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Abstract

This paper addresses the problem of the integration of EU law into the national legal systems. By what title can EU law impose its norms on domestic legal orders, and so much so that the conditions in which the rule-making process is organized within the Member States are considerably affected? On what conditions can EU law be integrated? What consequences does such normative integration entail? The legal dynamics of integration produces different discourses of justification that can be defined within a general grammar of relations between legal orders. The purpose of the paper is to describe these discourses and their respective relevance in the actual course of integration.

Keywords

Legal integration – European Union Law – Legitimacy – Primacy – Pluralism – Federalism

Legal Integration and Legitimacy

For it to be legitimate, this study must be carefully circumscribed. The problem it purports to address is not that of the legitimacy of the structures or institutions of the European Union but that of the integration of EU law into the legal systems of its Member States. By what title can EU law impose its norms on national legal systems, and so much so that the conditions in which the rule-making process is organized within those systems are considerably affected? On what conditions can EU law *be integrated*? What consequences does such normative integration entail? This paper addresses not so much the actual mechanics of the legal dynamics of integration but rather the kind of discourses of justification it produces and on which it rests.

What is legal integration? Achieving a better grasp of this idea is one of the challenges of this study. For the time being, let me use an image. EU law is integrated into national laws in the sense that it behaves like an *occupying authority* on foreign soil, by making use of national procedures and by mobilizing state organs so as to directly incorporate its norms within the national jurisdiction of the EU states. Admittedly it is a peaceful occupation because it is not imposed by means of constraint, which the EU lacks, but it is an occupation devoid of any direct legitimate basis: the EU being an international organization, instituted by treaties, its foundation lies not in the will of a people, sanctioned by a constitutional act, but in the series of concordant commitments given by a group of sovereign states that accept to transfer a share of their powers to it. The problem of the basis of this occupation is the problem of legal integration.

As EU norms are produced within an organization and by organs that are external to the state, their place in national law should depend, *a priori*, on the conditions domestic law sets out for foreign or international norms. However, it appears that EU norms have some peculiar authority that is different and certainly superior to the authority emanating from foreign or international norms. How to account for such a specific treatment? There are two ways to justify it: either the authority is ascribed to some national title, given a constitutional basis, but it then becomes impossible to justify any full and effective incorporation of EU law other than by admitting some contradictions within domestic law; or it is based on a European title, a rule of ‘internal primacy’ of the norms of EU law, but the difficulty then lies in identifying a political entity to which those norms might be ascribed.¹ In the first instance, we come to ask how different criteria of validity can co-exist within the same legal system, some applying to national and international norms, the others to EU norms and the national norms applying them; in the second instance, we wonder how foreign norms such as EU norms produced by an intergovernmental organization can prevail over national norms expressing the sovereign will.

To claim to absorb the problem of integration into national law but a national law that is unable to formalize a relationship of total submission to EU law, or alternatively to seek to endow EU law with its own force but a force that is powerless to provide its own basis for legitimation: that is the crux of the dilemma constantly facing European lawyers.

The Force of Legal Integration

It is not in terms of the classical opposition between monism and dualism that these contradictions can be solved. For, faced with the problems raised by European integration, the two approaches come together. They end up creating a *specific regime* for EU law. In the monist approach, foreign rules are incorporated as such into the domestic legal order. Incorporation is gained by satisfying the validity criteria laid down by the legal system in which those rules have their source. Such direct incorporation

¹ See M. Troper, ‘L’Europe politique et le concept de souveraineté’, in O. Beaud, A. Lechevalier, I. Pernice and S. Strudel (eds), *L’Europe en voie de constitution. Pour un bilan critique des travaux de la Convention* (Brussels: Bruylant, 2004).

is nevertheless the outcome of a decision internal this system which, moreover, will decide on the place the foreign rules occupy within its hierarchy of norms. If it opts to subordinate its own domestic norms to certain international norms, this is still done, by the grace of the provisions of the Constitution itself. The upshot is, practically far more than theoretically, a reinforcement of the postulate that the Constitution is superior to any other norm, whatever its source, in the domestic order. Such an approach does not readily admit that certain foreign norms, such as the norms of EU law, enjoy special protection, by being shielded from the constitutional principles of the hierarchy of norms (*lex superior, lex posterior, lex specialis*). Therefore, the only practical solution is to reserve a specific regime for EU law. In this sense, the French Constitutional Court recognized '*the existence of a [Community/EU] legal system integrated within the national system and distinct from the international legal system*'. In so doing it recognized the existence of a new regime created by the Constitution so as to govern the relations between European norms and national norms. This may justify domestic courts treating EU acts and the implementing acts of EU law as constitutionally protected measures but this also leads to these norms being subject to the 'more fundamental' provisions of the Constitution.²

The dualist approach addresses the problem in a different way. A foreign norm can only enter the national legal system by virtue of an individual act of incorporation governed by national law. Thus, the effects produced by this norm within the national system shall depend exclusively on how it has been transformed and on the state's sovereign decision to discard any acts within its national order that are incompatible with the norm. How are we to understand, in these circumstances, the application of norms like the norms of EU law that have as such '*force of law in all countries of the Community*'?³ It must be recognized that there is a relatively autonomous system, within the national sphere, standing apart from the system of national sources and governing the application of EU norms. This is precisely the approach adopted by a dualist court like the Italian Constitutional Court: the norms of EU law hold within an area of application where contrary national norms are not invalidated but are merely considered inapplicable. However, this immunity area can only be a zone of derogation; EU norms can prosper only within the bounds consented by the constitutional order. These bounds are the '*counter-limits*' that the Constitutional Court opposes to the application of EU law.⁴ Whether in a monist or a dualist system, it seems difficult to escape the contradiction engendered by the process of integration of EU law.

Probably no-one more than the European Court of Justice itself has contributed to recognizing these contradictions. On the relations between the Community legal system and the national legal systems, its first declarations showed great humility:

'The ECSC treaty is based on the principle of a strict separation of the powers of the Community institutions and those of the authorities of the Member States. Community law does not grant to the institutions of the Community the right to annul legislative or administrative measures adopted by a Member State.'

And to a plaintiff's claim that for Community law to be effective the ECJ had to be recognized as having the capacity to set aside illegal acts by the national administration, it replied that it was not allowed to '*interfere directly in the legislation or administration of Member States*'.⁵ But, once these limits had been recognized, the ECJ was careful to define a strategy for establishing the authority of Community law. That strategy involved two essential operations: the teleological interpretation and the systemic interpretation of Community law provisions making it possible both to align the rule-

² The French Constitutional Court states that the legislation transposing EU norms, and therefore these norms too, must comply with the 'rules and principles inherent to the constitutional identity of France' (Conseil const., décision n° 2006-540 DC, 27 juillet 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*).

³ Italian Constitutional Court, 27 December 1973, *Frontini*, n° 183.

⁴ See G. Itzcovich, *Teoria e ideologie del diritto comunitario* (Torino: Giappichelli editore, 2006) at 210 ff.

⁵ Case 6/60, *Humblet v. Belgian State* [1960] ECR 559.

making process with the “grand” objectives of integration and to impart to such rules the coherence of an autonomous and complete legal system. Basically, the whole work of the ECJ was to forge, from the material it was given to construe, an objective ‘unity of meaning and value’ protecting Community law against the dangers of duplication or of dissolution within the various national legal systems. The paradox is that this unity was constructed from a particular standpoint, that of the centralized interpreter of Community law. The Community legal system arose out of the objectivization of the standpoint taken by the ECJ on the international obligations contracted by the Member States, which it chose to read as a ‘*permanent limitation of their sovereign rights*’. By ‘constitutionalizing’ the EEC Treaty in this way, the ECJ sought to shield the norms that derive from it from the uncertain constraints associated with the national mechanisms of reception, the risks of new political negotiations, and the bureaucratic complications that foreign provisions are liable to encounter upon entering the national sphere. Its case law had a dual effect: it endowed Community law with a formal basis of validity by creating the conditions for a ‘*EC legality*’ while conferring complete control of this newly acquired autonomy on the ECJ itself.

The *Costa/Enel* decision was the scene for this ‘coup de force’. EC law is produced as an independent legal system by the simple effect of the formulas produced by the ECJ. These formulas are familiar:

‘the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question’.⁶

Thus, it was from ‘the very concept of Community’ – an institutional reality but above all, here, a political ambition – that the Community norms drew both their form as common rules and their force as mandatory rules. EC legality was fully aligned with a project for the economic, legal and political unification of Europe, with a ‘grand idea of order’.⁷ Legal integration was conceived as a two-tier arrangement: the assumption of a political project – the concept of Community – that served as the basis for legal integration, that is, to the subsuming of national laws within the Community legal system.⁸ From then on, it was plain that

‘those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions’.⁹

But these assertions of authority were not enough. It was difficult indeed to establish with the national authorities a hierarchical relation between European norms and national norms. In the course of integration, there was no shortage of examples of challenges to the authority of EU law. From one national order to the next, and sometimes even within one and the same order, legal integration prompted many instances of resistance. The ECJ reacted to this in two ways: one was to endeavour to incorporate within the EU’s legal order requirements derived from the protection of fundamental rights and social rights protected by some Member States constitutions; the other was to reformulate the standards for the implementation of European norms. For the ECJ, these forms of resistance did not relate to the actual existence of the ‘law of integration’, but merely to the effects it was likely to produce. Accordingly, it acknowledged that the effectiveness of EU law could be secured by less

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

⁷ P. Pescatore, ‘Les objectifs de la Communauté européenne comme principes d’interprétation dans la jurisprudence de la Cour de justice. Contribution à la doctrine de l’interprétation téléologique des traités internationaux’, in *Miscellanea Ganshof Van der Meersch*, t. II, (Brussels, Paris: Bruylant, LGDJ, 1972).

⁸ See K. Caunes, *Le principe de primauté du droit de l’union européenne. Contribution à l’étude de la nature juridique de l’Union européenne et des rapports de système européens*, Thesis, European University Institute, Florence (2009).

⁹ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1977] ECR 629.

radical means than by substituting European norms for national norms. In a decision that came twenty years after that in which these assertions of authority were first made, the ECJ stated that ‘*it cannot (...) be inferred from the judgment in Simmenthal that the incompatibility with Community law of a subsequently adopted rule of national law has the effect of rendering that rule of national law non-existent*’, the only obligation imposed on the national court being ‘*to disapply that rule*’.¹⁰ The rule of primacy of EU law was never meant to merge EU law with the laws of the Member States, but simply to respond to their essential separation and to the resulting need for some link between them. The recent *Melki* case is another example of the readiness of the Court for softening the command expressed in *Simmenthal*.¹¹

These assertions rest on the idea that there are two kinds of legal systems, one supranational and the other national, presumably equally autonomous and sovereign, and that are in fact in a position of proximity and of interdependence. This may be called the dualist representation of Legal integration. This dualism, which is not to be confused with the traditional ‘dualist’ approach to relations between national law and international norms, has little by little become the challenge to be taken up. The autonomy called for by EU law doctrine in the legal literature is based on this belief that legal integration is a specific form of compromise between the European and national legal orders, the different expressions of which should be examined and the relational techniques discovered. Such a representation determines the entire epistemology of European legal scholarship. If it is accepted that European integration is dependent upon the coexistence of two types of legal systems – autonomous and sovereign – it is inevitable their relations will be addressed from two separate standpoints: either from the control and supervision processes that EU law projects and that produces reactions in national law depending on the specific constraints of each order; or from heterogeneous treatments that national laws apply to the provisions of EU law and that in turn produce reactions in EU law, which is concerned with preserving its autonomy. European legal scholarship arising from international public law, which has long dominated integration studies, has generally chosen to adopt the first standpoint by looking at projection phenomena. Private law scholarship, which is now more active, seems more attentive to the other standpoint, which leads it to study the phenomena of diversity in relation to the reception of EU law. But these are two poles of one and the same approach to legal integration.

The dualist vision also has important practical effects. How can the gap be filled between the European formulation of objectives of integration and their translation into the national legal systems? The EU institutions traditionally responded to this by a strategy of compensation: multiplication of uniform regulations, development of autonomous interpretations of European regulations and, above all, creation of a framework in which national actors are in some sense forced to justify themselves with regard to the objectives of integration. I have proposed the term ‘*cadre de comparution*’ (‘framework of justification’) to describe the set of administrative and judicial procedures of control set up by EU law: their main effect is to expose the national authorities to perpetual tests of justification before the European institutions, before the other Member States and before their own control authorities.¹² The concept of ‘*legitimation by procedure*’, coined by Niklas Luhmann, seems also well suited to the process of legal integration organized in this way: this process consists in ‘*absorbing conflicts, weakening and exhausting participants, transforming and neutralizing their*

¹⁰ Case C-10/97, *Ministerio delle Finanze v. IN.CO.GE'90*, [1998] ECR I-6307.

¹¹ “In so far as national law lays down an obligation to initiate an interlocutory procedure for the review of constitutionality, which would prevent the national court from immediately disapplying a national legislative provision which it considers to be contrary to EU law, the functioning of the system established by Article 267 TFEU nevertheless requires that that court be free, first, to adopt any measure necessary to ensure the *provisional* judicial protection of the rights conferred under the European Union’s legal order and, second, to disapply, at the end of such an interlocutory procedure, that national legislative provision if that court holds it to be contrary to EU law” (§ 53, C-188/10).

¹² See ‘Le rôle constitutionnel de la Cour de justice des Communautés européennes tel qu’il se dégage de sa jurisprudence’ (2008) *Revue trimestrielle de droit européen*, at 29.

motives in the course of a story in which presentations and commitments are changed into presentations serving to eliminate alternatives'.¹³ However, such efforts are doomed to fail so long as they develop under the dualist postulate, which recognizes that the effectiveness of EU norms (including judicial norms) depends in the last resort on the willingness of the national authorities who apply them according to the specific constraints they have to satisfy.

For sure, the dualist representation of integration is not without its advantages: based on the principle of autonomy, it protects the integrity of each of the legal systems it brings into relation, it protects their normative coherence and the ideological system on the basis of which they find their legitimacy. However, it also has the effect of enclosing the integration regime in an insurmountable paradox: for how can one discipline relations between systems that are recognized to be sovereign and heterogeneous? To overcome this paradox, there is no other solution but to appeal to an element of 'force': the will and the power to achieve economic, social and political integration that transcends the autonomy of the legal systems. The ideology of 'European integration and unity' tends thereby to substitute for the democratic ideology that forms the basis of national legal systems. In other words, the introduction of conditions capable of ensuring the legitimation of integration 'by procedure' does not dispense with the need to resort to an outside principle of legitimacy that ends up affecting the ideological foundations of national systems.

The Forms of Legal Integration

Is it possible to depart from the dualist regime that shaped the process of European legal integration in its present forms? That there are forms in EU law that do not match this representation is not in doubt: there are hybrid instruments that combine features of EU law with features of national law, collective agreements which bring together European authorities and national authorities, or incomplete EU measures operating by reference (*renvoi*) to national law.¹⁴ However, the proliferation of such forms has in no way called into question the predominant dualist approach. The point is that it is not enough to identify original forms. One must also provide the means to enlighten in some other way the relations between legal systems that are established in the context of integration.

I propose to build a typology of these relations from a distinction drawn between two schemes: the distinction between a normative scheme and an institutional scheme¹⁵. The normative scheme corresponds to the idea that integration aims to create stable, concrete relations between the sets of norms of different legal systems. The institutional scheme stems from the idea that integration is also to be understood as a set of relations between the different authorities applying EU norms. By combining these two schemes in two basic relational modes (distinction/coordination of legal orders; hierarchy/independence of authorities), we get four possible integration regimes: i) the regime where legal orders are separate and authorities hierarchized, which corresponds to the 'dualist' representation just described; ii) the regime where legal orders are coordinated while authorities remain independent, which is the 'pluralist' hypothesis; iii) the regime of coordinated legal orders and hierarchized authorities, which is generally termed a 'federal' organization; iv) and the regime where legal orders are separate and at the same time authorities are independent, which is a 'conflictualist' type regime. By examining each of these regimes from the standpoint of European legal integration, two points are

¹³ N. Luhmann, *La légitimation par la procédure*, trad. de l'allemand par L.K. Sosoe, (Paris: Les Editions du Cerf, 2001) p. XLIX ; *Legitimation durch Verfahren*, (Neuwied/Berlin: Luchterhand, 1969).

¹⁴ See in more detail, 'Autonomie et antinomie du droit communautaire : la norme communautaire à l'épreuve des intérêts et des droits nationaux', (2004) n° spécial, 199 *Petites affiches*.

¹⁵ On the two concepts of legal order, one normative and the other institutional, see R. Guastini, *Lezioni di Teoria costituzionale* (Torino: Giappichelli editore, 2001). These two aspects of the EU legal order are captured in a recent and unusual Court's formula: "It is apparent from the Court's settled case-law that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions" (Opinion 1/09, 8 March 2011).

worth noting: first, it seems that they all find a place in the developments of the positive law of integration; second, the question of the relations of law and legitimacy are posed differently depending on the regime in question.

Law and Politics under the Dualist Regime

Let us begin from a basic point: this regime is based on cognitive monism. The legal systems being separate, autonomous and mutually exclusive, each legal system has its own standpoint on the relations between its fundamental norms and the external norms (norms from an outside source). Under the ‘conditions of reciprocal cognitive indeterminacy of legal orders’,¹⁶ there are as many perspectives on integration as there are sovereign legal systems. At the extremes of perspectives that can be envisaged lie, at one end, the perspective of EU law which views primacy as a rule with absolute authority and of universal scope within the domain of EU law, and at the other end, the national perspective that considers primacy a pure rule of outside origin the scope of which can only be relative and that must find a compromise with the hierarchical requirements of national law. It is obvious that, from this standpoint, any direct communication between legal systems seems to be excluded. If the rules coincide, if the evaluations concur, this is merely the effect of decisions that are internal to the systems concerned. There is strictly speaking no communication between legal orders that are separate and autonomous. As for assuming the existence of common values, dualism restricts itself to either ethical anticognitivism of positivist obedience (the world of values is unknowable) or to radical axiological relativism (each to his own values).

Under the circumstances, the problem facing dualism is how can one ensure the superiority of EU norms in domestic law when domestic legal systems have their own hierarchical requirements that are indifferent to those contained in EU law. How can the rule of primacy of European norms be *internalized*? The answer forged by dualism consists in transforming the rule of normative primacy into an institutional technique. Legal orders being separate, primacy necessarily involves the authorities. Primacy operates as a rule of *power-conferral*, by which the Union confers on the national authorities a title to act in conformity with EU law. The problem, though, is that there is no established hierarchy between the EU authorities and national authorities: their relationship corresponds to a regime of separation of powers and of functions.¹⁷ How can a European title be created when the national authorities hold their entitlement solely from the national constitution, as is recognized by the ECJ?¹⁸ It is somewhat misleading, then, to speak of a “conferral of power” because an authority established within an order cannot receive its power from a foreign norm. There remains, then, the possibility of giving to the national authorities ‘*European grounds for action*’. This is precisely the function of the co-operation mechanisms put in place by EU law and especially the procedure and practice of preliminary reference. The preliminary reference procedure is used to remind national courts, in the very course of the domestic proceedings, of the reasons for and objectives of integration. In this procedure, proximity becomes such that the ECJ takes on the function of a higher ranking ‘*national court*’,¹⁹ while the national court is commonly characterized as the ‘Community ordinary law court’. The strength of these ‘European grounds’ must lead the national courts to pre-empt the grounds for action drawn from their national mandate and even, as the case may be, to interpret the norms on which their jurisdiction is founded in such a way as to recognize they have the necessary

¹⁶ This is the premise of the dualist approach in international law. See C. Santulli, *Le statut international de l'ordre étatique. Etude du traitement du droit interne par le droit international* (Paris: Pedone, 2001).

¹⁷ In Case 6/64, *Costa v. ENEL* [1964] ECR 585, the Court speaks of ‘a clear separation of functions’.

¹⁸ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629, pt 21; Case C-430/93 and C-431/93, *Van Schijndel* [1995] ECR I-4705, pt 22.

¹⁹ See G. Morelli, ‘La Cour de justice des Communautés européennes en tant que juge interne’, in G. Morelli, *Studi sul processo internazionale*, (Milano: Giuffrè Editore, 1963).

powers to accomplish their mission of enforcing EU law.²⁰ By conferring on the national organs the power to interpret their own entitlement, the ECJ ‘augments’ their prerogatives, invests them with a ‘European function’, with a ‘quasi-title’ of authority. Now, enhancing the power of a third party by bestowing a title or by formulating grounds for action that substitute for other grounds, that is the very mark of authority, in which the legitimation of legal integration resides.²¹

This whole arrangement comes up against a reality test, though. It only holds provided that the national actors adhere to the reasons given by the ECJ. As numerous works of political science have shown, such support usually relies on individual motives, voluntary submission driven by a promise of emancipation or a transfer of loyalty towards what is viewed as a new centre of power and interest.²² But an authority is only legitimate if it can be recognized collectively and not just individually. Such recognition requires a general shared assumption. That assumption is embodied historically by the project of European unity: the legitimacy of integration relies on a commitment by the actors, a ‘political choice’, a certain representation of European unity.²³ The sociological works of A. Vauchez are aimed precisely at showing that, in the history of European integration, that commitment is not only a theoretical postulate but a social reality.²⁴ There has gradually formed a transnational community of jurists whose judicial, administrative, political and scholarly functions have proved permutable, conveying a shared culture and constituting a relatively autonomous field. In that lies a great deal of the success of the integration project. But should that commitment weaken or deteriorate, in a changing context, and the entire construction is imperilled. Herein lies the reason for recomposing the integration process, notably around the pluralist hypothesis.

Law and Values in a Pluralist Context

Although it is sometimes presented as the extension of dualism, pluralism is in fact the exact opposite. Firstly because it breaks with the exclusivism that characterized dualism. Pluralism accepts that legal systems may communicate, dialogue and enter into contact with each other: norms and interpretations circulate.²⁵ However, the authorities vested with the power to apply and interpret those norms remain strictly separate, each of them having its own view of the norms and the relations among norms that are applicable. But, just as there is a throng of viewpoints, there is the possibility of exchanging viewpoints. In the European legal area, authority is irretrievably dispersed,²⁶ but that dispersion is supposed to develop on a bedrock of shared values.

The striking thing is how easily this approach was able to be cast within the context of classical representations of integration. On the one side, as the reach of EU law extended to sensitive areas of internal law and national policy, the absolute authority of EU law postulated by the dualist regime was

²⁰ See Case C-432/05, *Unibet* [2007]; Case C-355/04 P, *Segi* [2007].

²¹ On the connection between the concept of authority and that of reason to act, see H.L.A. Hart, *Essays on Bentham. Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982); J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

²² On the definition of integration as a process of transfer of loyalty and activities towards a new power centre, with jurisdiction within nation states, see E.B. Haas, *The Uniting of Europe. Political, Social and Economic Forces (1950-1957)*, (Stanford: Stanford University Press, 1958).

²³ See G. Itzcovich, ‘Ordinamento giuridico, pluralismo giuridico, principi fondamentali. L’Europa e il suo diritto in tre concetti’ [2009] *Diritto pubblico comparato ed europeo*.

²⁴ See A. Vauchez, ‘Droit et politique’, in C. Belot, P. Magnette and S. Saurugger (eds), *Science politique de l’Union européenne* (Paris: Economica, 2008). See also A. Vauchez, “The Transnational politics of Judicialization. *Van Gend en Loos* and the Making of EU polity” (2010) 16 *European Law Journal*, 1-28.

²⁵ G. Itzcovich, “Legal Order, Legal Pluralism, Fundamental Principles. Europe and Its Law in Three Concepts”, *European law Journal*, forthcoming 2011.

²⁶ N. Walker, ‘Sovereignty and differentiated integration in the European Union’, (1988) 4 *European Law Journal* at 361-362.

ever less acceptable; but on the other, the approximation and cooperation procedures that had long been put in place by EU law finally meant that laws and their interpretations coincided increasingly. Under these circumstances, the pluralist argument of “the nesting of legal systems” made it possible, under the cover of a shared foundation of norms and values, to free the national authorities (and first among them the supreme and constitutional courts) from the constraints of submission, with a view precisely to giving them an incentive to join the dialogue.²⁷ For, if the norms of competing legal orders are no longer held as anything other than the ‘particular expression of common values’,²⁸ it becomes feasible for every interpreter to take them into consideration and interpret them. Thus a direct confrontation among legal systems is no longer excluded: it takes the form of a simple conflict of principles where fundamental norms of different origins are ‘weighted’. The rule of the primacy of EU law then loses its relevance; it is superseded by a method of reconciliation based on the ‘reasonable’ character of the assessments made by the various parties.²⁹ In this sense, legal orders are commensurable; what is still not commensurable in the idea of pluralism are the authorities responsible for adjudicating conflicts.³⁰

Therefore, the problem raised by this approach is symmetrical to the problem dealt with by dualism: how can common norms be maintained when the authorities applying those norms are totally independent and there is nothing to guarantee the convergence of their viewpoints? It is this problem that the processes of *translation* of legal problems developed by the ECJ and by national courts set out to tackle. For genuine communication among orders to be established it is important not just that norms should be able circulate but also that roles can be swapped. This is what is being put in place in certain recent jurisprudential developments. For example, adopting a conciliation technique, the ECJ accepts to take into consideration the interpretation made by a national constitutional court and to integrate it into its grounds by relaxing its national law review standard.³¹ Or alternatively it accepts to delegate to the national authorities a part of its power to construe the rules of EU law in a manner consistent with the requirements of European law.³² Or again, it refrains from settling the legal dispute and prefers to refer to the national court the care of completing its interpretation of the rule in relation to the specific features of its constitutional order.³³ Analogously, the French State Council accepts to modify the position its system imposes on it in order to ‘translate’ the conflict between a European directive and a constitutional norm into the sphere of control of EU law.³⁴ In another case, it expressly recognizes it has the power to construe a EU directive in respect of treaty-based norms expressing the common values of European legal systems.³⁵

²⁷ On this argument and its implications, see P. Brunet, ‘L’articulation des normes (analyse critique du pluralisme ordonné)’, in J.-B. Auby (ed), *L’influence du droit européen sur les catégories du droit public* (Paris : Dalloz, 2010).

²⁸ B. De Witte, ‘Droit communautaire et valeurs constitutionnelles nationales’ (1991) 14 *Droits* 87, at 90.

²⁹ Case C-112/00, *Schmidberger* [2003] ECR I-5659. See on this aspect, G. Itzcovich, *op. cit.* footnote 25.

³⁰ See N. Walker, ‘The Idea of Constitutionalism Pluralism’, *EUI Working Paper LAW*, n° 2002/1.

³¹ See Case C-36/02, *Omega* [2004] ECR I-9609.

³² In a decision on application of the directive on the right to family reunification of minor children of third-country nationals, the Court ruled that ‘while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive’s rules in a manner consistent with the requirements flowing from the protection of fundamental rights’ (Case C-540-03, *Parliament v. Council* [2006] ECR I-5769, pt 104). See also Case C-101/01 *Lindqvist* [2003] ECR I-12971.

³³ An example has been given in a matter concerning the granting of a regional aid measure by the Basque autonomous community in Spain. In this case, the Court recognized that, to interpret Community law on state aid, allowance must be made for ‘institutional, procedural and economic autonomy’ enjoyed by the infra-state authority concerned, the Basque autonomous community. The Court held it was for the national court to check whether such autonomy existed in the case at hand according to the criteria laid down by national law alone (Joined Cases C-428/06 to C-434/06, *UGT-Rioja et al.* [2008] ECR I-6747).

³⁴ Conseil d’Etat, Ass., 8 février 2007, *Arcelor*, req. n° 287110.

³⁵ Conseil d’Etat, Sect., 10 avril 2008, *Conseil national des barreaux e.a.*, req. n° 296845, 296907.

Be it via conciliation, delegation, abstention or translation, in all these cases, a court accepts that competing judicial authorities are in a better position than it is to solve the conflicts of interpretation it has to deal with. Better still, it attempts to understand the perspective the authorities take up. In this sense, pluralism is a form of perspectivism: it can vary points of view. But such perspectivism is not relativism, since each standpoint takes a set of common values as its reference norms. Pluralism makes it necessary to assume common supra-legal values that allow interpretations to be ordered and exchanged. It generates a 'new principle of legitimation', that is substantive and no longer procedural, axiological rather than formal: pluralism is said to be 'ordered' in that it rests on the belief in the existence of a set of higher values and of fundamental rights.³⁶ Thus the *commissaire du gouvernement* Matthias Guyomar can declare before the Conseil d'Etat that '*the legal space we share is based on common values: (...) observance of fundamental rights protected within the European framework of which we are all together, European and national courts, the final guarantors*'.³⁷

However, this hypothesis, which leads to equalizing the viewpoints and to removing the problem of the hierarchy of orders would, if taken to extremes, lead to giving any court in the position of an authentic interpreter within its legal system the power to define the substance and bounds of the fundamental principles of the European legal area. The reality test that pluralism comes up against is the risk of fragmentation and individuation of interpretations. Therefore, in the context of integration, pluralism can never be anything but apparent. Some coherence must be restored to the integration process. That can only be done by dogmatically establishing a set of common criteria of validity based on practical reason (essentially coherence and universability) – a 'hermeneutic framework' which is not fragmented – and by recognizing the ECJ enjoys a privilege in applying these criteria.³⁸ As D. Ritleng says in a fresh study of the principle of primacy: '*to the full extent that constitutional homogeneity is thus ensured between the national legal order and the Community legal order, the national courts leave it up to the Court of Justice to check that Community acts comply with constitutional principles and values*'.³⁹ The multiplicity of authentic interpreters must resolve itself to accepting there is a special interpreter of the supreme values: a European supreme court. The legitimacy of legal integration lies no longer in adhering to the political project of European unity but in the rational authority of a court.

The Idea of an "Oeuvre" and European Federalism

Is the federal hypothesis to be encountered in the process of European integration? This is a demanding hypothesis. It assumes a nesting of norms and interaction among the authorities of competing legal systems. The federalist approach describes legal systems as being both autonomous and interdependent. That interdependence is usually attested by the occurrence of what one might call 'hybrid norms'. Those who use this hypothesis to study European integration suggest it is no longer relevant to draw boundaries between the national legal systems and the EU legal system as they together form a 'compound' legal area.⁴⁰ 'Europe's compound Constitution' is materialized in a set of principles, values and even of procedures common to the legal systems.

The problem federalism raises is exactly the opposite of that posed by the previous two approaches: here it is not a question of looking for connections but of differentiating between legal orders that are intrinsically related. This problem is solved classically by a principle of allocation of powers.

³⁶ See also P. Brunet, *op. cit.* footnote 27.

³⁷ Conclusions sur Conseil d'Etat, Sect., 10 avril 2008, *Conseil national des barreaux e.a.*, (2008) *Revue française de droit administratif* at 575.

³⁸ M. Poiaras Maduro, "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism", (2007) 1 No 2 *European Journal of Legal Studies*.

³⁹ D. Ritleng, 'De l'utilité du principe de primauté du droit de l'Union' (2009) 4 *Revue trimestrielle de droit européen*.

⁴⁰ I. Pernice, 'Multilevel constitutionalism in the European Union', (2002) 27 *European Law Review* 511.

Relations between the orders are not conceived as the imposition of hierarchies of norms but as the outcome of an allocation of European and national competences. The conflicts that arise will bring about *coordination* solutions. A national norm will not be set aside because it is contrary to a norm of EU law that is superior to it, but because the national legislator has exercised his jurisdiction without allowing for the existence of a competing jurisdiction on the part of the European Union that was entitled to govern the situation in question. This type of formulation is found in two important doctrines developed by the ECJ: the '*implied powers doctrine*', which has allowed the powers of the EU to be extended within the international order,⁴¹ and the '*doctrine of pre-emption*', by which the recognition of a competence reserved to Member States does not prevent the exercise of that competence from being subject to the compliance with the provisions of EU law.⁴² In both cases, it is a matter of justifying an extension of powers by the necessity of building the Union.⁴³

To understand this type of reasoning, one must accept the idea that the EU system and the national systems form a '*coherent whole*'.⁴⁴ Federalism is based on a principle of justification of the globalist type: integration results from the inclusion within a global order of heterogeneous purposes produced by the various systems that populate the integration plane. The integration process ceases to be fragmented among legal systems separated by bulkheads, it is an order composed of special regimes, with their separate and sometimes contradictory objectives, but among which an equilibrium can be sought. Such a conception at the same time justifies the existence of an arbitrator whose task is to reconcile the different *finalités* pursued at EU and at national level: this is the role of the judge of integration – the ECJ.⁴⁵

However, this hypothesis subjects EU law to a new justification test: for if the orders commune, how can it be explained that one dominates and limits the others? The ECJ itself admits, and long has, that the pursuit of integration justifies '*intrusions of [Community/EU] competence into national sovereignty*' even beyond the fields expressly transferred to the Union, and '*wherever they are necessary*'.⁴⁶ This model engenders the fear of phenomena of colonization of domestic arrangements consolidated in domains that *a priori* are foreign to the European sphere. The extension of the reach of EU law creates what private law theorists call '*diagonal conflicts*'.⁴⁷ By this they mean conflicts of coherence that may arise from effects produced by the teleology of EU law on subjects that this law is not supposed to govern (personal status, welfare protection, nationality law, etc.). To solve this kind of problem, the case law of the United States Supreme Court has developed a doctrine of pre-emption

⁴¹ It has been possible to show that, to solve the question posed in the *AETR* ruling (Case 22/70, *AETR* [1971]), the Court could have chosen to apply its rule of primacy: primacy of Community norms over international obligations of member states in the domain of Community law. It is remarkable that, to avoid formulating the conflict of rules, the Court chose to ground its ruling on a model of coordination of powers (See the study by P. Eeckhout, in M. Poiras Maduro and L. Azoulai (eds), *The Past & Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010).

⁴² See, for example, Joined Cases C-76/05 and C-318/05, *Schwarz* [2007] ECR I-6849.

⁴³ On the idea of 'necessity' involved in the argument of implied powers, see G. Tusseau, *Les normes d'habilitation* (Paris: Dalloz, 2006).

⁴⁴ O. Beaud, *Théorie de la Fédération* (Paris: PUF, 2007) at 191-192.

⁴⁵ This role of interface and mediator appears clearly, for example, in *Viking Line* and *Laval* (Case C-438/05, *Viking Line* [2007] ECR I-10779; Case C-341/05, *Laval* [2007] ECR I-11767).

⁴⁶ Case 23/59, *De gezamenlijke Steenkolenmijnen in Limburg/Haute Autorité* [1961] ECR 3, p. 46. See on this point P. Pescatore, '*Fédéralisme et intégration : Remarques préliminaires*' (1973), republished in *Etudes de droit communautaire européen 1962-2007* (Brussels: Bruylant, 2008) p. 450. See also *The Law of Integration* (trans. C. Dwyer (Leiden: Sijthoff, 1974) at 27.

⁴⁷ See C. Joerges, A. Furrer and O. Gerstenberg, '*Challenges of European Integration to Private Law*', *Collected Courses of the Academy of European Law*, vol. VII, Book 1 (1996), (Netherlands: Kluwer Law International, 1999), at 281.

that relies on a certain understanding of the relationship between the part and the whole.⁴⁸ Thus, if state power must yield before the power exercised by the federation, although they are supposed to rest on identical bases, it is because state power is entitled to govern within its sphere of competence only a fraction of the situations covered by the powers of the federation.

A similar type of justification has been thematized by some commentators analysing the process of European integration: EU law takes on a *corrective* function for the national decision-making processes that are trapped in necessarily exclusive and limited frameworks of representation.⁴⁹ It introduces into national systems that are considered as parts of the whole, principles of openness that force them to co-exist. It provides an incentive for national authorities to allow, in their assessments, for interests that are not represented in the national legislations, those that come from or are established in the other Member States. The legitimacy of integration relies therefore entirely on the defence of ‘common interests’ represented by the legal system of the EU and transcribed by its court. But where do such interests come from? In the absence of any will of the European people to which to ascribe them, it can only be supposed that they transpire from an “*idée d’oeuvre commune*” that is manifested in the founding treaties and in each revision of them.⁵⁰

Conflictualism and the Holistic Hypothesis

It is hard to imagine that the conflictualist hypothesis can find a place in the context of the integration process. This scheme begins from a double series of distinctions between legal systems, both in normative terms and in institutional terms. Legal systems are heterogeneous, competing and incommensurable. Under this assumption, EU law does not escape from these relations of reciprocal independence. From the viewpoint of national legal systems, the position of EU law is no different from that of any other foreign law.⁵¹ That being so, the provisions of EU law are part of a discipline similar to private international law: it is the national authorities that choose, unilaterally, to attribute validity and enforceability to these norms to govern national legal relations. The rule of primacy is ‘internalized’ but pays a price for its transformation: it becomes a simple rule of conflict which is not designed to impose EU law on national law but, at best, to prevent conflicts of norms by creating an area for EU norms that national law declines to occupy.⁵²

The problem facing conflictualism is that of coordination among independent orders. It is the problem Santi Romano thematized under the notion of ‘*relevance of one order for another*’.⁵³ As there are no third norms – common values that can serve as a connection as provided for by the hypothesis of

⁴⁸ In *McCulloch v. Maryland*, 17 US 316 (1819), Justice Marshall wrote of the solution to the conflict of powers: ‘The difference is that which always exists, and always must exist, between the action of the whole on a part and the action of a part on the whole—between the laws of a Government declared to be supreme and those of a Government which, when in opposition to those laws, is not supreme’.

⁴⁹ The argument is found in C. Joerges and J. Neyer, “‘Deliberative Supranationalism’ Revisited”, *EUI Working Paper Law*, 2006/20; M. Poiares Maduro, ‘Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights’ (1997) *European Law Journal*, 55; S. Weatherill, ‘Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market’, in C. Barnard and J. Scott (eds), *The Law of the Single European Market. Unpacking the Premises* (Oxford: Hart Publishing, 2002) p. 41. See also the critical examination by A. Somek, *The Argument From Transnational Effects I: Representing Outsiders Through Freedom of Movement*, The University of Iowa College of Law, N° 09-23, May 2009 (available at <http://ssrn.com>) ;

⁵⁰ P. Pescatore, *The Law of Integration* (trans. C. Dwyer (Leiden: Sijthoff, 1974)). This idea is borrowed from Hauriou’s institutionalist analysis of law.

⁵¹ On this hypothesis see C. Joerges, ‘Rethinking European Law’s Supremacy’, *EUI Working Paper Law*, N° 2005/12.

⁵² On this model, in Italian legal theory, G. Itzcovich, *Teoria e ideologie del diritto comunitario* (Torino: Giappichelli editore, 2006) p. 391.

⁵³ Santi Romano, *L’ordinamento giuridico* (Firenze : Sansoni, 2nd ed. 1946) ; *L’ordre juridique* (1st ed. 1918), trad. de l’italien en français par L. François et P. Gothot, (Paris: Dalloz, 2002).

‘ordered pluralism’ – coordination relies exclusively on the establishment of relations specific to each system. Such relational forms are to be found in European law. EU law recognizes the process of *renvoi* by which it spontaneously refrains from settling a given matter, leaving it for national rules to apply. Thus, in the *Courage* decision, concerning the effect of European competition rules on compensation cases that are in principle governed by national contract law, the ECJ decided that EU law was not entitled to govern the subject matter.⁵⁴ It accepted that each national private law system could lay down its own rules of coordination (a form of ‘reversed primacy’). Reciprocally, it happens that EU law opens up a ‘void’ within which the rules of national law are immediately and directly applied.⁵⁵ Moreover, there are many instances of *horizontal recognition between national laws*, when the rule of a Member State is accepted as a condition for conferring subjective rights in another Member State. Another ‘conflictualist’ form consists in establishing common rules of *coordination* among national legal orders. Under the ‘new approach’ in the realm of harmonization of national laws, the European rule itself provides for the simultaneous and disjunctive application of European provisions and national provisions.⁵⁶

In all these cases, there is not strictly speaking any merger of legal systems in a global and third order. There is a mere cohabitation within each individual legal order of rules of different origins. Between them, conflict is avoided, primacy does not come into play, and relations of separate applicability are established. The legal systems are circles that only touch in the event of infringement of the fundamental values of one of them, what private lawyers call ‘*the imperative norms of national public order*’. Public order is therefore the ‘counter-limits’ opposed to the limits granted by national law for incorporation of EU law. In such a regime of coordination, the problem is to strike a balance between maintaining the autonomy of the national legal order and incorporating foreign norms. Legitimizing European integration then depends on the possibility of maintaining that balance without jeopardizing the objectives of EU law. To this end, EU law has multiplied the procedures of participation of the national authorities. The legitimation of integration depends on ‘proceduralization’. National courts and administrations are involved in ‘complex networks’ the purpose of which is to foster the development of ‘European’ solutions to specific problems.⁵⁷ These networks, that are consultation procedures, compose what are now called ‘European governance’ (‘deliberative administrative committees’ or ‘courts diplomacy’).

Even so those networks do not protect against the risk of differentiation. Nothing here guarantees that interactions will occur; the mediators are vulnerable to the capture of national interests; national arrangements are not sufficient to ensure the overall coherence on which the defence of the common good of integration depends. It is necessary therefore to posit a principle that transcends the particular instances of judgment. What might be the ‘*title of relevance*’ of EU norms for national laws? Short of any transcendent instance – political project, moral authority or “*idée d’oeuvre*” – the solution lies in a general principle of distribution that attributes to each order a specific place within the common framework. Legitimacy in a conflictualist regime is of a holistic type: it is for each order to interiorize the common good of integration, for each authority to find its place in the set of networks composing the integration process. This principle assumes that the enforcement authorities develop a broader

⁵⁴ Case C-453/99 *Courage et Crehan* [2009] ECR I-6297.

⁵⁵ See for example the Community Regulation on the European Economic Interest Grouping. The Regulation’s article 2(1) provides: ‘Subject to the provisions of this Regulation, the law applicable, on the one hand, to the contract for the formation of a grouping (...) and, on the other hand, to the internal organization of a grouping shall be the internal law of the State in which the official address is situated, as laid down in the contract for the formation of the grouping’. In its *European Information Technology Observatory* judgment of 18 December 1997, the ECJ recognized the Regulation was incomplete on the question of the grouping’s business name (C-402/96, Rec. p. I-7515).

⁵⁶ See J.-S. Bergé, ‘Le droit d’une “communauté de lois” : le front européen’, in *Mélanges en l’honneur de Paul Lagarde. Le droit international privé : esprit et méthodes* (Paris: Dalloz, 2005) p. 113.

⁵⁷ See C. Joerges, ‘On the Legitimacy of Europeanising Private Law: Considerations on a Justice-making Law for the EU Multi-level System’, (September 2003) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/73/art73-3.html>.

'European' vision of legal situations: of the type, say, recommended by the ECJ in the *Grunkin-Paul* case concerning the German authorities' refusal to recognize a child who was a German national but born in Denmark and living in that country under the double name of 'Grunkin-Paul' which had been registered by the Danish authorities.⁵⁸ It follows that the political function of the authorities implementing the law and especially of national courts becomes decisive in this case: it is through them and through the constraints they exert on public and private authorities that laws are 'Europeanized' within each national system.⁵⁹

A "Legitimacy Pathway"

The process of European legal integration has been presented as the framework of different justification tests to which EU law is constantly faced. Each test can only be understood in respect of a certain relational form among legal systems that is defined within a general grammar of relations between legal orders. In the actual course of integration, the dominant dualist regime made do with the presence of other regimes that became discretely and progressively established. That may give rise, depending on the way in which similar situations are handled, to different and sometimes contradictory solutions. Moreover, it is always possible to set oneself in the perspective of one of these regimes to evaluate the justification tests instituted by the others. For example, it is possible to understand from a conflictualist standpoint the problem of 'grounds for action' posed in the dualist regime; but then it will neither be envisaged nor solved in the same way: the dualist solution of imposing European grounds is contrary to the constraints of independence of the conflictualist regime (which will prefer a solution of internalization of European grounds in the jurisdiction of the national court). Likewise, the pluralist solution of 'translation' of legal problems may be understandable from a dualist standpoint as the outcome of successful judicial cooperation, but it is excessively risky cooperation because of the independence it seems to offer national courts. This also shows that there is no stable and general separation between the different regimes but only partial forms of coherence in relation to specific issues.

The second result of this study is that, whatever the regime under which it is contemplated, the legal dynamics of integration is subjected to a 'legitimacy pathway'. A pathway that comprises three separate sequences: (i) to resolve the tensions engendered by its relations with national legal systems, EU law is compelled to create relational mechanisms (power-conferral, translation processes, distribution of competences, relevance processes); (ii) mechanisms that only operate properly if they rest on a principle of justification (legitimation by authority, by values, by the 'whole' or by procedures) which is never quite adequate for the project of effective integration; (iii) this leads to postulating the existence of a collective representation having legal effects (political project, moral/rational authority, *idée d'oeuvre*, general principle of distribution of roles). This entire pathway has just one addressee and a single goal: the national authorities that must be persuaded to apply EU law. That may well be a good definition of integration: a set of duly justified relational mechanisms between legal systems in which the competent authorities must feel authorized to 'believe'.

⁵⁸ Case C-353/06, *Grunkin and Paul* [2008] ECR I-7639.

⁵⁹ See G. Canivet, 'Le fédéralisme judiciaire : étude comparée du fédéralisme juridictionnel américain et de l'architecture juridictionnelle de l'Union européenne', in *Liber Amicorum Guy Horsmans* (Brussels: Bruylant, 2004) at 133.

