of fact, the national territory is subject to the rules of two legal orders, each of which according to its own rules is autonomous and, as a consequence, each of which denies the autonomy of the other.⁸¹ Constitutional pluralism thus implies the recognition that, again as a matter of fact, there is no exclusive relationship between (national) law and territory.

The precedence question

As set out above, the application of the hierarchical model to the relationship between overlapping orders has important normative implications. Once the 'higher' order (the 'master') is chosen, the other order must be considered to be the lower order (the 'serf'). As to the relationship between national law and EU law, this automatically leads to a normative devaluation of the existence and functioning of one of these orders. Unity of law between the two orders is thus obtained at a high price: a theoretical insufficiency to explain the actual existence and functioning of either the one or the other legal order. The 'either-or' result of this paradigm constitutes nothing but a vicious circle from which there is no escape. In the model of constitutional pluralism the situation is fundamentally different. Its starting point constitutes the sociological or political reality that, in the national legal order, EU law is applied and that, in the majority of cases, conflicting national rules are set aside, as a result of which EU law exercises its full effect in accordance with its objectives and content. It is clear that, whatever may be the causes of this 'obedience', in particular by national courts,⁸² this factual situation

⁸⁰ See MacCormick, *supra* n. 10; S. Besson, 'From European Integration to European Integrity: Should European Law Speak with just One Voice', 10 *European Law Journal* (2004) p. 255-362.

⁸¹ See also Dubouis, *supra* n. 74, p. 205 at p. 211 et seq.; L. Azoulay, 'La Constitution et l'intégration. Les deux sources de l'Union européenne en formation', *Revue française de droit administratif* (2003) p. 859 at p. 866.

⁸² See on this point K.J. Alter, *Establishing the supremacy of European law: the making of an international rule of law in Europe* (Oxford, Oxford University Press 2001).

precludes an answer to the question as to the ultimate legal foundation of the precedence of EU law in the national territory. However, what matters is that this point is no longer relevant since it is not a legal but an empirical question or, to put it differently, a question of political power. Whether or not the EU legal order is able to enforce its autonomous precedence in respect of the national legal order does not call into question the fact, that, according to the former its law does enjoy autonomous precedence in the national territory.⁸³ Moreover, this question cannot be answered until the moment that the national legal order, by virtue of its constitutional law, actually carries out an *actus contrarius* and is able to maintain this 'exception'.⁸⁴ This question is closely related to the well-known problem of which level of authority in a federation is sovereign: the federation or the federated states. As long as there is no actual conflict, the question as to which entity enjoys this status remains dormant.⁸⁵ 'Marriages can last a lifetime without there being a clear rule about who takes the decision in the event of a disagreement.'⁸⁶

Interaction between the EU and national legal orders

There is nothing new in the statement that the EU legal order and the national legal order interact in the sense that they exercise influence upon one another.⁸⁷ For example, largely as a result of EU law, most national orders have competition rules comparable to those of Articles 81 and 82 EC. The emergence of what is called European administrative law constitutes another example. On the other hand, through the case-law of the ECJ, the well-known national law principles of equality, proportionality and legal certainty as well as many others have been incorporated into EU law. The process of 'constitutionalisation' of the EU is heavily influenced by numerous principles of national constitutional law as well.⁸⁸ One might say that this empirically perceptible two-way effect is self-evident. However, according to the hierarchical model it is not. Since this model always implies

⁸³ Cf. C. Richmond, *Perspectives on Law: System, Authority and Legislation in the EU* (Florence, European University Institute 2000) p. 116-119.

⁸⁴ 'Souverän ist, wer über den Ausnahmezustand entscheidet' [Sovereign is he who decides on the exception], a well-known statement of C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (Reprint of 1922 edition, Berlin, Duncker & Humblot 1985) p. 9.

⁸⁵ As already argued by Carl Schmitt, *Verfassungslehre*, 8th edn. (Berlin, Duncker & Humblot 1993) p. 371; see also J.S. Bell, 'French Constitutional Council and European Law', 54 *International and Comparative Law Quarterly* (2005) p. 735 at p. 744.

⁸⁶ Schieman, *supra* n. 7, p. 485.

⁸⁷ See, *inter alia*, J. Schwarze, *The Birth of a European Constitutional Order. The Interaction of National and European Constitutional Law* (Baden-Baden, Nomos 2000).

⁸⁸ See, *inter alia*, V. Skouris, 'L'influence du droit national et de la jurisprudence des juridictions des Etats membres sur l'interprétation du droit communautaire', in *Festschrift für Günter Hirsch* (München, 2008) p. 175 et seq.

the existence of a higher and a lower legal order, there can only be a one-way effect. Either the national legal order is strongly influenced by the EU legal order or the opposite is the case. Indeed, the unilateral relationship between master and serf means absolute obedience of the latter to the former.

On the other hand, effects of this kind can be perfectly explained in terms of constitutional pluralism. Being autonomous, each order adapts itself autonomously to certain legal facts and developments in the other legal order. For example, instead of recognising that EU law is legally bound by rules and principles of national constitutions,⁸⁹ through the case-law of the ECJ the protection of fundamental rights has been incorporated into EU law. The recognition of these rights and principles as an integral part of EU law became necessary in order to avoid the danger that national constitutional courts would declare EU rules inapplicable in their national territory because of actual or presumed breaches of national constitutions.⁹⁰ Accordingly, as far as this point is concerned, the EU legal order has demonstrated its autonomous capacity to maintain and strengthen the unity of EU law by adapting itself to certain essential requirements of national legal orders.⁹¹

COMPETING LEGAL ORDERS

A horror juris?

Constitutional pluralism thus explains the reality of the application of EU law in the national territory as well as the interaction between the EU and the national legal orders in a better way than is possible with the aid of the concept of an integrated legal order. Nevertheless, conceptually the understanding of constitutional pluralism entails a difficult mental exercise, not to mention conceiving of a *horror juris*. It requires lawyers no longer to approach the object of their analysis in normative terms of unity of law and its inherent requirement of an exclusive relationship between law and territory as well as its implicit state-centred thinking. As observed earlier, with respect to overlapping legal orders the basic assumption of constitutional pluralism is that a given situation may be governed by two conflicting rules, each of which is valid according to the legal order of which it consti-

⁸⁹ This was denied by the ECJ early on in Case 1/58, *Stork v. High Authority* [1958-1959] *ECR* 49, 66.

⁹⁰ See, *inter alia*, L. Ficchi, 'L'Etat de droit et la jurisprudence communautaire', in M. Dony and L.S. Rossi (eds.), *Démocratie, cohérence et transparence. Vers une constitutionnalisation de l'Union européenne* (Brussels, 2008) p. 11.

⁹¹ See on the comparative law aspects of this development, in particular, K. Lenaerts, 'Interlocking legal orders in the European Union and comparative law', 52 *International and Comparative Law Quarterly* (2003), p. 873-906.

tutes a part. Consequently, in such a context the two legal orders are ‘competing’ in order to obtain the largest possible share of the ‘market’. As observed above, it is not possible to indicate which order will ultimately obtain a victory, since this is a matter of experience. This conclusion is important, since it indicates that in the model of constitutional pluralism the interaction between overlapping legal orders is inherently unstable: the law of one order is ‘twisting’ itself into the law of the other, while the latter is ‘resisting’.⁹² This process, described by Lord Denning as the ‘incoming tide’, corresponds to the reality of the interaction between EU law and national law referred to above.⁹³ In this respect, it is sufficient to point to the disturbing effects of EU directives in the field of private law (‘de-codification’) and of ECJ rulings on national systems of direct taxation. In particular, recent developments in the case-law of the ECJ regarding the latter field demonstrate that due to strong national resistance the ‘invasion’ of EU law can be partially rolled back.⁹⁴

The penetrating force of EU law

That the competitive position of EU law in the national territory is strong results mainly from its position and functioning as a common public authority. As such, it substitutes itself for and complements numerous functions of a national state.⁹⁵ *Vis-à-vis* the national legal order it takes a legitimate position in that it protects general interests which at the national level cannot be protected in an optimal manner.⁹⁶ To a large extent, the autonomous nature of the application of EU law in the national legal order is the result of the independent and complete system of EU courts. In the preliminary ruling procedure, the EU legal order has an effective instrument to guarantee the uniform application and interpretation of EU law in the various national legal orders, in particular since in the framework of that procedure, the national judiciary, as far as the application of EU law is concerned, has become a factual part of the wider system of EU courts.⁹⁷ As a matter of fact,

⁹² See Jacqué, *supra* n. 58, p. 3.

⁹³ The same observation applies to the interaction between EU law and international law, *see supra* n 35.

⁹⁴ See also M. Dahlberg, ‘The European Court of Justice and direct taxation: a recent change of direction?’, in K. Andersson et al. (eds.), *National Tax Policy in Europe. To Be or Not to Be?* (2007) p. 165.

⁹⁵ See, *inter alia*, P.-C. Müller-Graf, ‘Europäische Verfassungsordnung – Notwendigkeit, Gestalt und Fortentwicklung’, *Europäisches Wirtschafts- und Steuerrecht* (2002) p. 206 at p. 208.

⁹⁶ See L.J. Brinkhorst, ‘Europese Unie en nationale soevereiniteit’ [European Union and national sovereignty] (Leiden, 2008).

⁹⁷ Cf. D. Simon, ‘Les exigences de la primauté du droit communautaire, continuité ou métamorphose?’, in *L’Europe et le droit; mélanges en hommage à Jean Boulois* (Paris, 1991) p. 481 at p. 489-490.

it can be observed that the penetrating force of EU law is considerable. Without exaggeration it can be said that, in the current state of the integration process, for the member states the national constitution is the last bastion against the continuing invasion of EU law.⁹⁸ This strength of the EU legal order is demonstrated by the inclusion in many national constitutions of special Europe clauses since, from the point of view of the national legal order, traditional treaty ratification clauses were no longer considered to be an effective instrument to keep the dynamics of the EU legal order under control.⁹⁹

Another feature of the strong competitive position of the EU legal order is its autonomous capacity to cope with the 'resistance' of national legal orders. The incorporation into EU law of fundamental rights protection and general principles of law has already been mentioned.¹⁰⁰ There are numerous other examples of this remarkable capacity of the EU legal order. An interesting one concerns the provisions of the Treaty of Lisbon on the role of national parliaments in the EU. The answer of the EU legal order to the claims of national legal orders to strengthen the application of the subsidiarity principle is to provide for a procedure in the framework of which national parliaments are entitled to issue 'yellow cards' with respect to proposed EU legislation. However, the result of these adaptations of the EU legal order is that national parliaments are *obliged* to act as agents of the EU subsidiarity principle and to adapt their working methods to the requirements of the EU legislative process. Whether this development will actually strengthen the autonomy of national parliaments is a matter for debate. What matters is that in this structure, national parliaments are directly subject to EU law, as a result of which they become a part of the EU structure.¹⁰¹

Diverging constitutional case-law

The concept of an integrated or composed legal order inevitably implies a hierarchical relationship between the courts of both legal orders. The superior position is taken either by the ECJ or by national courts, in particular national constitutional courts. As a matter of principle, in the hierarchical model diverging views between these courts on the status of EU law in the national legal order are excluded. If the national legal order is actually subordinate to the EU legal order, a national constitutional court cannot but take account of this normative setting, as

⁹⁸ Cf. Dubouis, *supra* n. 74, p. 205-206.

⁹⁹ See, *inter alia*, A. Albi, "Europe" clauses in the constitutions of central and eastern European countries', 42 *Common Market Law Review* (2005), p. 399-423.

¹⁰⁰ It is tempting to explain the incorporation into EU law of the Charter of Fundamental Rights and the accession to the ECHR as envisaged by the Treaty of Lisbon in similar terms.

¹⁰¹ See, *inter alia*, A. Pliakos, 'National parliaments and the European Union: Necessity of Assigning a Supranational Role', 19 *European Review of Public Law* (2007) p. 757-785.

a result of which it has to accept the higher rank of EU law without reservation. The same remark is valid for the opposite situation. Since on the question of the status of EU law in the national legal order divergent national and EU case-law actually exists and is likely to increase (in particular in the domain of freedom, security and justice), the conclusion can only be that there is no hierarchy between the two legal orders, either in law or in practice. In any event, in the framework of the hierarchical model the conclusion on the existence of diverging case-law is evident: dependent on the choice of the higher order, the case-law of either national constitutional courts or the ECJ on the status of EU law in the national territory is always 'wrong'. It is obvious that this result hardly constitutes a sound basis for a dialogue between the two legal orders and their constitutional courts, the need for which is stressed in particular by constitutional lawyers.¹⁰² In the model of constitutional pluralism there is no such anomaly. Since both orders proclaim their autonomy, their respective supreme courts cannot do anything other than uphold the autonomy of their legal orders. Accordingly, constitutional pluralism on the one hand provides for an objective explanation as to why the case-law of national constitutional courts and the ECJ on the status of EU law in the national legal order cannot always be in harmony, while on the other it does not impose the pejorative conclusion, inherent in the hierarchical model, that either one or other is 'wrong'.

Co-operation and conflict

An important objection to the concept of constitutional pluralism as described above is that, in the end, there is no law but only a state of nature: two independent legal orders engaged in an almost eternal battle in the national territory to obtain superiority. In other words, there is no 'law of laws'.¹⁰³ However, this view seems to overlook a number of important aspects of this concept. To start with, constitutional pluralism is not a normative concept. It essentially describes two strongly related phenomena. First, it makes clear that a situation of independent legal orders, in which there is no territorial unity of law or unity of organisation, amounts to a 'disorder of orders'.¹⁰⁴ Secondly, it explains the actual situation of the interaction between two overlapping legal orders which are penetrating each other to an increasing extent, a process which confirms that these orders are acting according to their own autonomous mechanisms. As set out above, this inter-

¹⁰² See Select Committee on European Union of the House of Lords, *The future role of the Court of Justice*, session 2003-04, n° 6 (15 March 2004; <www.publications.parliament.uk>).

¹⁰³ Cf. the editorial in 4 *EuConst* (2008) p. 395-398.

¹⁰⁴ Cf. N. Walker, 'Beyond boundary disputes and basic grids: mapping the global disorder of normative orders', 6 *International Journal of Constitutional Law* (2008) p. 373 et seq.

action is, by its very nature, unstable. Its intensity differs as to place, time and circumstances; sometimes it takes place in a harmonious manner, in other cases it comes close to a burglary. It provokes resistance and sometimes a near war-like situation. However, a 'disorder of orders' and the absence of a mechanism to coordinate the unstable interactions between these orders should not be confused with a state of anarchy.¹⁰⁵ Inherent in the concept of constitutional pluralism is that it does not provide a normative justification for the breach of treaty or other legal obligations or, as far as EU law is concerned, that it calls into question its autonomous foundation. It only explains how through the mutual interaction between national legal orders and emerging non-state legal orders the territorial unity of law and accordingly the state monopoly over the law applicable in the national territory is called into question. Furthermore, inherent in an autonomous legal order is its capacity to adapt itself constantly to a changing environment, as a result either of positive or of negative interactions. By its very nature an autonomous order will develop in reaction to the other(s) in order to guarantee its survival. Since the scope of the EU and national legal orders is to a very large extent overlapping, both orders are in fact highly interdependent, as a result of which they are exposed to strong interactions in the sense discussed above. Both orders thus become more and more intertwined. Moreover, it must be kept in mind that, being communities based on the rule of law, both orders interact in accordance with the principles of that rule which are inherent to them and which to a very large extent they have in common as a result of their interaction. Recently, this process has been aptly qualified as 'Europeanisation' and 'co-evolution'¹⁰⁶ or, in geographical terms, as the development of a 'pluralist European constitutional area'.¹⁰⁷ What these communities of law have in common is far more important than what may separate them.¹⁰⁸ In terms of costs and benefits, a defeat in a 'war' between constitutional courts may well turn out to be a Pyrrhic victory for the other.

¹⁰⁵ See on this M. Delmas-Marty, *Les forces imaginantes du droit, tome 2: le pluralisme ordonné* (Paris, 2006).

¹⁰⁶ See R. Wahl, 'Europäisierung: Die miteinander verbundenen Entwicklungen von Rechtsordnungen als ganzen', in H-H Trute et al. (eds.), *Allgemeines Verwaltungsrecht – Zur Tragfähigkeit eines Konzepts* (Tübingen, 2008) p. 879 et seq.

¹⁰⁷ See, *inter alia*, P. Häberle, 'Europa: eine Verfassungsgemeinschaft?', in F. Ronge (ed.), *In welcher Verfassung ist Europa – Welche Verfassung für Europa* (Baden-Baden, 2001) p. 99; idem, 'Gibt es ein europäisches Gemeinwohl? Eine Problemskizze', in *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberg* (Berlin 2002) p. 1153.

¹⁰⁸ See T. Koopmans, 'The birth of European law at the crossroads of legal traditions', *American Journal of Comparative Law* (1991) p. 493-507.

CONCLUSION

The popular concept of an integrated or composed legal order appears to be a false paradigm. To explain the relationship between EU law and national law and, more particularly, the foundation of the precedence of EU law in the national legal order in terms of hierarchy always leads to an ‘either – or’ situation.¹⁰⁹ It forces us to make a choice between two options which have in common the fact that choosing one always implies distorting the essential characteristics of the other. It distorts legal reality in that it fails to explain the two-way interaction and the resulting convergence between the two orders. The concept of constitutional pluralism, on the other hand, offers an escape from the binary prison of monism and its inherent master-serf perspective. This concept provides an objective explanation of the process of ‘Europeanisation’ as a two-way interaction between two autonomously functioning legal orders.¹¹⁰ Constitutional pluralism thus seems to be a promising paradigm for the development of a theoretical framework to explain the empirically perceptible tendency that as a result of globalisation, of which European integration constitutes but one manifestation, the centuries-old exclusive relationship between law and territory is gradually being severed. It makes it possible to explain how the territory of the state is no longer subjected exclusively to law produced by or recognised by the state or, to put it differently, how to an increasing extent the law *in* the state is ‘denationalised’. Instead of the ‘either-or’ stalemate it offers a theoretical basis for a true dialogue between different sources of law and compensation for the gradual loss of state authority in a globalising environment.¹¹¹



¹⁰⁹ See the editorial of C.W.A. Timmermans in *Sociaal-Economische Wetgeving* (2008), p. 315.

¹¹⁰ An excellent example of this type of interaction is offered by the case-law of the ECJ and the ECHR. For reasons of space this topic cannot be considered here.

¹¹¹ See also T. Koopmans, ‘Sources of law: the new pluralism’, in *Festschrift til Ole Due* (Kopenhagen, Gadjur, 1994) p. 189-205.