

RECON Online Working Paper 2011/02

From Constitutional Pluralism to a Pluralistic Constitution?

Constitutional Synthesis as a
MacCormickian Constitutional
Theory of European Integration

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January 2011

URL: www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html

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RECON Online Working Paper Series | ISSN 1504-6907

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Issued by ARENA

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Abstract

This paper aims at putting forward the key elements of a constitutional theory of European law on the basis of D. Neil MacCormick's theory of European constitutional pluralism. Firstly, I consider how the institutional theory of law fleshed out by MacCormick creates the theoretical space within which it is possible to make sense of legal and political phenomena below, above and beyond the nation-state, and particularly, of the EU. Secondly, I ponder on how this affects standard constitutional theories of Community law. Because standard theoretical re-constructions of Community law are premised on the close relationship between law and nation-state, they turn to be incapable of providing a satisfactory and simultaneous answer to three fundamental questions, namely the genesis of EU law, the primacy of EU law and the endurance and growth of EU law. Thirdly, I consider the many achievements of MacCormick's European constitutional pluralism, in particular, the thesis that Community law can be approached from at least two differentiated, but equally authoritative, standpoints (the differentiated but equal standpoints thesis) and that the stability of the European legal order is rooted on non-legal bases that reveal the transformation of sovereignty in contemporary Europe (the stability beyond sovereignty thesis). But I also consider the turn that the Scottish philosopher made towards a moderate pluralism under international law, a shift that is decisive in order to understand the *problématique* of Community law and the questions that MacCormick was struggling to solve. Fourthly, I sketch the theory of constitutional synthesis, a constitutional theory of European integration which aims to apply the key insights of MacCormick's European constitutional pluralism to solving the problems which were left open by the theory of the Edinburgh professor. It emphasises the singularity of the European path towards a democratic constitution, the theory of constitutional synthesis combines sensitivity towards the fundamental pluralistic traits of Union law with a commitment towards the idea of constitutional law as a monistic means of social integration.

Keywords

Constitutional Law — Grundnorm — Law — Legal Pluralism — Legal Theories of Integration — Master Rule — Nation State — Sovereignty

Introduction

This working paper explores in a critical, but very sympathetic, fashion D. Neil MacCormick's writings on European integration. It is structured in four parts and a conclusion. The first section explores the main constitutional implications of MacCormick's institutional theory of law. I consider how the breed of jurisprudence advocated by the Scottish philosopher created the theoretical space within which it is possible to make sense of legal and political phenomena below, above and beyond the nation-state. The second section offers a critical analysis of the standard constitutional theories of Community law. I claim that, because standard theoretical re-constructions of Community law are premised on the close relationship between law and nation-state, they turn out to be incapable of providing a satisfactory and simultaneous answer to three fundamental questions, namely (1) how a European constitutional law came about (the genesis riddle); (2) in what relation European constitutional law should stand *vis-à-vis* national constitutional law (the primacy riddle); and (3) what the sources of the stability of the Community legal order are (the stability riddle). The third section dwells on the many achievements of MacCormick's constitutional theory of European integration, hereafter referred to as European constitutional pluralism. I give an account of what to me seem to be the two main elements of European constitutional pluralism: the thesis that Community law can be approached from at least two differentiated, but equally authoritative, standpoints (the differentiated but equal standpoints thesis) and that the stability of the European legal order is rooted on non-legal bases that reveal the transformation of sovereignty in contemporary Europe (the stability beyond sovereignty thesis). I also consider the turn that the Scottish philosopher made towards a moderate pluralism under international law in the second half of the 1990s, a shift that is, in my view, decisive in order to understand the *problématique* of Community law and the questions that MacCormick was struggling to solve. The fourth section contains the main elements of the theory of constitutional synthesis, a constitutional theory of European integration which aims to apply the key insights of MacCormick's European constitutional pluralism to solving the problems which were left open by the theory of the Edinburgh professor. By emphasising the singularity of the European path towards a democratic constitution, the theory of constitutional synthesis combines sensitivity towards the fundamental pluralistic traits of Union law with a commitment towards the idea of constitutional law as a monistic means of social integration. The fifth section contains the conclusion.

The Constitutional Implications of MacCormick's Institutional Theory of Law

As Massimo La Torre argues at length in a chapter to a forthcoming volume on MacCormick's theory,¹ MacCormick's institutional theory of law is properly interpreted as the theoretical *deepening* of some of the key insights contained in the "classical" positivism of Hans Kelsen and H.L.A. Hart (and reflecting, I may add, a keen interest in Scandinavian Legal Realism). The key distinctive contribution of Neil

¹ Agustín José Menéndez and John Erik Fossum, *Law and Democracy in D. Neil MacCormick's Legal and Political Theory*, Springer, Law and Philosophy series 93, forthcoming 2011. This working paper will be published as chapter 11 of the book.

MacCormick to jurisprudence is his emphasis on the *institutional* dimension of law as a normative order. As already argued in the Introduction to this volume,² MacCormick defended a pluralistic understanding of law, capable of accounting both for its normative underpinnings and its societal roots, and specifically aimed at clarifying the argumentative character of law.

For the purposes of this working paper, it is perhaps proper to consider in greater detail what MacCormick's institutional theory of law has contributed to the proper answering of three classical jurisprudential questions, namely, (1) the functions of law and the limits of its province; (2) the normative foundations of law; and (3) the pieces that make up law. A sequential and joint consideration of these issues is proper because it reveals the extent to which MacCormick's institutional theory of law has managed to mould legal theory in such a shape as to make fit much better with the democratic and social state of law, or as Neil himself used to refer, the democratic and social *Rechtsstaat*.

Firstly, MacCormick made a major contribution to a nuanced and multidimensional understanding of the social functions of law which was at the same time conscious of the limits of law as a means of social integration and of its normative roots.

Kelsen made phenomenal contributions to legal theory, including the basic intellectual map with which we still approach positive law: the Kelsenian pyramid, which was, after all, perhaps not so much Kelsenian, but Merkelian;³ Kelsen was also a ground-breaker when he pointed to the systemic character of law as a means of social integration,⁴ structurally creating the intellectual space in which the multidimensional character of the societal functions of law could be thought of. However, there was a clear "prescriptivist" bias in Kelsen. Indeed, the insistence of the Austrian legal theorist on the "coercive" character of law was ambivalent at the very least,⁵ and seems to have become even more so by the end of his life (especially in the *General Theory of Norms*, written by the so-called "second Kelsen").⁶ So, for all the structural contribution, Kelsen still defined law as a coercive social technique. This was, in a way, the point of departure of Hart. When he criticised Hobbesian and Austinian legal positivism for its definition of valid norms as the commands of the sovereign, he was laying down the ground for a criticism of Kelsenian reduction of

² Indeed, MacCormick and Ota Weinberger are rightly characterised as the founding fathers of the "new" institutional approach to law. See MacCormick & Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism*, (Dordrecht: Kluwer, 1996). On the two jurisprudential traditions that these two authors represented, see Massimo La Torre in this volume.

³ *Ibid.*, p. 235 *et seq.* See, also, "Foreword to the Second Printing of Main Problems in the Theory of Public Law", in: Stanley L. Paulson & Bonnie Litschewski Paulson (eds), *Normativity and Norms. Critical Perspectives on Kelsenian Themes*, (Oxford: Oxford University Press, 1998), pp. 3-22, especially p. 11 *et seq.* The very metaphor of the pyramid seems to have been coined by the French translator of the *Pure Theory*. This was, for once, a clear added value resulting from the sensitivity of one national tradition to specific mental and architectural forms.

⁴ Hans Kelsen, *The Pure Theory of Law*, especially p. 193 & 201.

⁵ Hans Kelsen, "The Law as a Specific Social Technique", (1941) 9 *University of Chicago Law Review*, pp. 75-97.

⁶ Hans Kelsen, *General Theory of Norms*, (Oxford: Oxford University Press, 1991). See, also, Stanley L. Paulson, "Kelsen's Theory of Law: The Final Round", (1992) 12 *Oxford Journal of Legal Studies*, pp. 265-274.

law to coercion and conflict-solving.⁷ Hart found that such a reductionist approach failed to capture not only the fact that power was constituted by law, but also that law was also a key institution in the production of normative knowledge; the latter function being somehow autonomous (even if not independent) from the coercive side of law. As a result, Hart claimed that Hobbesian and Austinian theories of law failed to explain, in a coherent and economic fashion, the dynamicity and reflexivity of the legal order *beyond* the holder of coercive power, beyond the *sovereign*.⁸ This prompted Hart to introduce his famous distinction between primary and secondary norms, including, among the latter, the rule of recognition.⁹ The shift from norm to system also implied re-characterising the sense in which law was coercive, at the same time that it enlarged the view on the social tasks that law discharged as such a system. Hart could pay heed to the fact that law was expected not only to solve conflicts, but also to be the empowering grammar with the help of which individuals could construct their world of social relations (the typical function, indeed, of contract law and private law in general) and to be the support of collective action in the pursuit of collective goals (as, typically, public law is, at least in the *Sozialer Rechtsstaat*).¹⁰ However, there was still a remnant of prescriptivism in Hart's theory, which was reflected in his characterisation of law by reference to the law of the nation-state. Not only were constitutional and legal pluralism depicted as the result of political pathologies,¹¹ but critically Hart (contrary to Kelsen) remained sceptical of the legal character of international law¹² (and a trifle Eurocentric in his consideration of non-Western legal orders).¹³ MacCormick pushed the insights of both Kelsen and Hart further forward by clarifying the implications of a systemic approach to law, fully conscious of the social tasks that the legal order, as a whole, is expected to perform. In particular, the three-fold set of social tasks discharged by law as revealed by Hart should not only make us ponder over the extent to which legal systems should be defined by exclusive reference to one of the techniques through which they integrate society (coercion) to the exclusion of others (ensuring certainty of moral knowledge and enabling the de-centralised shaping of the social fabric), but also over the degree to which law cannot but be the reflection of the normative and institutional imagination of human beings.¹⁴ This moved MacCormick to re-characterise law as a social means of integration which complements critical morality in the task of integrating society when the complexity of societal relationships, the sheer number of those involved, or the speed at which social or environmental changes take place,

⁷ H.L.A. Hart, *The Concept of Law*, (Oxford: Oxford University Press, 1961), Chapters III & IV.

⁸ *Ibid.*

⁹ *Ibid.*, Chapter V.

¹⁰ On this, see Tony Honoré, "The Dependence of Morality on Law", (1992) 13 *Oxford Journal of Legal Studies*, pp. 1-17, and "On the Necessary Connection of Law and Morality", (2002) 23 *Oxford Journal of Legal Studies*, pp. 489-95. This also entailed a renewed understanding of the point of coercion. See Hart, note 7 **Error! Bookmark not defined.***supra*, p. 198: "Sanctions are therefore required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not."

¹¹ See Hart, note 7 *supra*, pp. 117-121.

¹² *Ibid.*, Chapter X.

¹³ See Peter Fitzpatrick, *The Mythology of Modern Law*, (London: Routledge, 1992).

¹⁴ Neil MacCormick, *Institutions of Law*, (Oxford: Oxford University Press, 2007), p. 24 *et seq.*

make integration through spontaneous order reliant upon the normative and institutional genius of human beings simply insufficient, and incapable of guaranteeing stable social integration.¹⁵ This not only reveals that coercion is only one of the legal techniques of social integration, but it also makes explicit the extent to which coercion cannot, by itself, found a legal system, or ensure the stability of the legal order (a conundrum that plagues the Hobbesian approaches to law, not to be thrown away in haste, as Waldron reminds us in his contribution to this volume). But after this is acknowledged, there is no good reason left to restrict the legal phenomenon to nation-state law.¹⁶ Nation-state law may be the more relevant form of law in modern societies, but that still does not make it the *only* form of law.¹⁷ If law is defined by taking the plurality of tasks that it discharges into account, and of the corresponding social techniques employed to discharge such tasks, instead of a clear cut and binomic characterisation of institutional systems as legal and non-legal, we should draw the limits of the province of jurisprudence in gradualistic (“range”) terms, and be open to the consideration and re-construction of legal orders *above*, *below* and *beyond* the state.¹⁸ This also resulted in MacCormick stressing the “constructed” character of the legal system, thereby reflecting not only its being posited (thus, our talk of *legal positivism* and *positive law*), but also, and perhaps crucially, the fact that the legal system is not a pre-given reality, but a regulatory ideal (as I will shortly claim a premise with a Kelsenian flavour).¹⁹ Whether, in such a re-construction, we emphasise or play down the national borders and the (alleged) unbound primacy of the national constitution becomes and open, not a given question. In this regard, MacCormick broke ranks more with Hart than with Kelsen. While the Austrian legal theorist was a child of the Austro-Hungarian Empire, and a committed internationalist,²⁰ Hart was (as already indicated) somehow defiant of international law,²¹ and regarded the manifold constitutional problems resulting from de-colonisation as temporal departures from the close and narrow attachment between law and the nation-state.²² Indeed, the re-reading of Kelsen was rather influential in shaping the mature form of European constitutional pluralism.²³

¹⁵ *Ibid.*, p. 21 *et seq.*

¹⁶ Neil MacCormick, “Law as Institutional Fact”, (1974) 90 *Law Quarterly Review*, pp. 102-129; MacCormick & Weinberger, note 2 *supra*; and MacCormick, *Institutions of Law*, note 14 *supra*.

¹⁷ *Ibid.*, pp. 39-49.

¹⁸ MacCormick was existentially and politically interested in state forms different from that of the nation-state. The “utilitarian nationalistic” position Neil openly advocated in “Independence and Constitutional Change” was not so much interested in specific constitutional clothes as in the diversification of “real centres” of power. See “Independence and Constitutional Change”, in: Neil MacCormick (ed), *The Scottish Debate*, (Oxford: Oxford University Press, 1970), pp. 52-64. See, especially, p. 55: “Upon this view of the matter, the real question of principle is not whether Scotland should become wholly independent or not. It is whether or not we shall choose to establish some form of separate political institutions in Scotland, and shall take a pragmatic and utilitarian view in deciding which form would be most beneficial.”

¹⁹ Joxerramon Bengoetxea, “Legal System as a Regulative Ideal”, (1994) 53 *ARSP*, [Supplement] pp. 66-80.

²⁰ On Kelsen and the underlying normative theory to the pure theory of law, see Lars Vinx, *Hans Kelsen’s Pure Theory of Law*, (Oxford: Oxford University Press, 2007).

²¹ See Hart, note 7 *supra*, Chapter X on international law.

²² See Hart, note 7 **Error! Bookmark not defined.** *supra*, pp. 119-23. The fact that the British philosopher labelled such situations as “pathological” may reveal that, while his legal theory was pluralist friendly,

Secondly, MacCormick clarified the normative foundations of law and state. As has already been indicated when considering his analysis of the functions of law, MacCormick embraced the systemic and dynamic approach to law and jurisprudence introduced by Kelsen and Hart. But he was willing to explore the very foundations of law, questioning the implicit premise in both Kelsen and Hart, namely, the continued existence of the state. This prompted him to stress, as was already hinted, that law is, indeed, made possible by the normative and institutional imagination of human beings, and to claim “radically” that law must, indeed, be understood and theorised not from the standpoint of institutional actors, but from that of the addressees of the law, *i.e.*, citizens. Both Kelsen and Hart had fought the corner of legal autonomy against sociologists (to be followed as advocates of a reductionist view of law by economists and critical legal scholars),²⁴ and had stressed that law could only be meaningfully understood from a standpoint internal to the law, which, indeed, takes the normative claim (or claims) of law seriously. This was famously phrased by Hart as the distinction between the internal and the external points of view, to which I have already referred.²⁵ However, both Kelsen and Hart were somewhat victims of the prevalent worldviews (even in their social-democratic political entourages), and tended to take the state for granted the “state” (indeed, as we saw, of the nation-state) as the founding block of law. This allowed them to set aside complex foundational questions, and to take for granted that law, as a means of social integration, was somehow intrinsic to this pre-given entity, the state. This is reflected in the tendency of both scholars to identify the internal point of view of law with that of institutional agents. Legislatures and judges were decisive in the process of defining the *internal point of view*, both in leading the process of the identification of the contents of the *grundnorm* (the historical constitution to which it pointed),²⁶ and of the socially-backed rule of recognition (defined by reference to the social practice of judges).²⁷ On his side, MacCormick problematised the very foundations of law as a means of social integration, and made it unequivocally clear not only that law was possible because of

his political theory may not have been so. Indeed, Hart seems to have shared with Kelsen the belief that only a monistic legal order could properly ensure social integration trusted to it. This accounts for the implicit “creeping” in Hart’s theory of a series of assumptions concerning a common “cultural” code shared by judges, which plays a key role both in ensuring that one and the same rule of recognition underlies the practice of all judges, and in framing their discretion in hard cases. On “cultural” codes and judicial application of law, see Kaarlo Tuori, “Fundamental Rights Principles: Disciplining the Instrumentality of Policies”, in: Agustín José Menéndez & Erik Oddvar Eriksen (eds), *Arguing Fundamental Rights*, (Dordrecht: Springer, 2006), pp. 33-52. What is probably lurking there is the “elitist” drive of which not even committed Labourites, such as Hart, were fully conscious at the time. See Massimo La Torre, “The Hierarchical Model and H.L.A. Hart’s Concept of Law”, (2007) 93 *ARSP*, pp. 81-100.

²³ Catherine Richmond, “Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law”, (1997) 16 *Law and Philosophy*, pp. 377-420, was perhaps the most influential piece on MacCormick’s nuancing of his pluralistic position. See *infra*.

²⁴ See Kelsen, “Una fundamentación de la sociología del derecho”, (1993) 12 *Doxa*, pp. 213-256; Hart, “Scandinavian Realism”, in: *idem*, *Essays in Jurisprudence and Philosophy*, (Oxford: Oxford University Press, 1983), pp. 161-169. See, also, Owen Fiss, “The Death of Law”, (1986) 72 *Cornell Law Review*, pp. 1-16.

²⁵ Hart, *The Concept of Law*, note 7 *supra*, pp. 89-91 on the internal and external points of view on law.

²⁶ Kelsen, *The Pure Theory of Law*, note 4 *supra*, p. 196: “The dynamic type is characterised by this: the presupposed basic norm contains nothing but the determination of a norm-creating fact, the authorization of a norm-creating authority or (which amounts to the same) a rule that stipulates how the general and individual norms of the order based on the basic norm ought to be created.”

²⁷ Hart, *The Concept of Law*, note 7 *supra*, pp. 100-109 & 116.

the normative and institutional imagination and proclivities of human beings, but also that the proper justification of law had to do with the potential of constitutional democratic legal orders to realise - to the largest possible extent - the autonomy of individuals.²⁸ This constitutes the background to MacCormick's breaking ranks with both Kelsen and Hart by promoting a "norm-user" approach to legal theory, in which, at the end of the day, the internal point of view hinges on the social practices of *citizens at large*.²⁹ This is, indeed, why MacCormick came to affirm very clearly, in *Institutions of Law*, that all legal systems are based upon a constitutional convention, underpinned by citizens.³⁰ This shift has not only legal-dogmatic implications, but also contributes to the reconciliation of legal theory with democratic public philosophy, by democratising the very basis upon which the definition of the province of law rests.

Thirdly, MacCormick has made major contributions to our understanding of the structure of legal orders and legal argumentation. In particular, I would like to stress that his *Institutional Theory of Law* weighs up the role of principles in legal argumentation with the necessary rule-based character of modern systems. It is well-known that Hart shared with classical legal positivism the view that hard cases were not governed by law. The "penumbra" of legal norms required judges to act as legislators in deciding the case at hand, and establishing a precedent which would be part of the applicable law next time³¹ (a characterisation very congenial to the *common sense of common lawyers*, one must add).³² Clearly influenced by Scandinavian legal realists,³³ and dialectically motivated by the major implications of Dworkin's criticism to Hart's legal positivism,³⁴ MacCormick paid great attention to the processes through

²⁸ See Neil MacCormick, "The Relative Heteronomy of Law", (1995) 3 *European Journal of Philosophy*, pp. 69-85.

²⁹ MacCormick, *Legal Theory and Legal Reasoning*, (Oxford: Oxford University Press), 1978, pp. 275-292; *idem*, *H.L.A. Hart*, (Princeton NJ: Princeton University Press, 2008) (second edition), pp. 202-6; MacCormick, *Institutions of Law*, note 14 *supra*, p. 57, 61 *et seq.*, 238 & 286 *et seq.* This is closely associated to the central claim made by MacCormick that law is one of the many normative orders of society, and that state law is one of the many institutionalised normative orders in a given society. On the purity of the pure theory of law, MacCormick stated that "Law is not only an object of study for legal science, but it is in some form an element in the lives and actions of citizens and officials", in: Hart, *The Concept of Law*, note 7 *supra*, p. 23.

³⁰ *Institutions of Law*, note 14 *supra*, p. 287: "Obviously, what makes them [constitutions] work is the will of whichever people conceive the constitution to be their constitution, when there are enough people, sufficiently agreed (though certainly never unanimous) about the ideological underpinnings. What they agree on, however articulately or tacitly, is a common norm that they ought to respect the constitution thus underpinned, and that anyone purporting to exercise public power must do so only in the terms permitted by the constitution."

³¹ H.L.A. Hart, "Positivism and the Separation of Law and Morals", (1958) 71 *Harvard Law Review*, pp. 593-629, at 609 & 614, on the discretion of judges in the area of penumbra.

³² On how the artificial reason of law elucidated by judges was still said to be authored by the people, see Alan Cromartie, "The Idea of Common Law as Custom", in: Amanda Perreau Saussine & James Bernard Murphy (eds), *The Nature of Customary Law*, (Cambridge: Cambridge University Press, 2007), pp. 203-227.

³³ Karl Olivecrona, *Law as Fact*, (London: Stevens, 1971) (second edition), Chapters III, IV & V. See, also, Silvana Castignone, *La macchina del diritto: il realismo giuridico in Svezia*, (Milan: Edizioni di Comunità, 1974), and Liborio L. Hierro, *El Realismo Jurídico Escandinavo*, (Valencia: Fernando Torres, 1981).

³⁴ Ronald Dworkin, "The Model of Rules (I)", now in *Taking Rights Seriously*, (London: Duckworth, 1978), pp. 14-45.

which norms were applied from his very first writings. *Legal Theory and Legal Reasoning*³⁵ was one of the handful of decisive books on legal reasoning coming from the positivistic tradition which highlighted the central role of re-constructive argumentation in the forging of law as a social reality.³⁶ While, in the first edition of the book, MacCormick was still engaged in figuring out how the central role of principles in legal theory could be accommodated within classical British positivism,³⁷ he progressively shifted away from Hart on this matter and came closer to what is generally labelled as a post-positivistic position close, but not identical, to Dworkin's.³⁸ To the claims of Dworkin concerning the texture of legal argumentation, the institutional theory of law added the point that principles make it possible to combine the authoritative collective regulation of social relations with the division of labour between social institutions in order to avoid overtaxing the capacities of any of them. In particular, they render it possible to split the production of collective-action norms between legislative and regulatory decision-making processes. While this entailed recognising that legal principles allowed the prospective regulation of social relations to be combined with the instillation of normative values into the law, MacCormick rightly insisted on the fact that the specific and unconditional character of rules is fundamental to the process of integration through law, as rules provide authoritative, non-contradictory and explicit (ready-made, if you wish) normative guidance, in the vast majority of cases in which this is needed to solve conflicts, to allow citizens to shape their lives in mutual agreement with others, and to pursue collective goals through co-ordinated collective action.³⁹ This implied the application of Dworkin's argument in favour of characterising law as a matter of principle in favour of a characterisation of law as a matter of rules and principles. MacCormick was led to this insight by his bottom-up re-construction of law as a reflection of the normative and institutional imagination of human beings. Indeed, democratic law needs to be quantitatively an order of rules in order to ensure that law is applied in a

³⁵ Neil MacCormick, *Legal Theory and Legal Reasoning*, (Oxford: Oxford University Press, 1978).

³⁶ In addition to MacCormick's, see Robert Alexy, *The Theory of Legal Argumentation*, (Oxford: Oxford University Press, 1987); Aleksander Peczenik, *On Law and Reason*, (Dordrecht: Kluwer, 1989); Ailius Aarnio, *The Rational as Reasonable, A Treatise on Legal Justification*, (Dordrecht: Kluwer, 1987).

³⁷ MacCormick, *Legal Theory and Legal Reasoning*, note 29 *supra*, pp. 152-194.

³⁸ MacCormick, "The Concept of Law and the Concept of Law", (1994) 14 *Oxford Journal of Legal Studies*, pp. 1-23, at 19 *et seq*; *idem*, *Rhetoric and the Rule of Law*, (Oxford: Oxford University Press, 2005), p. 189 *et seq*; See, also, MacCormick in this volume.

³⁹ MacCormick, *Rhetoric and the Rule of Law*, note 38 *supra*, p. 6. "Whether we hold a non-cognitivist or a cognitivist approach to morality, we will regard law as a necessary complement of moral reasoning in the integration of modern societies. The cognitivist will consider law necessary because even if there are objectively, or at the very least inter-subjectively valid moral principles, they are unfit to serve as common action norms in modern societies. As already observed, there may be a correct moral answer to each moral problem, but the limited moral faculties of human beings leave us uncertain concerning their actual content. Morality tends to be expressed in the language of principles (first and foremost, the principle of universalisability), while modern conditions call for integration through concrete rules attuned to concrete ethical and prudential questions. Furthermore, moral norms are fragile tools of social integration, given the fact that the inclination to comply with moral requirements may be undermined in absence of the insurance provided by institutions ready to coercively enforce common action norms, or, whether due to disagreement, weakness of will, or simply ignorance, substituted or replaced as a spring of action by the fear of being at the receiving end of the sanctioning power. The role of law as a means of social integration is even further stressed from a non-cognitivist standpoint, given the inexistence of objectively or even inter-subjectively valid moral principles. Under such a perspective, law is not so much a complement of morality, but the key medium which holds together a society."

de-centralised manner by citizens; only then would it be able to discharge its task of complementing critical morality in the integration of society (just consider how the self-assessment of the income tax, characteristic of democracies, is dependent on the tax being defined by very precise and detailed rules, not principles). Moreover, if law is functionally a matter of rules, but argumentatively a matter of principles, there is less of an obstacle to come to terms with nascent legal orders beyond the state, based upon principles which are open to be progressively “thickened” by the production and derivation of rules (as, indeed, Community law can be fairly described to have been and, to a large extent, continues to be).

These three key contributions can be seen as a major step towards the exploration of the constitutional implications of positivism as a legal theory. MacCormick broke the allegedly necessary link between law and the nation-state, and suggested a less drastic contrast between law and other institutional orders, pushing the classical tradition of the general theory of law and the state *below, above and beyond the nation-state*. The Scottish philosopher *democratised* the underlying approach of positivism by placing the citizen, not institutional agents, at the core of legal theorising. Finally, the Edinburgh professor calibrated the relationship between the components of the legal order, rules and principles, by showing the close relation between a bottom-up legal order and rules, and also by showing the critical mutual dependence of rules and principles. These constitutional explorations made positivism more self-conscious of its normative baggage, and helped the liberal and democratic public philosophy that propelled both Kelsen and Hart to become fully-reflected in positivistic legal theory. The hidden legacies of Hobbes (or, as some authors would have it, of natural law) were detected and abandoned in MacCormick’s institutional theory of law.

The Intriguing (Legal and Political) Nature of the European Union and of its Constitution

The process of political, economic and legal integration unleashed by the Treaty establishing the European Coal and Steel Community (and further refined and completed by a succession of additional Treaties, up to the Treaty of Lisbon of 2007) has resulted in the creation of a supranational level of government, framed by a constitutional legal order and equipped with an autonomous institutional structure. This is what is generally referred to as the European Union, as Union law (or still very frequently, Community law, as I will do in this paper), and as “Brussels” (meaning the supranational institutional structure).⁴⁰

In addition, Community law and European institutions play a key and, indeed, growing, role in shaping the legal and political orders of Member States of the European Union (and even of states which are not full members of the Union).⁴¹ Whatever the concrete quantitative figures, it is a fact that the key constitutional principles and fundamental policies legally articulated at the supranational level (Community laws made in Brussels, if you wish) play a decisive role in framing

⁴⁰ See, in general, John Erik Fossum & Agustín José Menéndez, *The Constitution’s Gift. A Constitutional Theory for a Democratic European Union*, (Lanham MD: Rowman & Littlefield, 2011).

⁴¹ Including not only the EEA Member States (Norway, Iceland, Liechtenstein), but also Switzerland and the non-Member States which have adopted the euro as their unofficial (or even official) currency.

national politics.⁴² Similarly, European integration has come hand in hand with the Europeanisation of national legal and political orders.⁴³ Furthermore, it became almost self-evident that Community laws would prevail over clashing national legal provisions, with the sole, and rather theoretical, exception of the “core” principles of national constitutional law.⁴⁴ This is the core content of the European constitutional practice, which acknowledges the primacy of Community law over conflicting national norms.

Having said that, all these developments have taken place within a constitutional structure which is *formally* characteristic of public international law. It is still the case that the European Union is, formally speaking, an international organisation, Community law an international legal order, and the institutions of the Union tend to be re-constructed as purely intergovernmental, or, at most, supranational, agencies under the, more or less, direct control of their principals, the Member States. This is why national political actors and national constitutional judges claim that the European Union is an international organisation *sui generis*, and thus, that Community law should be constructed as an international legal order (at most, of a special and peculiar breed).⁴⁵ However, the characterisation of the European Union, its law and its institutional structure as “international” is overly conservative and flies in the face of the constitutional developments and practices that have just been referred to. This is why “supranational” political actors and supranational judges seem to have come to endorse the view that Community law is the constitutional law of a state (if not an actual nation-state) in the making, to wit, the European Union.⁴⁶ This would, to a large extent, explain the present constitutional practice, but it would also leave many questions unanswered concerning how it came about (who authorised this constitutional transformation and when?) and how it can be rendered compatible with the (decisive) primacy of the national constitutions and the persistence of the autonomous constitutional identity of each Member State and its respective national legal order. Such principles are part and parcel not only of national constitutional law, but also of Community law and of the Treaties of the European Union in particular.

In particular, the two standard approaches to the constitutional theory of European integration fail to provide a satisfactory and simultaneous answer to three basic

⁴² There has been a “conflict of the statistics” concerning the percentage of the total number of new laws which are approved in Brussels and in national capitals. But the real issue is the substantive weight of Community law, its framing power of national political wills. On the socio-economic dimension, see Raül Letelier & Agustín J. Menéndez (eds), *The Sineews of Peace*, (Oslo: ARENA, RECON Report 8/2009).

⁴³ Indeed, one of the leading research centres on European studies is called ARENA (Advanced Research on the Europeanisation of the Nation State). See, for example, Johan P. Olsen, “The Many Faces of Europeanization”, (2002) 40 *Journal of Common Market Studies*, pp. 921-952 and *Europe in Search of a Political Order*, (Oxford: Oxford University Press, 2006). The reader should be informed that my judgment about the importance of the centre may be clouded by the fact of having been closely attached to it for a number of years.

⁴⁴ Mattias Kumm, “Who is the final arbiter of constitutionality”, (1999) 36 *Common Market Law Review*, pp. 351-86, and “The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty”, (2005) 11 *European Law Journal*, pp. 262-307.

⁴⁵ See, for example, Derrick Wyatt: “New legal order or old?”, (1982) 7 *European Law Review*, pp. 147-166.

⁴⁶ The “constitutional” approach underpins the case law of the ECJ since the 1960s.

problems or riddles: How did Community law come about? (the genesis riddle); How do supranational and national constitutional law relate? (as conflicts between norms require us to consider the position in which they stand to one another); and How can it be possible that such a fragile creature as Community law has not only been proved to be remarkably stable, but has also grown so exponentially (as stability is supposed to require a matching of the validity and legitimacy of legal norms, which is to be doubted in the case of Community law)?

How did the present supranational institutional set up and decision-making procedures come about? (“the genesis riddle”). The three original Communities constituted in 1951 and 1957 were established by means of three international treaties, and thus came into existence as a trio of classical international organisations.⁴⁷ This could be expected to have resulted in the creation of a new legal order of public international law. From the perspective of national legal orders, the Treaties would probably be granted the rank and status of statutes (albeit with a higher passive force within their scope), and the eventual secondary norms produced by Community institutions would be regarded as statutory instruments or administrative acts. But, in the present constitutional practice (even national constitutional practice), the Treaties are constructed as though they were the constitution of the European Union, while regulations and directives are constructed as though they were statutes. But how could such a transformation have taken place if the only “constituting” act of the European Union has been the ratification of the founding Treaties and the subsequent amendments to them? How could such a major constitutional change (the “constitutionalisation” of the Treaties and the “legalisation” of regulations and directives) have taken place without an explicit constitutional reform?

What is the relationship of Community legal norms vis-à-vis national norms? (“the primacy riddle”). European integration has resulted in the establishment of a set of institutional structures and law-making processes, which seem, *prima facie*, to be autonomous from national ones, but whose breadth and scope of application essentially overlap with national ones. But, if this is so, what is the relationship between the normative outcome of national and supra-national law-making processes, or, in short, between national and Community laws? What should we do if the said norms seem to prescribe different normative solutions in concrete cases? Which norm should prevail? In order to answer this question, we need to clarify the criteria upon which we should decide the issue. Are the relevant conflict rules part and parcel of the national order? Or are they to be found in the Community order? Or should we invoke some kind of meta-norm external to both the national and the Community legal systems? Social legal practices clash in this regard. But it is far from clear which one should be regarded as the more promising. If we grant primacy to national norms, we run the risk of undermining the effectiveness of Community law, and thus, not only legal integration as such, but also the equality of all Europeans before their common law. But if we give primacy to supranational norms (which seems to be frequently done), are we setting aside what seem, *prima facie*, to be the norms invested with a higher democratic legitimacy in favour of those with less legitimacy? Should we re-think the democratic rationale upon the basis of which national constitutional norms are supposed to prevail over Community ones? Or

⁴⁷ They were partially consolidated into a single institutional structure through the 1965 Merger Treaty; structure which was re-configured in the 1992 Treaty of Maastricht and in successive amending treaties.

should we draw a solution from the very fact that social practices are plural and come into conflict?

How can it be that European integration and the resulting supranational institutional set-up and decision-making procedures have proved remarkably stable even though the institutional structure of the Union is somewhat incomplete or even defective when compared to national and federal structures? (“the stability riddle”). Leaving aside the question of what type of polity the European Union is, it seems beyond doubt that the institutions of the European Union do not have, at their direct disposal, any means of direct enforcement or coercion by which they could supplement the motivation of European citizens and national legal actors to comply with the obligations imposed by Community law. Similarly, the institutions of the Union have very limited material resources at their disposal. Not only is the budget of the Union miniscule in comparison to that of the Member States, but the Member States retain control of the flow of the resources that accrue to the Union.⁴⁸ This leaves the existence and effectiveness of the Union literally at the mercy of national institutions, the selfsame institutions which have seen their powers either transferred to, or framed by, the European Union. And, notwithstanding this, the Union has not only proven to be a stable institutional creation, but has also acquired new competences and resources over time. How could this be? How could the Union not only be remarkably effective in the use of its powers, but also increase them when the (national) institutional actors losing their powers had the power to block this very process (as they are after all, supposed to be the “Masters of the Treaties”)?

These three riddles reveal that we have a well-established constitutional practice which has (still) not been properly captured, explained, or justified by a coherent constitutional theory of European integration, or by a public philosophy of European integration and Union law capable of accounting both for the democratic legitimacy of the Union, and of serving as the basic normative framework within which to solve basic questions of constitutional interpretation. The mechanical affirmation of the primacy of either national or Community norms, which derives from the “classical” theories, either fails to account for actual practice (in which Community norms always prevail, at least for the time being), or fails to go hand in hand with a solvent normative explanation of the actual primacy of Community norms (democratic legitimacy which seems to be poorer than that of national norms, and, as such, points to the opposite solution).

When law transcends national borders, as is clearly the case with Community law, our understandings of law, the constitution and politics reveal themselves to be inadequate. This is, indeed, one basic insight to which MacCormick returned to again and again. Indeed, he rightly claimed that:

“It is not only our theories of law, but also our theories of democracy, that are challenged by the new forms that are evolving among us in Europe.”⁴⁹

He was not only stating that our theories of law and constitutional theories could not come to terms with Community law as a law *above* and *beyond* national borders, but

⁴⁸ Agustín José Menéndez, “Taxing Europe”, (2004) 10 *Columbia Journal of European Law*, pp. 297-338.

⁴⁹ Neil MacCormick, *Questioning Sovereignty*, (Oxford: Oxford University Press, 1999), p. 135.

also (and critically) that any alternative constitutional theory of Community law should be grounded on a democratic public philosophy of European integration. And this is the challenge which the Scottish philosopher tried to meet with his European Constitutional Pluralism.

European Constitutional Pluralism

Both his legal theory (in the terms considered in Section I) and his existential commitment to Scottish nationalism made Neil MacCormick's legal and political theory structurally interested in legal phenomena *below, above and beyond* the nation-state. These were the two *fait différentielles*, which worked their way into MacCormick's theory and made his approach a distinct one in the 1970s and 1980s. Indeed, MacCormick's rejection of the necessary connection between law and the nation-state (or more precisely, between the legal system and the nation-state) goes a long way to explain why he was naturally curious about the European Union and its emergent legal system.

This is, indeed, the existential and theoretical background of his path-breaking work entitled *Beyond the Sovereign State*, which appeared in the *Modern Law Review* in 1993. The text established itself rather rapidly as a *must read*, part and parcel to this day of the compulsory reading list of graduate and undergraduate courses on European Studies, Community law and general political philosophy.⁵⁰

In *Beyond the Sovereign State* and in the successive essays later gathered in the volume entitled *Questioning Sovereignty*, MacCormick claimed that the theoretical and practical flaws of standard constitutional theories of European integration could be traced back to the wrong assumption that the whole set of European norms could, and, indeed should, be re-constructed from a single and final standpoint (that of the *master rule* of the legal order, be it located at national or supranational level).⁵¹ This assumption reflected the hidden Hobbesian (if not natural law) inheritance in modern positivism, and significantly found resonance in the obsession with *the sovereign*.⁵²

⁵⁰ MacCormick's theory may be said to have imposed itself as the standard theory of Community law among *European* scholars (although, as might be expected, not among *national* scholars studying European law). And even if it is improbable that the Court of Justice and the national constitutional courts will endorse it, given that their authority is closely dependent on affirming a monist understanding of law, individual justices seem to have come to endorse pluralism in their academic writings, at the same time that pluralist scholars have become judges. Moreover, the implicit understanding of the relationships between courts seems to have come to be inspired by some form of pluralism; this is clearly reflected in the constantly repeated claim that European courts do not stand in a hierarchical relationship, but do, indeed, dialogue (or bargain) with each other.

⁵¹ MacCormick, "Beyond the Sovereign State", (1993) 52 *Modern Law Review*, pp. 1-18, at 5: "One thing which is necessary for jurisprudence of the philosophy of law to do in the present state of affairs is to guard against taking a narrow one-state or Community-only perspective, a monocular view of these things"; p. 6: "Instead of committing oneself to a monocular vision dictated by sovereignty theory, one can embrace the possibility of acknowledging differences of perspective, differences of point of view"; and p. 17: "Can we think of a world in which our normative existence and our practical life are anchored in, or related to, a variety of institutional systems, each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of which, for most purposes, can operate without serious mutual conflict in areas of overlap?"

⁵² In "The Benthamite Constitution", now in: *Questioning Sovereignty*, note 49 *supra*, MacCormick undertakes a very revealing historical research to show that the upholding of "monism" and the rejection

MacCormick invited legal and political actors to recognise that European constitutional practice proves the possibility of the peaceful and fruitful co-existence of at least two of such *master rules* (the European and the national ones; in technical terms, of at least twenty-eight such norms at the time of writing).⁵³ Consequently, the re-construction and the interpretation of Community law should be undertaken from the assumption that there are (at least) two equally-valid standpoints from which Community law can be, and actually is, re-constructed and interpreted in Europe.⁵⁴ Let us call it *the plural but equal standpoints thesis*. Legal pluralism was *thinkable* because the very idea of what the system of law is the result of a process of re-construction as the argumentative character of law revealed (if, as we saw, the legal system is a regulatory ideal, there is nothing *necessary* about the identification of the legal system and the legal order of the nation-state). And European constitutional pluralism was *possible* because the stability of a legal order is not dependent on the will of one single and omnipotent sovereign, but on the social practice, on the part of the citizens at large, of following the legal norms.⁵⁵ Let us call it *the legal stability beyond sovereignty thesis*.

The *plural but equal standpoints thesis* is coherent with the emphasis in MacCormick's institutional theory of law upon the social basis of law and its thorough cleansing of prescriptivism from legal theory. As considered in Section I, while prescriptivist legal theories move from the assumption that law is constituted by the will of a sovereign to the conclusion that there must be one single viewpoint from which to re-construct and interpret the legal system correctly, institutional theory is interested in gaining a proper understanding of how the human normative imagination leads to spontaneous order, and how the human institutional imagination results in the institutionalisation of normative practices. From the latter perspective, the obvious "pluralistic" traits of European constitutional practice are not aberrations to be left aside in any proper theoretical explanation of Community law; on the contrary, the mark of the plausibility of any European constitutional theory lies in its making sense of such pluralistic constitutional practice. It seems well-established that the

of "pluralism" are but the hidden inheritance of "old" natural law theories to "modern" positivism. "Old" natural law theories affirmed that natural law was, indeed, authored by God. "Modern" positivist theories continue to hold the same, only they have "secularised" god by means of replacing it by a "secular" character, *i.e.*, the sovereign, the holder of raw power. This implies a full continuity in the assumption that a key feature of law is authorship by a concrete individual will (thus, the central role played by God, and now played by the sovereign), reflected in the tendency to reduce laws to "commands", and consequently, to characterise law as a tool to constrain and limit action, neglects the "constitutive" aspects of law. Similarly, this hidden heritage renders us blind to the close connection between law and practical reason, and consequently, to the necessarily collective authorship of any modern law.

⁵³ Of perhaps three, if it is claimed (as perhaps MacCormick, himself, would be inclined to do) that the regional legal order also has a relevant *grundnorm*.

⁵⁴ MacCormick, "Juridical Pluralism and the Risk of Constitutional Conflict", now in: *Questioning Sovereignty*, note 49 *supra*, p. 119: "A pluralistic analysis in either of these senses shows the systems of law operative on the European level to be distinct and partially independent of each other, though also partially overlapping and interacting."

⁵⁵ *Ibid.*,

MacCormick, "Juridical Pluralism and the Risk of Constitutional Conflict", now in: *Questioning Sovereignty*, note 49 *supra*, pp. 119-21, especially at 119: "Resolving those problems, or, more wisely still, avoiding their occurrence in the first place, is a matter for circumspection and for political as much as legal judgment."

understanding of European law of national constitutional courts, on the one hand, and the European Court of Justice, on the other, is far from being the same. How legal arguments about normative conflicts should be formed is not answered in the same way in Karlsruhe or Rome as they are in Luxembourg. To this, it must be added that these differentiated institutional practices reflect wider social practices. While most citizens may tend to share the practice of their national constitutional court, having been educated and socialised in a political system which accepted (and, in many cases, promoted) national constitutions as the supreme law of the land, some of them may share and even act upon the basis of the practice followed by the European Court of Justice, either due to the acceptance of an “existential” European political identity (a phenomenon related to the increasing numbers of citizens who spend a part of their lives in another Member State, or who acquire strong personal links with other Member States) or, perhaps more frequently, to the fact that European law promotes, to a large extent, the material interests of (some of) the citizens involved. Finally, the co-existence of overlapping social-legal practices both across and within the borders of a Member State does not undermine the capacity of law to solve conflicts and co-ordinate actions. This clearly indicates that the pre-conditions for reconciling legal pluralism with the effectiveness of law are, at the very least, for the time being, being met in Europe.

The equal, but differentiated, viewpoints thus seem capable of dissolving both the genesis and the primacy riddles. Firstly, the genesis riddle becomes a non-problem. From the national constitutional standpoint, there is no riddle at all, because the validity of Community law continues to be dependent on the national constitution (to be more precise, on the national constitutional provisions upon the basis of which the foundational treaties of the Union and its successive amendments have been signed, the constitutionality of which has been aptly policed by national constitutional courts). From the European constitutional standpoint, the autonomy, if not the independence, of Community law can be presented as a necessary development in order to realise the very constitutional programme enshrined in European post-war constitutions. The *effective* integrative capacity of law in Europe was, and indeed remains, dependent on integration through supranational law (something which, one could argue, is the real moral lesson of the two World Wars). Secondly, European constitutional pluralism solves the primacy riddle by splitting it. Once there is no privileged standpoint to re-construct Community law, it follows that constitutional conflicts can be solved in different ways from different standpoints. This is a far from surprising conclusion from the standpoint of the institutional theory of law, given that, if the idea of the legal system as a complete and coherent order is a *regulatory* ideal, it is bound to be realised *only to a certain extent* in real legal systems. As long as constitutional practice manages to preserve the integrative capacity of law, such divergences are only part and parcel of what a legal order is, and how it functions.

The stability beyond sovereignty thesis highlights the limits of supranational and national legal norms as a means of social integration, and reveals the necessary foundation of legal stability on something other than positive law or the naked power of one single, ultimate sovereign. By highlighting the connection between the normative and the institutional imagination of human beings and law, the institutional theory of law not only makes us see European constitutional conflicts as *normal*, but also stresses that the integrative capacity cannot rest on law *de facto* providing one single authoritative answer to all legal problems. The stability of Community law does not depend so much on the provision of one right answer through one single *master rule*, as on the

affinity of the legal systems and on political deliberation and bargaining, reasoning and decision-making.⁵⁶ This goes a long way to dissolving the stability riddle, as it reveals that the assumption that stability depends on the very structure and character of law is an illusion. Law is only one of the means of social integration. Nation-state law and community law are not the only institutional normative orders available, and their integrative capacity is neither a reflection of their mere existence, nor of their having been established by a sovereign. If the ultimate foundation of Community law is the social practice of citizens (and not merely that of institutional actors), who solve conflicts and co-ordinate action by reference to Community law, then the stability of Community law *must* appeal to the normative and institutional proclivities of citizens. It is a *normative problem*, mediated not only by law, but also, and critically, by politics.

While *Beyond Sovereignty* contains the core of European constitutional pluralism (and, as such, remains the centre of gravity of the theory, in the expanded version which one finds in several chapters of *Questioning Sovereignty*), MacCormick nuanced the theory in the second half of the 1990s and in the early years of the present century, heavily influenced by his re-reading of Kelsen.⁵⁷ In particular, he moved from a commitment to a “radical” form of European constitutional pluralism, to a “moderate” European constitutional pluralism, or pluralism “under international law”. It seems to me that this is a change of critical importance, which increases, not diminishes, the coherence between MacCormick’s overall legal-theoretical project and his European constitutional theory; while drastically re-formulating the first premise of European constitutional pluralism.

The original “radical” constitutional pluralism of MacCormick was right to point out that legal monism, the claim that there is a need to reduce law to a system observed from one, and only one, legal viewpoint, is a rather flawed theory, if it stems from a prescriptivist conception of law, because the insistence on a mythical single sovereign is no solution to the key problems in legal theory, or, for that matter, in European constitutional law. However, this does not do away with the normative force of the regulatory ideal of the legal system. Indeed, there are very good *normative* reasons to hold fast to the Kelsenian attachment to the regulatory ideal of law as a monistic legal order, “imperially” prone to translate all social conflicts and co-ordination problems into one single language and find one single answer to such problems.⁵⁸ And such reasons include the close connection between law and the normative and institutional imagination of human beings. Indeed, it is only if we subscribe to the regulatory ideal of the single legal order that law can serve as an institutionalised alternative to spontaneous order in the very terms that MacCormick argued with gusto and brilliancy in all his writings. This, in my view, explains why he moved from radical pluralism to moderate pluralism. Both the insistence on the term “pluralism” and the

⁵⁶ The proposals to create specific, *ad hoc* bodies in charge of arbitrating European constitutional conflicts present clear pluralistic undertones. See, for example, Christoph Schmid, “From Pont d’Avignon to Ponte Vecchio. The Resolution of Constitutional Conflicts between the European Union and the Member States through Principles of Public International Law”, (1998) 18 *Yearbook of European Law*, pp. 415-476 and “The neglected conciliation approach to the ‘final arbiter’ conflict”, (1999) 36 *Common Market Law Review*, pp. 509-14.

⁵⁷ See note 42 *supra*, and “Questioning Post-Sovereignty”, (2004) 29 *European Law Review*, pp. 852-863.

⁵⁸ See Alexander Somek, “Kelsen lives”, (2007) 18 *European Journal of International Law*, pp. 409-51. See, also, Flavia Carbonell and Tanja Hitzel-Cassagnes in this volume.

choice of a “third” legal order, “international law”, are clear indicators that MacCormick continued to think that there was something irrepressibly pluralistic about the European constitution. Unrestrained pluralism was no way out because it imperilled the integrative capacities of law, but a return to monism *simpliciter* would betray the basic intuition behind the institutional theory of law, and the imperative to make the theory capable of accounting for a social practice which had normative merit. In Section IV, I will argue that “moderate” constitutional pluralism is to be taken as both a perceptive diagnosis of a problem, and a provisional solution to it. This is why I will try to consider in more detail what is genuinely pluralistic about Community law.

But, before doing so, it should also be stressed that the shift from radical to moderate constitutional pluralism is also indicative of the fact that European constitutional pluralism remains under-defined (as, it seems to me, Neil Walker claims in his contribution to this volume). The reference to “international law” as the “monistic” framework of a dual legal system renders it clear that the *stability beyond sovereignty thesis* remains too general and abstract, as it does not consider the *concrete* sources of stability of Community law. Would one conclude that international politics, international negotiation and deliberation are plausible sources of stability? How come they play such a function with regard to Community law, but fail rather patently to play a similar role at the world or global level?⁵⁹ Is this completely unrelated to the role played by law in European integration? The move from radical to moderate pluralism only highlights that, while *the stability beyond sovereignty thesis* points in the right direction, it is unsatisfactory because it fails to consider the sources of stability of Community law *in detail*. As I claim in Section IV, this can be done in pure MacCormickian spirit, by considering that not only is European politics highly mediated by national and supranational law in its contents, but it is also structurally framed by European constitutional law. Indeed, MacCormick hinted on several occasions at the close relationship between national and supranational constitutional law. However, he did not explore the issue in depth, but this *can* be done, and we will start to do so in the next section.

Constitutional Synthesis

MacCormick’s European constitutional pluralism combines a brilliant and perceptive *critique* of “standard” constitutional theories of Community law (on account of their being premised on the close relation between law and nation-state) and a perceptive re-construction of the law of the European Union, which has come a long way to equip us with a theory capable both of guiding the solution of constitutional conflicts and controversies, and of being proposed as a public philosophy of European integration. In short, of being a democratic constitutional theory of Community law. However, in the previous section, I found that European constitutional pluralism was still a partially unfinished constitutional theory. The shift from radical to moderate pluralism revealed a major tension lurking behind the very term “pluralism”. The

⁵⁹ As, indeed, the so-called “war on terror” has made abundantly clear, and as Neil with great civic courage reminded us from the European Parliament during the “dark years” in which the gloves came off and only a handful of just men in our institutions kept their pledge to liberty and democracy. See his Tercentenary Lecture, “On Public Law and The Nature of the Law of Nations”, available at: http://www.law.ed.ac.uk/file_download/series/14_tercentenarylecturepubliclawandthelawofnatureandnations.pdf.

characterisation of law as being necessarily “one”, sometimes reflects a “prescriptivistic” bias, resulting from the close (and unjustified) association of law, the sovereign, and the nation-state. But the endorsement of legal system as a regulatory ideal was nonetheless required in order to carry out the integrative tasks assigned to law in modern societies. At the same time, constitutional pluralism insisted that the stability of Union law depended on sources other than the existence of a mythic and monolithic sovereign will to underpin it. But it failed to spell out the role played in this regard by the foundational relationship between national and Community law, and by the overall institutional design of the Union.

The theory of constitutional synthesis⁶⁰ builds on European constitutional pluralism, both on its major achievements and on its unfinished parts. In particular, the theory of constitutional thesis is premised on the assumption that the key insights of European constitutional pluralism (the differentiated but equal viewpoints and stability beyond sovereignty) are sound and correct. However, and, for the reasons already considered in Section III and briefly repeated now, constitutional synthesis draws (four) different implications from these two premises. Firstly, the “equal, but differentiated”, standpoints thesis implies that any sound European constitutional theory must account *simultaneously* for the relevance of supranational and national constitutional law in the forging of European constitutional law. In other words, it must reduce law to a system in such a way that the relationship between the twenty-seven legal orders of the Member States and Community law is properly clarified. Secondly, the “equal, but differentiated” viewpoints implies that any sound European constitutional theory must take the fact that there is no institution, be it in European or in national law, which has been authoritatively granted the monopoly on the final word of the interpretation of Community law, seriously. The institutional pluralism of the Union is, in this regard, a fact which has to be reconciled with the claim to authority of both Community law and national constitutional laws. Thirdly, the differentiated approach to primacy must be constructed as requiring any European constitutional theory to account for the European constitutional practice which grants an almost complete primacy to Community law while explaining the continued adherence to the primacy of national constitutions (as the supreme law of the land), and, consequently, explaining the central role of national European constitutional clauses in the process of European integration. Fourthly, the plurality of stability sources alerts us to the fact that European constitutional theory must take the principles of European constitutional law that have a structural effect and reduce the likelihood of a conflict, while providing a transfer of democratic legitimacy from national to European constitutional law, seriously.

The Core of Constitutional Synthesis in Three Theses

The basic idea behind constitutional synthesis is that the European Union and its legal order are the result of a process of constitutional synthesis, of an “ever closer” putting in common of national constitutional norms (normative synthesis) and of the

⁶⁰ A first attempt at fleshing the theory of constitutional synthesis is to be found in my “Sobre los conflictos constitucionales europeos. Validez del derecho comunitario y legitimidad democrática de la Unión Europea”, (2007) 24 *Anuario de Filosofía del Derecho*, pp. 139-196. This made its way, although in a much edited version, into the book co-authored with John Erik Fossum, *The Constitution's Gift. A Constitutional Theory for a Democratic European Union*, (Lanham MD: Rowman and Littlefield, 2011).

“development” of a supranational institutional structure (institutional development). This intuition can be specified by reference to three theses.

The Peculiarity of the Synthetic Path towards the Establishment of a Democratic Constitution

The *first thesis* is that the constitutional law which frames and contributes to steer the process of European integration is neither revolutionarily established in a “Philadelphian” constitutional moment, nor the outgrowth or accumulation of “Burkean” constitutional conventions and partial constitutional decisions *à la anglaise*. On the contrary, constitutional synthesis is characterised by the central structuring and legitimising role played by the constitutions of the participating states (*seconded* to a new role as part of the collective constitutional law of the new polity),⁶¹ or by the regulatory ideal of a common constitutional law, which is progressively recognised as the constitution of the new polity, and whose normative consequences are fleshed out and specified as the process develops further. To put it differently, instead of a revolutionary act of constitution-making, or the slow growth of constitutional conventions, constitutional synthesis is launched by an act which implies the secondment of national constitutions to the role of common constitutional law. This makes synthetic founding much more economical in political resources than revolutionary founding, and, at the same time, it is much quicker than evolutionary founding. The price to be paid is that, instead of an explicit set of constitutional norms, the founding Treaties reflect a scattered set of norms, while the bulk of the common constitutional law remains implicit, a *regulatory ideal* to be fleshed out as integration progresses.

European constitutional law was composed of, and, to a large extent, keeps on being composed of, the *common constitutional law* of the Member States. The establishment of the European Communities was thus akin to a foundational moment; but, contrary to what is the case in a revolutionary constitutional tradition (such as the French or the Italian one), the constitution of the Union was not written by *We the European People*, but was defined by implicit reference to the six national constitutions of the founding Member States. In this way, the French, German, Italian, Dutch, Belgian and Luxembourgish constitutions were *seconded* to the role of being part of the constitutional collective of Europe. National constitutions started living a “double

⁶¹ The idea of a supranational constitutional law which is the result of seconding national constitutions was hinted at by the European Court of Justice in Case 11/70 *Internationale*, par 4 when claiming that the lack of a written bill of rights in the primary law of the Union came hand in hand with an unwritten principle of protection of fundamental rights, which was filled in by reference to the “constitutional traditions common to the Member States” properly spelled out in the context of European integration (“the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community”). In doing this, the Court was following a line of reasoning pioneered by Pierre Pescatore: see “Fundamental Rights and Freedoms in the System of the European Communities”, (1970) 18 *American Journal of Comparative Law*, pp. 343-51. On the technical aspects of legal synthesis, it must be stressed that a critical comparative approach has underpinned the case law of the ECJ since its very inception. See Koen Lenaerts, “Interlocking legal orders in the European Union and Comparative Law”, (2003) 52 *International and Comparative Law Quarterly*, pp. 873-906. On the constitutional aspects of the idea of constitutional synthesis, see Agustín José Menéndez, “The European Democratic Challenge”, (2009) 15 *European Law Journal*, pp. 277-308.

constitutional life". They combined their old role as national constitutions and the new role as part of the *collective* supranational constitution.⁶²

Constitutional synthesis is grounded on the national constitutional provisions which not only authorise, but also mandate, the active participation of national institutions in the creation of a supranational legal order as the only way of fully realising the principles which underlie the national constitution (s). Thus, the "opening" clauses of post-war constitutions, and the explicitly European clauses of the more recent ones are constructed as reflecting the self-awareness of the national constitution (s) about the limits of realising constitutional values in one single nation-state.

Constitutional synthesis claims that there is a substantive identity between national constitutional norms and Community constitutional norms. In other words, European integration pre-supposes the creation of a new legal order, but not the creation of a new set of constitutional norms; a key source of the legitimacy of the new legal order is, indeed, the transfer of national constitutional norms to the new legal order. However, the process, by necessity, has major constitutional implications for each Member State. Firstly, the accession of a state to the European Union marks a new constitutional beginning for that state. Contrary to what is the case in most constitutional transformations, constitutional change is not mainly about the substantive content of the fundamental law, but concerns the *scope* of the polity (there is an implicit re-definition of who we acknowledge as the co-citizens of our political community) and the very *nature* of the new polity (as it actually aims at re-founding both the national and the international legal orders by means of transforming sovereign nation-states into parts of a cosmopolitan federal order). Secondly, the very essence of the process of constitutional synthesis is that of the progressive ascertainment of common constitutional standards which may eventually result in marginal changes in national constitutional norms *to align them* with the contents of Community constitutional law, which, in turn, is reflective of what is actually *common* to the Member States. In this regard, it should be noted that Community constitutional law is not defined by reference to individual sets of constitutional norms, but to what is common to *all* national constitutional norms. In those cases in which national constitutional norms point to different normative solutions, synthesis is not achieved by finding a common minimum denominator, but by means of considering which of the national constitutional norms is more congenial to Community law. This is to be decided by considering the underlying arguments for or against the competing national constitutional solutions, and, in particular, by considering the extent to which the national norm can be "Europeanised", both in the sense of fitting with European constitutional law as it stands (as already synthesised in the Treaties, the amendments to the Treaties or the legislation and case law of the Union), and with its consequences being acceptable in the Union as a whole.⁶³

⁶² This could be illustrated by using the image of the "field" as a metaphorical device. Indeed, the founding of the Communities implied that national constitutions abandoned their constitutional solitude as constitutions of the self-sufficient nation-state and placed themselves in the common European constitutional field. Constitutional autarchy was thus replaced by constitutional openness, co-operation and reflexivity.

⁶³ If all national constitutional norms converge, as in most cases they do, the common norm is easy to establish. The strong affinity between national and Community constitutional norms is due to the history of European integration, to the fact that all Member States are parties to the European Convention on Human Rights; moreover accession to the European Union is conditioned to candidate states indeed

Synthetic Supranational Institutional Development

The *second thesis* is that the supranational legal order comes hand in hand with a supranational institutional structure. But the latter is only partially established at the founding, takes time to be rendered functional in a process in which different national institutional cultures and structures try to leave their mark at the supranational level, and its structure is necessarily rendered more complicated as new institutions and decision-making processes are added in order to handle new policies. This entails that constitutional synthesis can be described as the combination of normative synthesis and institutional development and consolidation, two processes that have very different inner logics. While normative synthesis exerts a centripetal pull towards homogeneity, institutional consolidation is a more complex process with strong built-in centrifugal elements - it serves as the conduit through which the constitutional plurality of the constituting states is wired into the supranational institutional structure.

Institutional consolidation concerns the outgrowth and consolidation of the institutional structure of the supranational polity. Its logic is not exclusively *normative*. Institutions are mainly about law, but not exclusively about law. Institutions are organisations infused with value. They occupy buildings, make use of objects with empirical existence, and are represented by very material (when not venial) beings. Institutional organisations cannot be brought into existence by a normative regulatory ideal; they have to be created, staffed and funded, and develop their own institutional identity. In a constitutional union of already established constitutional states, this process is complicated by three factors. Firstly, constitutional synthesis pre-supposes the combination of a single constitutional order with a pluralistic institutional structure, to the extent that supranational and national institutions are not hierarchically organised or ranked. Secondly, constitutional synthesis at the regional-continental level of government (*i.e.*, in between global organisations and nation-states) tends to proceed in a far from crowded institutional space. In contrast to the constitution of a nation-state, which *de facto* relies upon an existing institutional structure, constitutional synthesis requires the creation of new institutional structures. This usually entails that institution-making proceeds in a fragmentary fashion, that the synthetic polity starts with bits and pieces of an institutional structure, instead of with a complete one. Thirdly, the derivative character of the synthetic polity implies that the *institutional void* is only formally a *void*, as the creation of supranational institutions consists of the *projection* of national institutional structures and cultures to the supranational level. But because such structures and cultures are much more idiosyncratic than national constitutional laws, the probable result is that the creation of supranational institutions is the site of a bitter contest between different national institutional structures and cultures.

Upon such a basis, the *homogenising* logic of normative synthesis contrasts with the manifold pluralistic proclivities proper of institutional consolidation. This tension is aggravated over time, and a crisis emerges when the relationship between the two processes is polarised. As normative synthesis proceeds, it fosters some institutional convergence. But the synthetic process can also feed institutional pluralism and conflict, and thus produce a constellation incapable of solving institutional conflicts among the different levels of government.

fitting in the constitutional paradigm defined by the common constitutional traditions.

The Pluralistic Character of Constitutional Synthesis

The *third thesis* is that the regulatory ideal of a single constitutional law comes hand in hand with the respect for national constitutional and institutional structures. This entails that, while supranational law is one, there are several institutions that apply the supranational law in an authoritative manner. The peculiar combination of a single law and a pluralist institutional structure results from the just mentioned fact that there is no ultimate hierarchical structuring of supranational and national institutions, and is compounded by the pluralistic proclivities of institutional consolidation at supranational level.

The fact that the synthetic constitutional path is one in which participating states retain their separate existence, as well as their separate constitutional and institutional identity, implies that constitutional synthesis is a peculiar breed of pluralistic constitutional theory. On the one hand, it is *not* pluralistic to the extent that it endorses the monistic logic of law as a means of social integration through the *regulatory ideal of a common constitutional law*. The integrative capacities of law (its role as a complement of morality in the solving of conflicts and the co-ordination of action by means of determining, in a certain manner, what the common action norms are) require law to be as conclusive as possible. Were law to be as inconclusive as morality, it would not add much to our practical knowledge, and it would not be capable of operating effectively as a means of social integration. Both autonomy and the motivational force of law require that we assume that law gives one *right* answer to all the problems to be solved through it. Legal argumentation breaks down if we assume that the same case can have different, even contradictory solutions. This may be the case *empirically*, but, from an internal perspective of law, this cannot be endorsed as part of the social practice of integration through law. Democratic legal systems are further pushed into this peculiar form of “monism” by the normative requirements of the principle of equality before the law.

On the other hand, constitutional synthesis is pluralistic in a double sense. First, the regulatory ideal of a common constitutional law co-exists with the actual plurality of national constitutional laws. The constitutional moment in synthesis only results in the endorsement of a regulatory ideal, and in the bits and pieces of the set of common constitutional norms. Most constitutional norms remain *in nuce*, or better put, in several drafts, as many national constitutions participate in the process of integration. The regulatory ideal of a common constitutional law is fleshed out in *actual* common constitutional norms (and, in general, in common legal norms) only very slowly (and not without setbacks and backlashes). Furthermore, the regulatory ideal of a common constitutional law comes hand in hand with a pluralistic institutional setting. As already indicated, instead of a hierarchically-structured institutional set-up, a synthetic polity is characterised by the existence of a plurality of institutions all of which legitimately claim to have a relevant word in the process of applying the “single” constitutional legal order. This is, in my view, the proper implication to draw from the “differentiated, but equal” viewpoints thesis. Indeed, constitutional synthesis has not led (and is not expected to lead) to Member States losing their autonomous political and legal identity (which has been coined, in the European constitutional jargon, as the national constitutional identity).⁶⁴ This is so *thanks to*, and

⁶⁴ The term “national constitutional identity” entered the European debate in the famous ruling of the German Constitutional Court *Solange I*, 1974 WL 42441 (BverfG (Ger)), [1974] 2 C.M.L.R. 540, par. 22:

not *despite of*, integration. The constitutional pluralism that comes hand in hand with constitutional synthesis is both rendered possible *and* stabilised by the new institutional structure and the growing substantive convergence between national constitutional orders. Constitutional synthesis could be seen as the political and legal counterpart to the common market of old (not the single market of the Single European Act!) in the objective of rescuing the nation-state;⁶⁵ in our view, it is more proper to consider it as a means of re-configuring and re-defining the state, and, thereby, at the very minimum, detaching the state from the nation; and perhaps even disposing of the idea of the sovereign state completely.⁶⁶

Thus, constitutional synthesis articulates two key insights of the pluralist theory of Community law when (1) it stresses the open character of the process of constitutional synthesis (which accounts for the fact that no institutional actor has been acknowledged the power to solve, in an authoritative and final manner, conflicts between norms produced through Community and national law-making processes), and (2) it highlights the pluralist source of European constitutional law, the actual result of the process of constitutional synthesis of national constitutional norms. This not only provides the basis for the claim to the democratic legitimacy of Community law (transferred from the national to the European constitutional order when national constitutional norms become the core constitutional framework of the Union), but also reveals the complexity of constitutional conflicts in the European legal order, as they are, at the very same time, “vertical” conflicts between Community and national law, and “horizontal” conflicts between national constitutional laws, aspiring to define the common constitutional standard.

However, the theory of constitutional synthesis reconciles pluralism with the normative defence of a monist re-construction of the European legal order, in part on account of the social integrative capacity of European law and the fostering of equality before the law across borders, in part on account of the substantive identity of European and national constitutional law. Moreover, it offers a limited, but comprehensive, explanation of the sources of stability of the European legal order, which, at the same time, accounts for the progressive weakening of the said sources.

“Article 24 of the Constitution must be understood and construed in the overall context of the whole Constitution. That is, it does not open the way to amending the basic structure of the Constitution, which forms the basis of its identity, without a formal amendment to the Constitution, that is, it does not open any such way through the legislation of the inter-State institution”. It was then propelled to the supranational level in Maastricht (resulting in Article 6.3 of the Treaty of European Union, where the principle of respect of national identities in general terms was affirmed). And in the Constitutional Treaty and in the Treaty of Lisbon, this principle was spelled out by reference to constitutional identity. On the academic debate following the Constitutional Treaty, see Armin von Bogdandy, “The European constitution and European identity: Text and subtext of the Treaty establishing a Constitution for Europe”, (2005) 3 *International Journal of Constitutional Law*, pp. 295-315; Michel Rosenfeld, “The European treaty–constitution and constitutional identity: A view from America”, (2005) 3 *International Journal of Constitutional Law*, pp. 316-31; Jan Herman Reestman & Leonard F.M. Besselink, “Constitutional identity and the European courts”, (2007) 3 *European Constitutional Law Review* 3, pp. 177-81. In more general theoretical terms, see the interesting reflections of Gary Jeffrey Jaconsohn, in “Constitutional Identity”, (2006) 68 *The Review of Politics*, pp. 361-97.

⁶⁵ Alan Milward, *The Rescue of the European Nation-State*, (London: Routledge, 1992).

⁶⁶ William E. Scheuermann, “Postnational democracies without postnational states? Some skeptical reflections”, (2009) 2 *Ethics & Global Politics*, pp. 41-63; Hauke Brunkhorst, “Reply: States with constitutions, constitutions without states, and democracy - Skeptical reflections on Scheuerman’s skeptical reflection”, (2009) 2 *Ethics & Global Politics*, pp. 65-81.

How the Theory of Constitutional Synthesis Solves the Three Riddles

The theory of constitutional synthesis claims that the genesis riddle is solved once we realise that the establishment of the constitution of the European legal order has not been the result of either an act of revolutionary constitution-making or the outcome of a process of constitutional evolution, but is properly described as the transfer of the common national constitutional norms to the Community legal order as authorised and mandated by the national constitutions of the Member States themselves.

Firstly, the ultimate normative foundation of the present European constitutional practice is to be found in the “opening” clauses of national constitutions which authorise and mandate supranational integration as a necessary means to realise the constitutional principles of the fundamental law, given the impossibility of doing so within the confines of a closed national-constitutional order. The fundamental laws of three out of the six founding Members of the European Coal and Steel Community, and of five of the six founding Members of the European Economic Community and the Euratom contained radically innovative clauses concerning the relationship between the nation-state and the international community. Since then, general integration clauses have been replaced by specific European clauses, which have also been inserted in the constitutions of most of the states which have acceded to Union membership since then.⁶⁷ The constitutional importance of these clauses stems from the fact that they do not limit themselves to determining the procedure through which international treaties have to be negotiated, signed and ratified, or the place assigned to them in the system of the sources of law, as standard constitutional clauses on international affairs and external relations usually do. On the contrary, the supranational integration clauses mandate the active participation of the state in the creation and defence of multilateral international organisations, which implies a mandate to exercise some of their national sovereign powers collectively, and consequently, the transcendence of the *national* character of such public powers created and disciplined by the constitution itself. These clauses can be properly regarded as the positivisation of the moral duty to create common supranational institutions and to agree common norms capable of solving conflicts and co-ordinating common action in view of the common public interest. This grounds the claim that they must be seen as the late fruit of the cosmopolitan conceptions of democracy and law elaborated in the interwar period,⁶⁸ which explains the close

⁶⁷ Karl Loewenstein, “Sovereignty and International Cooperation”, (1954) 48 *American Journal of International Law*, pp. 222-244, especially at 233-34 (the European Coal and Steel Community), and at 237-38 (European Defence Community); Antonio Cassese, “Modern Constitutions and International Law”, (1985) 192 *Recueil*, pp. 331-476; Thomas M. Franck & Arun K. Thiruvengadam, “International Law and Constitution-Making”, (2003) 2 *Chinese Journal of International Law*, pp. 467-518. On European clauses in the Constitutions of Member States of the European Union, see Monica Claes, “Constitutionalising Europe at its source”, (2005) 24 *Yearbook of European Law*, pp. 81-125, and Christopher Grabenwarter, “National Constitutional Law Relating to the European Union”, in: Armin von Bogdandy & Jürgen Bast, *Principles of European Constitutional Law*, (Oxford: Hart Publishing, 2006), pp. 95-144; on more recent clauses, see Anneli Albi, “‘Europe’ Articles in the Constitutions of Central and Eastern European Countries”, (2005) 42 *Common Market Law Review*, pp. 399-423.

⁶⁸ Hans Kelsen, “Les rapports de système entre le droit interne et le droit internationale public”, (1926) 14 *Recueil des Cours*, pp. 227-331; Joseph Gabriel Starke, “Monism and Dualism in the Theory of International Law”, (1936) 17 *British Yearbook of International Law*, pp. 66-81; Boris Mirkine-Guetzévitch, “Droit International et droit constitutionnel”, (1938) 38 *Recueil des Cours*, pp. 311-463; Umberto Campagnolo, *Nations et Droit*, (Paris: Felix Alcan, 1938); Albéric Rolin, *Les Origines de l’Institut de droit international (1873-1923): Souvenirs d’un témoin*, (Brussels: Vroment, 1923). A concrete application to

relationship in which they stand to the normative foundation of the primacy of Community legal norms.

Second, the establishment of a new common constitution by reference to already existing national constitutional norms offers a (temporary and provisional) alternative to the coupling of democratic agency and legitimacy characteristic of revolutionary constitution-making and to the progressive acquisition of democratic legitimacy characteristic of the evolutionary model. Because the new constitution is formed by national constitutional norms, it draws from them the democratic legitimacy of which they were invested in each national constitution-making process (either through revolutionary or evolutionary constitution-making processes). And because the validity of each and every European law depends on compliance with European constitutional law, then the derivative democratic legitimacy of Community constitutional norms is radiated to secondary Community norms when they are interpreted and constructed according to the basic principles of European constitutional law. This provides integration with democratic legitimacy in the absence of an explicit constitution-making process.⁶⁹

When these two premises are properly considered, the present European constitutional practice reveals itself to be far less problematical than it may seem at first glance. The claim that European law is the supreme law of the European “land” is but another way of saying that the common constitutional laws of the Member States are the supreme law of the European “land”. When one realises that such a transformation was authorised and mandated by national constitutions, the riddle is solved.

Constitutional synthesis claims that the primacy riddle is solved once we take the fact that European constitutional law and national constitutional law cannot be properly portrayed as two sets of differentiated constitutional norms into account. The collective of national constitutional norms *constitutes* the deep layer of European constitutional law. European constitutional law is not only *derivative*, in the sense of being a creature of national constitutional law, but is also *common*, its being *what is common to national constitutions*. Constitutional synthesis implies a particular form of,

Europe before the Second World War is documented in B Mirkin-Guetzevich & Georges Scelle (eds), *L'Union Européenne*, (Paris: Librairie Delagrave, 1931). In the war period, see Hans Kelsen, *Peace through Law*, (Chapel Hill NC: University of North Carolina, 1944); in the post-war period, see Hans Kelsen, *The Law of the United Nations*, (London: Stevens and sons, 1950); Alf Ross, *Constitution of the United Nations*, (Copenhagen: Munksgaard, 1950).

⁶⁹ Integration through the explicit writing of a new federal constitution for the European Union may or may not have been a feasible alternative after the Second World War. It could be argued that the political conditions under which an explicit European constitutional general will could be forged were lacking, and that there was no clear idea of what the institutional and decision-making set-up of a supranational Union should look like. This was, indeed, the paradox of European integration before the European Communities were established. The need to overcome the nation-state was strongly felt for a rather long-time (stretching back to the Abbé Pierre and Kant at the very least) but an effective and democratic way of breaking away from the nation-state seemed not to be available. Indeed, the risks of opening an explicit constitution-making process were proven by the failure of the Defence and Political Communities in 1954. Synthetic constitution-making promises allow us to proceed with the process of European integration sufficiently far as to render the new supranational polity robust enough to be capable of undergoing an explicit constitution-making process. Because it has a solid (even if derivative) democratic legitimacy-basis, a synthetic constitution is one that would be expected to enact changes in the legal and political order of the political community which it constitutes.

and understanding of, constitutional primacy. In other words, the shape of primacy under constitutional synthesis does not emanate from the elevation of one set of constitutional norms to the status of the supreme law of the land, but through one over-arching arrangement emanating from the synthesis of the many, instead. Once the initial legal-institutional structure is put in place, synthesis is not achieved by finding a common minimum denominator, but by means of considering which of the national constitutional norms is more congenial to Community law. This is no mere copying exercise, however, as we have underlined above. It is a reflexive process which considers the underlying arguments for or against the range of competing national constitutional solutions. It considers the extent to which the national norm can be “Europeanised”, both in the sense of fitting with European constitutional law as it stands (as already synthesised in the Treaties, the amendments to the Treaties or the legislation and case law of the Union), and whether its consequences will be acceptable to the Union as a whole.⁷⁰ Numbers are relevant, but not decisive. The key question is one of critical comparison between national solutions, which is preferably settled through the Community law-making process. When a national constitutional norm is relegated, or trumped by the common constitutional standard, that solution is not incompatible with the national constitution, but can be justified by the reflexivity that is an implicit requirement of the national constitutional mandate of openness. Thus, in horizontal conflicts, there is only an apparent riddle in claiming that the derivative legal order (Community law) prevails over the original legal orders (national constitutional orders). The primacy of the derivative order is willed by each national constitution because it is a necessary requirement for the process of integration through constitutional law. From the national viewpoint, European legal integration leads to the “opening” of national constitutional norms to the fundamental laws of all the other Member States. As already hinted at, this “opening” may eventually trigger a process of reflexive change to reconcile the primacy of the national constitution with the constitutional mandate to integrate into supranational political structures. From the Community standpoint, this entails that the constitution of the Community be underpinned by a plurality of constitutional sources (each of the constitutions of the Member States), but that, at the same time, the constitutional aspiration of the Community is to forge a single and cohesive set of fundamental norms as integration proceeds.

Primacy is less clearly justified in vertical conflicts. Indeed, and as we claimed in Section III, the Court of Justice has still to substantiate good arguments for giving primacy to its “transcendental” understanding of the economic freedoms over national laws protecting overriding national interests. The right intuition behind the “counter-limits” and “national constitutional identity” of national constitutional courts, which we considered in Section III, is precisely that all constitutional conflicts cannot be solved by reference to a one-size-fits-all standard. Indeed, it seems to me that what is wrong in the theoretical construction of national constitutional courts is the emphasis on the defence of the national constitution against the European one (even if this emphasis is easy to explain, given the national institutional identity of European constitutions). The best argumentative countermove would be to gain the

⁷⁰ If all national constitutional norms converge, as, in most cases, they do, the common norm is easy to establish. The strong affinity between national and Community constitutional norms is due to the history of European integration, to the fact that all Member States are parties to the European Convention on Human Rights; moreover, accession to the European Union is conditioned to candidate states fitting into the constitutional paradigm defined by the common constitutional traditions.

supranational constitutional ground, and claim that limits to *vertical* primacy are not only required by the defence of the national constitution as national, but also of the collective of national constitutions, and thus, of the *deep* constitution of the European Union. Because Community law combines the regulatory ideal of one single constitutional order with a radical institutional pluralism, national constitutional courts should take their duty to guard not only the national, but also the European constitution, seriously.

The theory of constitutional synthesis shows that the primacy riddle is more easily solved once we realise that synthesis gives a distinct shape to the very notion of primacy, given the composite character of the supranational constitutional order. Acknowledging primacy to European constitutional norms is not demeaning to the overall primacy of the Constitution, but it does mainly contribute to realise it, and only marginally requires the revision of the national constitutional standard by reference to the collective of national constitutional standards. The derivative character of Community law comes hand in hand with its primacy in *horizontal and mixed conflicts* because primacy is the only way to realise the shared objective of integrating through constitutional law. Primacy is, indeed, only problematical when the vertical conflict is the result of the emancipation of Community constitutional standards *against* the substantive contents of national constitutional standards (such was the case in the famous *Viking* ruling, and, in general, every time that economic freedoms overrule national norms on the grounds that they are obstacles to the maintenance of the single market).

The theory of constitutional synthesis claims that the key source of the stability of the European legal order resides in the foundational role played by national constitutional norms in both the Community and the national legal orders. It is because (and one could add, it will continue to be the case as long as) national constitutional norms play the same role in the domestic and in the Community legal orders that European legal integration is infused with the democratic legitimacy which provides decisive motivational force to citizens and institutional actors alike.

Moreover, the theory of constitutional synthesis shares with the national and pluralist theories of Community law the notion that the stability of the European legal order is critically dependent on the internalisation of the double role which national constitutions play due to their dual function as supreme national law and as part of the collective of supreme Community norms. Because the substantive unity of European law comes hand in hand with a differentiated institutional structure and overlapping law-making processes, the way in which law is systematised and turned into a consistent whole plays a decisive role. Thus, the theory of constitutional synthesis finds the insights provided by pluralist theories on the relevance of the argument from coherence in ensuring the stability of the European legal order to be appealing. But it adds that the force of the argument does not merely come from its being a logical part of any theory of legal argumentation, but also from its implicit endorsement, both by the Community and by national constitutional courts, of provisions which impose a reciprocal obligation of constitutional loyalty.⁷¹ In particular, national constitutional courts should assume their double identity as the

⁷¹ Or, to put it otherwise, the obligation is not merely moral, prudential or grounded on scholarly-constructed principles, but it is, indeed, a legal obligation which derives from the best possible interpretation of the law in force in each and every Member State.

guardians of both the national and the European constitution. Because the said courts are no longer mere national institutions, but part and parcel of the overall European institutional structure, because their opinions are not only relevant to their citizens and permanent residents, but can also influence the way in which European constitutional law is constructed (as the synthesis of all national constitutional norms), their role as the defender of the national constitution cannot but include that of the guardian of the Community constitution. If the Polish Constitutional Court adjudicates upon a European constitutional conflict, both Community law and Polish Constitutional law require the Court to ground its decision *not only on a narrow set of Polish constitutional arguments*, but on a *wider* set of Polish constitutional arguments which takes the fact that the Polish legal order has become integrated, in application of its own constitution, into the European legal order, into account.

Conclusion

This working paper has emphasised the close relationship between Neil MacCormick's European constitutional theory and his major achievements as a legal theorist, and, in particular, his fundamental contribution to the establishment and the development of "modern" institutional jurisprudence. In Section I, I sustained that MacCormick's reconciliation of legal positivism with the liberal and democratic public philosophy, which was endorsed, but not coherently followed, by the two foremost legal positivists of the last century (Kelsen and Hart), created the theoretical space within which it was possible to forge a constitutional theory *beyond the state*, and, in particular, a constitutional theory of the European Union. In Section III, I claimed that MacCormick put forward some of the basic building-blocks of a sound constitutional theory of European integration. In particular, his emphasis on the co-existence of a plurality of equally authoritative standpoints from which to reconstruct and systematise Community law pointed to the structural "pluralistic" character of the European Constitution. Similarly, his underlining of the limits of law, and, in particular, of the incapacity of any legal system to ensure its own stability, helped rebut claims which diminished the full-blown "legal" nature of Community law on account of the fact that it was not supported by an independent "sovereign" will. However, I also argued in Section III that MacCormick's own writings reveal his uneasiness with some of the implications of constitutional pluralism. Very significant in this regard is his shift from a radical to a moderate "pluralistic" standpoint. This led me to put forward, in Section IV, an alternative constitutional theory of the European Union: the theory of constitutional synthesis. Its key insight is that the constitutional path through which the European constitution has been democratically established is different from both that of revolutionary and evolutionary constitutionalism; and that such a path is what makes the Union intrinsically pluralistic from a legal standpoint. To say that the European Union is the result of a process of constitutional synthesis is the same as claiming that already constitutionally-established constitutional states *put their constitutions in common* and in a progressive, albeit piece-meal, process, developed a common and supranational institutional structure. I affirmed and now re-iterate that constitutional synthesis is able to remain loyal to the key insights of MacCormick's institutional theory and European constitutional theory, but that it manages to ease some of the tensions underlying the constitutional theory of the author of *Legal Theory and Legal Reasoning*. But, even if it departs from MacCormick's European constitutional pluralism, the theory of constitutional synthesis is highly indebted to MacCormick's institutional theory and to his reflections on European constitutional history, and constitutional

synthesis endeavours to be fairly MacCormickian in spirit. Thus, it is proper to conclude, dear reader, that it is intended more as a move in the right direction, than as a definitive and final rendering of this very necessary European constitutional theory. If only Neil could still show us the way!

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RECON is an Integrated Project financed by the European Commission's Sixth Framework Programme for Research, Priority 7 – Citizens and Governance in a Knowledge-based Society. Project No.: CIT4-CT-2006-028698.

Coordinator: ARENA – Centre for European Studies, University of Oslo.

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