ARETE

RESEARCH PAPER

Heterarchy between legal orders: towards a pluralist conception of the European Union

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ANALYSIS

According to Wittgenstein, "the limits of language mean the limits of my world".[1] In this sense, categories shape the world they set out to understand. For this reason, and since the way we conceptualise the world influences our perception and comprehension of the context we live in, scholars have the duty to use proper concepts to describe reality. Especially in times of legitimacy crisis and scepticism, addressing good definitions and accurate descriptions can be helpful to rationalise and understand complex issues. In particular, one of the hardest challenges of the last decades for legal philosophers concerns the analysis of the international legal order's development through categories and paradigms. Mostly, the biggest problem to solve has always been the relation between the national legal order and the international one. In fact, since States decide to cooperate or at least to recognise other States' sovereignty, they accept some limitations to their own sovereignty. This point poses serious consequences, which progressively became even more evident in the process of European integration. The aim of the paper is to highlight the importance of a pluralist approach towards the European Union in order to understand its values and purposes, the way it operates and the idea of international relations that it proposes.

[1] WITTGENSTEIN, L. (1922), *Tractatus Logico-Philosophicus,* London: Routledge & Kegan Paul LDT.

1. Kelsenian theory of legal monism and Hart's critiques

One of the most important legal philosophers who investigated the issue of the relationship between national and international legal order is Hans Kelsen. He proposed a positivist approach based on a monistic interpretation. Coherently with his pure theory of law for the State and his normativism, according to Kelsen the validity of States' law and their efficacy result from a *grundnorm* – i.e. a fundamental norm inherent to each legal order that identifies legally valid norms. Specifically, Kelsen sees in the "*pacta sunt servanda*" principle the basis to build his fundamental norm and create the international legal order, from which the States' legal orders derive. In this sense, national legal orders are delegated from the international one, which uniforms and limits them in order to grant for their equality. Therefore, States exercise those competences that the international legal order gives them and their systems represent parts of the broader international one, which is all-embracing. Interestingly, this latter principle of competence and delegation from the "upper" international level to the "lower" national one is diametrically opposed to the principle of conferral laid down in European Union law, since the supranational legal order exercises those competences that *States* decide to delegate. However, in Kelsen's view, international law does not address his norms towards States but rather it refers to individuals, as it is not separated from national law and belongs to the same hierarchy. According to Kelsen, embracing a dualistic theory of international law would imply the recognition of two separated and different systems – international and national law – based on two different fundamental norms. This would be illogical, because both international law and national law are valid, binding and enforceable at the same time. As a result of this demand of simultaneous validity, Kelsen claims that the category of "valid law" must be a single system, otherwise there could be equally valid norms with incompatible or even opposed contents. In a nutshell, in the monistic view there is a unique legal system with the *grundnorm* at its apex, which is totally presupposed as a foundation of the system, whereas all national constitutional and legal norms stand below in the hierarchy.

Actually, monistic views are not fully able to describe the way in which supranational legal orders operate. In fact, monism cannot explain antinomies within norms because it requires the international context to be uniform. Thus, there would be no point in theorising incoherence and conflicts within authorities.[2] Therefore, only dualistic theories can recognise and eventually solve

[2] See ITZCOVICH, G. (2009), Ordinamento giuridico, pluralismo giuridico, principi fondamentali. L'Europa e il suo diritto in tre concetti*, in Diritto pubblico comparato ed europeo*, Bologna: Giappichelli, Il Mulino.

antinomies between different legal orders and within the State itself. H.L.A. Hart, who regrets Kelsen's effort to define a *grundnorm* for the international legal system, also highlights Kelsen's theory weaknesses. First, describing legal orders, Hart does not necessarily imply a strict hierarchy like Kelsen does, but he involves a more articulated system composed by primary and secondary rules. In this sense, primary rules are those that establish duties – what individuals must or must not do – while secondary rules give instructions about how to introduce new primary rules, how to react in case of breaches and how to define valid norms within the legal order. This latter competence belongs to the rule of recognition, which establishes formal criteria based on sources and procedures. However, the rule of recognition does not impose a hierarchy as the *grundnorm* does. Secondary rules are not superior to primary rules since they only establish criteria to overcome those structural weaknesses that would affect a legal order exclusively composed by primary norms – which would be inefficient, static and uncertain. According to Hart, there is no fundamental norm that defines validity standards of international norms, so that these latter are effectively operative but they do not establish a proper legal system. For Hart, the international legal order only exists as a series of fragmented norms, because it cannot develop over a rule of recognition, which is necessary to create a coherent legal order.[3]

Anyway, even though Hart criticises Kelsen hierarchical view, he ends up by regretting the international system for not implementing top-down mechanisms. In fact, Hart denies the nature of legal order to international law because it lacks a clear hierarchy within his sources and norms. In so doing, not only Hart cannot describe the international legal order, but also he claims that it does not exist as a system but only as a "fact". For this reason, Hart's view is not simply dualistic, but it is mainly skeptical.

2. Santi Romano's institutionalism, pluralism and heterarchy

Moving from Hart's dualism to the purely dualist theory, this latter claims that international law and national law operate on different levels, and international law is a horizontal legal order that mainly regulates *relations* between independent and equal sovereign States. To be effective, it requires an application at the national level, as national legislature transforms international norms into rules of national law. This interpretation is the most popular one within national legal systems nowadays, especially with reference to the European Union, which is slightly different from the international legal order for many reasons. In fact, the European legal order is not simply inter-

[3] See HART, H.L.A. (1961), *The Concept of Law*, Oxford: Clarendon series.

national, but it is supra-national, which means that it has an autonomous standing, with his structures and institutions, over the States. Anyway, dualistic theories have some problems dealing with contemporary global context and risks to result simplistic and anachronistic since they reduce the legal space to just two systems.

On the contrary, not only at a global level there are many legal orders, but also within each States there are different systems. This pluralistic approach is developed in Santi Romano's theory of institutionalism, according to which a legal order is a social organisation with a concrete existence, whose law grants for the unity of the structure. For Romano, each legal order is an institution, each institution is a legal order, and institutions originate from facts, which are embedded in law to set out system's values and goals. The legal order contains norms, behaviours and social facts ordered over a principle of legitimacy thanks to which the system funds its authority and decides over the validity and the contents of its norms. Therefore, the qualification of "institution" does not depend on external factors – for example others institutions' recognition – but on internal factors, namely the structure of the social group and the organic relationship between members. For all these reasons, there can be many legal orders, even non-state ones, because the State is not the only possible legal order, but there are as many legal orders as institutions. Nevertheless, their autonomy does not imply isolation – as they can interact and constitute wider institutions – or completeness – as none legal order can afford for all his requirements and necessities. To sum, for Romano, since the existence of a plurality of social fact is objectively true, the plurality of legal orders is undeniable, because these latter are the concretisation of social facts characterised by legal justification and legitimacy to act.

This leads to a broader and more coherent view of the legal context called "*pluralism*", which is different from monism and dualism. It emerges from a less formalistic approach to the international context, which results more appropriate to understand how legal systems interact and develop. Formalistic positivist approaches, like the kelsenian and hartian ones, fail into describing complex supranational legal orders, as they lack proper punitive powers and cannot be defined by traditional legal concepts such as sanctions, legislator's authority or public and democratic legitimacy.[4] In this sense, within a non-formalistic and pluralist approach, theories have to set out a different standard of legitimacy from the mere legality, looking for more substantive and extendible

[4] See FONTANELLI, F. (2011), Santi Romano and L'ordinamento giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations, *Transnational Legal Theory* (Taylor and Francis Online), vol. 2, n. 1.

conceptions applicable to different legal orders. For these requirements to be fulfilled, many concepts develop in the international and in European Union legal order, primarily the idea of the "rule of law". This latter, has the duty to replace those formalistic and purely legal conceptions that account for the States, like the notion of order, respect of the law, sovereignty and so on. In fact, legality by itself is not enough to legitimate international law, which has to fit into some forms of authority. However, in our contemporary legal times, authority comes from democratic legitimacy, which is hard to fulfil at an international and European level – even though some steps forward have been made in this sense after the Lisbon Treaty. The constant reference to the "rule of law" is an attempt to replace the lack of democratisation and of guarantees for the European legal process to be fair and non-arbitrary.

In particular, one of the most difficult issues to accept for the States in the past years was the fact that a State can be sovereign and subject to international law at the same time. This has been overcome thanks to the concept of *consent*, as the only law that obliges States is the one that they accepted in the international context.

Moreover, an attempt to re-legitimate sovereignty lies into the differentiation between different types of sovereignty itself. In this view, each State is sovereign in an *external* sense if the exercise of power over the territory is not subject to superior external powers, while it is sovereign in an *internal* sense when there is a central source of democratic legitimised legislative power within the State.[5] In this way, only States have the legal authority to rule their citizens' behaviour. Against this claim, Professor Neil MacCormick affirmed that not all the law shall origin from the same single source of power, as many different legal orders can overlap and interact, without being necessarily in a relationship of hierarchy.[6] MacCormick criticises the idea of a definitive law deriving from sovereignty, which is supposed to be the unique legal source within the State. Thus, he invokes a post-sovereignty context with many different sources of power over the same territory and no final authority, as each State already includes different and coexistent orders. In this sense, we can affirm that there is an erosion of States' external sovereignty, which would imply an unrealistic monopoly of the legislative power over citizens.

[5] See BESSON, S. (2010), Theorizing the sources of International law, in Besson, S. and Tasioulas, J., *The philosophy of international law,* Oxford University Press.

[6] MACCORMICK, N. (1993), Beyond the Sovereign State, *The Modern Law Review*, vol. 56, n. 1, Oxford: Blackwell Publishers.

Looking at the European Union in this sense, MacCormick claims that not only sovereignty is an out of date characteristic of the States, but also overcoming this concept is not a loss but an opportunity. In fact, even though the funding treaties were international agreements to set out an international organisation, they created powers that were without precedents for an international organisation, like the power to establish compulsory and directly applicable regulations within member States.[7] In doing so, the European Community started operating together with its member states, regulating the coexistence of the legal orders through relational norms and establishing the Court of Justice. This latter has the monopoly over the final interpretation of the European law and, in its view, national law cannot ignore European law without questioning the legal basis of the European Union. In fact, in the European Union framework, the unity of the legal order is not a product of normative hierarchy, but the normative structure is a reflection of the institutional setup, which historically developed through the relations among different actors.[8] The development of the European Union through the relations between different orders shows a close connection between the institution and the States, which change and adapt simultaneously. Therefore, the special functioning of the European Union exists not only thanks to its legal organisation, but also thanks to its particular qualification of society, which is able to define a balance that was impossible to define *ex ante*. The order develops not in the project – i.e. the legal norms – but into the process and *practice*. For all these reasons, the European Union is a legal order that lacks a properly normative hierarchy, as even supremacy and direct effect are just jurisprudential developments and do not have legislative basis.[9] Thus, at this stage, none of the member states is able to claim that all the political or legal power exercised within its territory exclusively derives from internal sources[10].

Similarly, nor the European Union holds all the legal power, as it is not a "super-State" equipped with absolute or unlimited sovereignty and has to deal with different types of limitations such as counter-limits. Therefore, in Europe there is a pluralist situation that goes beyond sovereignty and recalls the existence of some forms of order that do not imply hierarchies and where elements need to not be constantly classified. In fact, the effort to keep, justify and enforce a permanent hierarchy could undermine the flexibility and adaptability of law itself. Extreme

[7] See the Article 189 of the Treaty of Rome, 1957.
[8] FONTANELLI, F. (2011), Santi Romano and L'ordinamento giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations, cit.
[9] Ibid.
[10] MACCORMICK, N. (1993), Beyond the Sovereign State, cit.

formalism could not be the best option for the development of Europe, as substantive views could suit better the purpose that lies under the creation of a community of States for the promotion of common values.

3. The issue of the "final say"

However, at this point, the question of *which* actor between these different existing authorities in the pluralist framework has or should have the "final say" over antinomies and juridical questions becomes relevant. Pluralist theories offer an interesting approach that can help solve this controversy claiming that legal orders are autonomous, but not exclusive. Therefore, rather than questioning their authority, it is more appropriate to describe these systems in terms of *authoritativeness*. This concept is based on a formal comprehension of authority but it is not exclusive, i.e. does not deny other sources of powers since it only possesses the duty to take into account a not-compulsory opinion in the process of legal reasoning.[11]

In this sense, in the EU context each autonomous claim and opinion about legal validity that derives from formal and substantive sources of law is authoritative and must be taken into account. Authoritativeness also means that eventual conflicts between norms do not determine the abrogation of one of them, but the opposition is solved through *disapplication*. Indeed, the solution of the particular case lies into the non-application of one of the conflicting norms, which remains eventually valid and potentially productive of legal effects. In so doing, applying norms does not have normative consequences, but rather it leads to practical and factual outcomes. Then, due to the autonomy of legal orders, different legal systems could provide different solutions to the same conflict, and in the act of solving particular cases, national courts can consider the national principles more authoritative and prevalent. For instance, this may happen when a European norm does not fit the competences devolved by the State or violates a fundamental right.

For, there are not fixed rules of preference, and hierarchy within legal orders is mobile and horizontal rather than vertical – so that it is more appropriate refer to it as "heterarchy". This latter expression describes a special kind of relations between legal orders where each one influences and it is in turn influenced by the others, and there is not a top-down mechanism that imposes one system's view or opinion. As the EU Court of Justice, when interpreting European law takes into account member States' law, similarly national courts look at European law to interpret national

[11] ITZCOVICH, G. (2009), *Ordinamento giuridico, pluralismo giuridico, principi fondamentali. L'Europa e il suo diritto in tre concetti, in Diritto pubblico comparato ed europeo*, cit.

norms. For all these reasons, "who" should prevail between the national legal order and the international one cannot be defined in absolute terms of definitive superiority. When abandoning exclusivity and embracing authoritativeness instead of authority, the issue of the "final say" becomes a question that has to be answered case by case rather than applying a general principle that must be followed blindly.

As a consequence, in case of judicial overlapping between the Court of Justice and one member State's national court, best practices could help in defining and allocating jurisdictions as they are able to set out standards for the European Union to work properly.[12] Then, in those cases where *uniformity* is a fundamental issue to take into account, the European position will be prominent compared to those of the member States. On the contrary, in those cases where *democratic legitimacy* is the main requirement to decide, national jurisdiction will prevail. In particular, a national court can advocate its jurisdiction together with the one of the Court of Justice each time the interpretation of European law involves fundamental rights or legislative jurisdiction or constitutional principles of the State. In the first case, in evaluating fundamental rights' violations, the national court should not focus on the case but on the general practice of adjudication at a European level. In the second case, if at a European level there are not enough guarantees to prevent an unjustified appropriation of the legislative power – i.e. the European legislation involves subjects out of the European Union's competence – national courts should intervene.

During their activity, national state's courts must operate without undermining the coherence of the European legal order, taking into account communities' different traditions in interpretatio.[13] In this context, the goal of national courts is to build a proper relation between the national and European legal order based on the best and more suitable interpretation of *principles*. Therefore, the rule to adopt will be the one that better fits and realizes ideals and goals that lie under the juridical practice of the European Union and its member states.[14] The national court, even when judging fundamental national rights, cannot perceive itself as a server of its own national interests, but it should pursue the principle of constitutional adaptation. Then, when some

[12] KLEMEN, J. (2014), *Constitutional Pluralism in the EU*, Oxford: Oxford University Press.

[13] KUMM, M. (1999), Who is the Final Arbiter of Constitutionally in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice, *Common Market Law Review*, vol. 36, Leiden: Kluwer Law International.

[14] KUMM, M. (2005), The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Theory, *European Law Journal*, vol. 11,Oxford: Blackwell Publishing Ldt.

violations of European law also violate national constitutional principles, the national court will have the final authority over the constitutionality of the disputed case about EU law. On the contrary, if the violation of the European Union law does not involve national constitutional principles, then the Court of Justice will have the final authority and will bind both the European and the national legal orders. In this sense, the Court of Justice becomes the final arbiter for the European legal order's constitutionality, while the national court remains final arbiter for the State's constitutionality.[15]

Again, there is no absolute and *ex ante* response to the question of who should have the final say over constitutional issues in Europe, coherently with the heterarchical context. In fact, nor the national legal orders nor the EU legal order hold the necessary final authority requested into the monistic view, since this latter implies a supreme and exclusive law over the territory. Leaving unsolved this issue means to accept the pluralist shape of the EU context.[16]

4. Conclusion

In the light of heterarchy, the convergence of national and supranational institutions can be found mainly towards principles related to fundamental rights, the Rule of law, democracy and constitutional principles and limits to power. In fact, compared to other issues, these principles do not produce *direct* conflicts between jurisdictions, as their concern does not regard the principles themselves but the way in which their different interpretations and developments relate between legal orders.[17] In this sense, monism and dualism cannot be used to properly describe the relationship between principles in different legal orders. On the one hand, monism solves each question of validity, effect, grade and legitimacy of juridical acts within only one specific legal order. On the other hand, dualism – intended as the separation of legal orders and the pretence that all the law develops from a single source of power into the legal order without interacting with external elements – is hopelessly linked to the traditional and old-fashioned principle of sovereignty. The only theory able to deal with an approach based on principles is pluralism, which refuses the principle of absolute authority within legal orders, also admitting that each legal order is

[15] KLEMEN, J. (2014), *Constitutional Pluralism in the EU*, cit.

[16] VON BOGDANDY, A. (2008), Pluralism, direct effect, and the ultimate say: on the relationship between international and domestic constitutional law, *International Journal of Constitutional Law*, vol. 6, n. 3, Oxford: Oxford University Press.

[17] VON BOGDANDY, A. (2014), Common principles for a plurality of orders: a study on public authority in the European legal area, *International Journal of Constitutional Law,* vol. 12, n. 4, Oxford: Oxford University Press.

not closed in itself but incorporates principles and rights from other legal orders. In this sense, pluralistic view definitively refuses the paradigm of hierarchy as symbol of order and of "final authority". Then, the European context becomes a multi-level juridical space where pretences of sovereignty turn into conflicts through different interpretations of the same principles. Therefore, conflicts are not between legal orders – i.e. between different and autonomous pretences to exclusive authority – but between comprehensions and principles to balance. Conceptions of pluralism allow scholars to go beyond the strict idea of legal validity and to overcome the formal horizon of typical positivist theories. Embracing a substantive approach based on principles rather than on norms creates flexible interactions, able to integrate, adapt and develop reciprocally.

Thus, traditional characteristics of law linked to certainty, predictability and order, are definitively out of date. They simply cannot apply to the European context as they develop on different prerequisites from those who create supranational and transnational regimes, and they are unable to interpret our contemporary inter-legal world. In addition, traditional legal issues change as they switch from exclusivity to balance; from authority to authoritativeness; from hierarchy to heterarchy; from norms to principles. Thanks to this new approach it is possible to enquire the complexity of contemporary law, which is not determined just by internal factors, but shapes thanks to different actors. Only in so doing we can preserve a coherent idea of democracy within a heterogeneous community, as recognising a core of common values beyond the differences among States is the proof that the international – and the European – legal orders have a higher goal. In fact, pluralism highlights the chance to create a transnational community that is more than the sum of its parts, where each actor can find and give sense at the same time, creating forms of law that are beyond the borders and able to realise common purposes.

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