

## PLURALISM REGAINED

### BOOK REVIEW:

### **‘EL COSMOPOLITISMO JUDICIAL EN UNA SOCIEDAD GLOBAL: GLOBALIZACIÓN’**

**by D. ORDONEZ-SOLIS**

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David Baez Seara \*

Cosmopolitanism, in its Kantian formulation, is linked to the idea of the removal of constraints to the public use of reason or, in other terms, to securing the possibility of free and unconstrained inter-subjectivity.<sup>1</sup> All the contemporary conceptions of cosmopolitanism share with the classical Kantian ideal the necessity of subjecting relations and practices to an uncoerced interaction and an impartial reasoning.<sup>2</sup> With *El Cosmopolitismo Judicial en una Sociedad Global* [*Judicial Cosmopolitanism in a Global Society*, in the English translation], Ordoñez Solís explains how the globalisation process creates a new type of ‘cosmopolitan’ rationale in which judges and courts are also involved. The book is divided into three main sections. In the first part, Ordoñez Solís succinctly explains the creation and the basic features of the globalisation process. In the second part, the author analyses the role of judicial dialogues by focusing on the relevant case-law with a special emphasis on the decisions of the European Court of Justice. In the last part, he introduces the idea of “communicative deliberative contexts” as both an incipient pattern of behaviour of the European judicial community and as a normative ideal that must be strengthened globally. The final product is an interesting and lucid analysis of the communicative interactions between European and international courts, that makes frequent use of the relevant case-law to illustrate the main ideas. In spite of this profusion of judicial decisions, the author skilfully avoids technical language and succeeds in writing a book intelligible for

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\* Researcher, European University Institute; david.baez@eui.eu. I wish to thank Lucas Lixinski, Luc Wintgens and Giovanni Sartor for their comments and suggestions to earlier versions of this text.

<sup>1</sup> D. HELD, “Principles of Cosmopolitanism Order”, in M. ESCAMILLA and M. SAAVEDRA, *Law and Justice in a Global Society*, Granada, Anales de la cátedra Francisco Suarez, 2005, at p. 146.

<sup>2</sup> See D. HELD, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, Cambridge, Polity Press, 1995; D. HELD, *Models of Democracy*, Cambridge, Polity Press, 1996; B. BARRY, “Statism and Nationalism: A Cosmopolitan Critique”, in I. SHAPIRO and L. BRILMAYER, *Global Justice*, New York, New York University Press, 1999.

those interested in the globalisation process and with no formal training in law. The book, however, suffers from one serious flaw: the absence of more developed arguments to warrant the main idea of the book; namely, that judicial cosmopolitanism must be understood as the process of establishing international and supranational judicial instances supported by the involvement of national judges in the application of a so-called 'universal' order, together with a need to strengthen communicative or deliberative structures. This is particularly unfortunate because, not finding this necessary theoretical exercise, the reader could have the mistaken impression that 'judicial cosmopolitanism' simply amounts to a general exercise by courts and judges in seeking a sort of universal understanding on a wide spectrum of controversial issues concerning constitutional rights and freedoms. However, cosmopolitan claims are more limited and complex than this. If contemporary legal practice is characterised by communication and dialogue, their pre-conditions and causes need to be explained clearly.

In this short review, I concentrate exclusively on this issue. I do this merely because the idea of judicial cosmopolitanism as expressed by Ordoñez Solís is an accurate account of the practice of the European judicial community that merely needs some refinement. Perhaps this polishing process must start first by distinguishing between cosmopolitanism and pluralism. The former is the term used by Ordoñez Solís in his book while the latter is the designation most commonly used by European law scholars to talk about the relation between the European legal order and the municipal legal systems of the member states. Both terms do not necessarily need to be understood in the same way, as the driving idea of cosmopolitanism -at least, in its classical formulation- is the transposition of the constitutional state on the global stage, while pluralism can simply be understood as the interrelation of different legal systems. However, both terms are currently used in a very similar way. The so-called 'new' cosmopolitanism re-constructs the Kantian project in a manner that departs from 'state' structures by underlying the role of discursive procedures in multilevel systems. Similarly, legal pluralism sees the relations between legal systems in a pluralistic rather than monistic way, and as an interactive rather than hierarchical process.<sup>3</sup> The way we use both terms in this review corresponds to their latter 'discursive' formulation and therefore the term 'pluralism' -and its derivatives, 'constitutional pluralism' and 'judicial pluralism'- can be replaced in the text by 'cosmopolitanism', and *vice versa*, without changing its meaning.

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<sup>3</sup> N. McCORMICK, "The Maastricht-Urteil: Sovereignty Now", *European Law Journal*, 2005, at p. 256.

## I. SOURCES OF PLURALISM

Poiares Maduro distinguishes between four sources of constitutional pluralism in the European context: the plurality of constitutional sources composing the EU constitutional framework; the non-conditional or resisted supremacy of EU rules over national constitutional rules; the emergence of new forms of power challenging the traditional legal categories upon which EU rules have been framed; and the existence of conflicting political claims supported by the corresponding claims of polity authority.<sup>4</sup> The same types of arguments have been elaborated, in a more or less theoretical way, over the last decade and they are still being developed nowadays. They all derive from a view that opposes the paradigmatic conceptualisation of the legal system as an autonomous and closed entity. The notion of ‘system’ is replaced by other notions which do not (necessarily) entail the traditional features associated with legal systems, such as ‘order’ or ‘network’.<sup>5</sup> In order to assess the significance of the pluralist argument, we need to say more about these four sources of constitutional pluralism.

### 1. *The plurality of constitutional sources*

The example of the European Union is especially significant here. What is particularly important in the existence of these multiple constitutional sources is the interaction of the different constitutional discourses which, as Maduro affirms, have “fed the EU constitutional framework and its general principles of law, particularly as developed in the jurisprudence of the Court of Justice”.<sup>6</sup> By means of this inter-connection, the national constitutional discourses and the European legal discourse have evolved together into a new discourse, which has started a life of its own. European constitutional orders are intertwined at the level of the discourse of judicial officials, whose tendency to convergence creates new legal concepts.

### 2. *Resisted supremacy of EU rules over national constitutional rules*

The best-known cases of challenges to the supremacy of European law by

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<sup>4</sup> See M.P. MADURO, “Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism”, *European Journal of Legal Studies*, Dec. 2007, at pp. 1-2.

<sup>5</sup> See, for a detailed explanation of a ‘network’ view of the legal order, F. OST and VAN DE KERCHOVE, *De la pyramide au réseau: Pour une théorie dialectique du droit*, Brussels, FUSL.

<sup>6</sup> *Ibid.*, at p. 1.

national constitutional courts are perhaps the *Solange I* (1974),<sup>7</sup> *Solange II* (1986)<sup>8</sup> and *Maastricht* (1993)<sup>9</sup> decisions of the German Constitutional Court. The monist thesis stated by the European Court of Justice in *Costa v. ENEL* (1964),<sup>10</sup> according to which the validity of national law and European law is subordinated to their conformity with the Treaty, has been defied by dualist trends, provoked by the will of national constitutional courts to protect interests of special importance. What is important for the pluralist argument is that the monist-dualist dichotomy is overcome by a new discursive logic of interaction that entails a discursive conception of supremacy. This discursivity makes sense from the point of view of the foundations of the European legal order, which was based on national law, as well as from the point of view of national law itself, which is on many occasions derived from European law. This circularity interconnects both legal orders and makes them depend upon each other.

### 3. *The emergence of new forms of power challenging traditional legal categories*

On one hand, legal orders are interconnected to each other, borrowing and creating new legal concepts. On the other hand, they are also related to other societal orders, such as politics and economy. It is then possible to talk of a double input into the legal order; an internal input coming from other legal orders and an external input coming from other societal orders. If we focus our attention on the latter, it seems that the new trends produced by the process of globalisation affect the political and economic orders. The scope of this change is a matter of controversy amongst globalisation theorists, but what is far less controversial is that the current world economy and political system operate with a different form and logic from those of earlier decades. For instance, in today's international politics the primary actors are no longer the heads of state and government or foreign ministers, but also administrative agencies, courts and legislatures, and in the economic sphere national economies are now enmeshed in a global system of production and exchange.<sup>11</sup> Therefore, for the supporters of the pluralist argument, if law is to function within the society it regulates, it needs to fit into at least the basic principles of the other societal orders.<sup>12</sup> This requirement puts pressure on those traditional

<sup>7</sup> *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, BVerfGE 37, 271; *Common Market Law Review*, 1974, at p. 540.

<sup>8</sup> *Wünsche Handelsgesellschaft*, BvR 2, 197/83; *Common Market Law Review*, 1987, at p. 225.

<sup>9</sup> BVerfGE 89, 155; *Common Market Law Reports*, 1994, at p. 77.

<sup>10</sup> Case 6/64, *Flamino Costa v. ENEL*, ECR, 1964, at p. 585.

<sup>11</sup> D. HELD, *Global Covenant: The Social Democratic Alternative to the Washington Consensus*, Cambridge, Polity Press, pp. 22 and 75.

<sup>12</sup> M. VAN HOECKE, *Law as Communication*, Oxford, Hart, 2002, p. 48.

legal categories unable to function in conformity with new societal changes and may occasionally replace them with new legal categories more appropriate for the new context.<sup>13</sup>

4. *The existence of conflicting political claims supported by the corresponding claims of polity authority*

Whereas the three characteristics above stressed the capacity of constitutional pluralism for providing cooperation, in this last one, the stress is instead on competition between political claims and political authorities. Competition is nevertheless channelled through discursive procedures enabling communication between the conflicting authorities. The emphasis on discursivity identifies this approach with Habermas' theory of deliberative democracy, according to which the normative claims of public authorities need to be validated in a deliberative procedure in which the addressees of those claims are allowed to participate. Political claims are seen by deliberative theorists as regulative statements which aim at correctness. In normal communication, the goal of correctness is the object of a tacit agreement between the speakers; when the claims are challenged by their addressees, however, then they need to be justified by means of a practical discussion concerning the conformity of the contested claims. The object of this discussion or deliberation is to re-establish the broken consensus between the parties.<sup>14</sup> What is particularly interesting for the pluralist argument is the way in which this discussion takes place, as the deliberation between the participants needs to be institutionalised according to the conditionings of the communicative rationality; namely, (i) the only valid claims are those in which all the potential addressees could reach an agreement as participants in a rational discussion (principle of discussion) and (ii) the only legitimate norms are those which are susceptible to reaching the agreement of all members of the legal community at the end of a discursive and institutionalised process of law creation (principle of democracy). Therefore, cooperation -this time, framed as a deliberative process- is once again seen as the way to face conflicting claims.

From the analysis of the above four sources of constitutional pluralism, we can observe the interconnection between them since each one presupposes, at least to a certain extent, the other. However the 'to a

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<sup>13</sup> For instance, the traditional legal categories associated with the classic state or the welfare state are substituted by the categories derived from the regulating state. See, for an account of Europe as a regulating state, G. MAJONE, *La communauté européenne: Un état régulateur*, Paris, Montschrestien, 1996.

<sup>14</sup> J. HABERMAS, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, Polity Press, 1996.

certain extent' qualifier is a key issue, as abuses of deduction mixed with normative views can give us a wrong idea about the real scope of the pluralist argument. This argument, as we have said, is rightly implicit in each of the four sources. As Allan Rosas affirms, we are facing a patchwork of authorities instead of just one national government and one legislature.<sup>15</sup> Similarly, Ordóñez Solís states, when talking about the judicial protection of human rights in the European sphere, that the procedure has a double top-down / bottom-up dimension that cannot be resolved by applying the criterion of hierarchy.<sup>16</sup> However, it can also be argued that what the pluralist argument entails is just a complex system of delimitation of competences which itself entails a complex understanding of hierarchies. If that is the case it would then be possible to admit the above four sources of constitutional pluralism and still argue that most relations are still relations of hierarchy. In the next section we will try to determine the extent to which this view is correct.

## II. PLURALIST SCENARIOS (I): CONTINUING WITH THE STATE DYNAMICS?

The debate on constitutional pluralism relies on the much wider debate on the relation between law and the state. As Raz argues, a theory of law -in this case, a theory about the European legal order- must be partly based on a theory of the state.<sup>17</sup> A state is a political system embedded in a wider social system. In other words, the state is a subsystem among other subsystems which form a social system. These different subsystems are not monolithic entities and, consequently, an interaction exists amongst them. This must be the starting point of any discussion on pluralism and was, indeed, the main concern of the early pluralist writers. Hooker for instance refused to distinguish between legal and non-legal rules.<sup>18</sup> The problem with this approach is that it is not that helpful for our purposes. How can we discuss the relation between national legal orders and the European legal order if we obscure the distinction between norms which are part of the law and those which are not? In addition, it is possible to distinguish

<sup>15</sup> A. ROSAS, "The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue", *European Journal of Legal Studies*, Dec. 2007, at p. 1.

<sup>16</sup> D. ORDÓÑEZ SOLÍS, *El Cosmopolitismo Judicial en una Sociedad Global: Globalización, Derecho y Jueces*, Navarra, Thomson-Aranzadi, 2008, p. 157.

<sup>17</sup> Other legal theorists reject this claim. For example, Kelsen claimed that the concept of 'state' can only be explained in legal terms; see H. KELSEN, *General Theory of Law and the State*, Cambridge, Harvard University Press, 1945, pp. 181-207. The French Constitutional theorist Michel Troper holds a similar view; see M. TROPER, *Pour une théorie juridique de l'état*, Paris, P.U.F., 1994.

<sup>18</sup> M.B. HOOKER, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*, Oxford, Oxford University Press, 1975.

between the legal and the non-legal by relying on a distinctive feature of law, its institutionalised nature. Therefore, a necessary condition for the existence of legal norms is their recognition by the law-applying organs. But one could argue that the institutionalised character of law is also determined by its enactment by law-creating institutions, and thus this act alone is enough to determine when a norm is legal. The problem with this argument is that it misrepresents the normative nature of law. As a normative system, the law purports to guide the behaviour of individuals and institutions; and, when the actions of law-creating and law-applying institutions conflict, the actions of the latter are the ones that affect the practical reasoning of the subjects.<sup>19</sup>

If it is possible to draw a line between legal and non-legal norms and if the legal is determined by law-applying organs which are themselves institutionalised, then it is also possible to conclude that law and the state are ultimately interrelated and in consequence any inquiry on constitutional pluralism must take into account the state -in the Benthamite definition of the term, the “independent political society”<sup>20</sup>- as an element of analysis un-dissociable from ‘law’ or ‘legal order’. But the state does not necessarily mean the ‘traditional state’, and therefore accounts on evolving forms of the state which stress the diminished independence of the “independent political society” are necessary for an accurate analysis of pluralist constitutional practices. In this respect, Neil Walker points out that while the state continues to be a player in the emerging multi-level order, a revised conception of constitutionalism should also be open to the discovery of meaningful constitutional discourse in non-state sites and processes.<sup>21</sup> However, it seems that this discovery, and ulterior recognition, needs the state as a *point de départ* mainly because the act of recognition takes the form of a law-creating act by which the norm is incorporated into the legal system. On the other hand, the problem with constitutional pluralism is not the discovery of constitutional discourses in non-state sites, but how processes of regional and international integration create ‘autonomous’ legal orders which absorb part of the state’s ‘independent’ character by establishing state-like structures, as Ordóñez Solís well illustrates in the first part of the book.

The paradigmatic case in the creation of state-like structures is, doubtlessly, the European integration process. In this respect the

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<sup>19</sup> J. RAZ, “The Identity of Legal Systems”, *California Law Review*, 1971, at p. 803.

<sup>20</sup> See J. BENTHAM, “A Fragment on Government”, in R. HARRISON, *Bentham: A Fragment on Government*, Cambridge, Cambridge University Press, 1960.

<sup>21</sup> N. WALKER, “The Idea of Constitutional Pluralism”, *Modern Law Review*, 2002, at p. 334.

European Court of Justice makes three claims of supremacy about the legal orders of the member states: first, the European Court is entitled to give a definitive answer on all questions of European law; second, the European Court is entitled to determine what constitutes an issue of European law; and third, the European Court has supremacy over all conflicting rules of national law of the member states.<sup>22</sup> However, these three claims are not always accepted by the constitutional courts of the member states. The court which has most vehemently challenged the supremacy of European law is probably the German Federal Constitutional Court with its *Maastrich-Urteil* decision of October 1993.<sup>23</sup> The German Federal Constitutional Court declared that the German law ratifying the Maastricht Treaty could violate the constitutional right to participate in the elections of the Bundestag established in Article 38 of the German Basic Law, which excluded the possibility “of reducing the content of the legitimation of state power and the influence on its exercise provided by the electoral process by transferring powers to such an extent that there is a breach of the democratic principle in so far as it is declared inviolable by Article 79 § 3 in conjunction with Article 20 §§ 1 and 2”.<sup>24</sup> In the view of the German Constitutional Court, European law suffers from a democratic deficit. In this respect, the Court held that the European Parliament only provides “complementary” legitimacy for European law and that, until those legitimacy conditions are obtained, “the functions and powers of substantial importance must remain with the German Bundestag”, as the German parliament must preserve sufficient powers “to give legal expression to what binds the people together (to a greater or lesser extent of homogeneity) spiritually, socially and politically”.<sup>25</sup> But the explicit rejection of the supremacy of European law came in the third part of the decision when the issues of democracy and legitimacy were linked to that of competences. As Baquero Cruz affirms, the German Court expressed the following basic ideas: first, the validity of Community law depends upon the act of accession and ultimately upon the German Constitution and, therefore, Community law is not autonomous; second, the European

<sup>22</sup> N.W. BARBER, “Legal Pluralism and the European Union”, *European Law Journal*, 2006, pp. 306-329.

<sup>23</sup> The *Maastrich-Urteil* decision is not the only decision by the German constitutional court that challenges the supremacy claims. For instance, in *Solange I* of 1974, this same court stated that as long the European Community did not have codified fundamental rights, the German courts would continue to recognise the fundamental rights of Germany as supreme. It also maintained that German courts had the rights to review all incoming legislation to assure that it did not conflict with the fundamental rights of German law; see *Common Market Law Reports*, 1974, at p. 540.

<sup>24</sup> *Common Market Law Reports*, 1994, at p. 77; see, for a deep and lucid analysis of the *Maastrich-Urteil* decision, J. BAQUERO CRUZ, “The Legacy of the Maastrich-Urteil and the Pluralist Movement”, *European Law Journal*, 2008, pp. 389-422.

<sup>25</sup> *Common Market Law Reports*, 1994, at p. 88.



Union has no competence to determine its own competence -no *kompetenz-kompetenz*-, thus any interpretation of the Treaty in a way not compatible with the basis for the Act of Accession “would not be legally binding within the sphere of German sovereignty”.<sup>26</sup> Consequently, by affirming the non-acceptance of expansive interpretations of the Union’s powers, the German Constitutional Court challenged both the first and the third supremacy claims.<sup>27</sup>

Furthermore, this conditional opposition to the supremacy of European law came under a particular conceptual framework of the process of European integration that we may label as a ‘national-constitutional’ approach, in which the relation between national constitutional orders and European law is seen from the point of view of the former.<sup>28</sup> In this respect we are faced with two interrelated problems: first, we need to answer the question of whether the national-constitutional approach is an appropriate analytical tool in the description and understanding of our current European constitutional practices; second, we need to determine whether the national-constitutional approach is a necessary condition for European constitutional pluralism to exist. A negative answer to both of these questions paves the way for the development of alternative notions of constitutional pluralism which, as we will later argue, do not necessarily need to focus on the inconsistencies of rules of recognition.

By using the expression ‘compound of states’ the German Constitutional Court in the *Maastrich-Urteil* decision stressed the dualistic character of the European process in which the national constitutional orders are seen as establishing the grounds for the validity of European law. However, this conservative discourse also entails a reification of the (traditional) state with its classic features of supreme internal and external authority. The problem with this view is that it does not reflect the actual political and legal scenarios and processes. In this respect, Weller believes that ‘state’ “is a technical term which modestly represents one of many layers of competence to which individuals have transferred public powers”.<sup>29</sup> In spite of these arguments, the national-constitutional approach seems to be taken as the implicit basis for certain approaches to constitutional pluralism, which tend to stress the inconsistencies of fundamental rules of

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<sup>26</sup> *Ibid.*, at p. 89.

<sup>27</sup> N.W. BARBER, “Legal Pluralism and the European Union”, *supra* note 22, at p. 323.

<sup>28</sup> J. BAQUERO CRUZ, “The Legacy of the Maastrich-Urteil and the Pluralist Movement”, *supra* note 24, at p. 405.

<sup>29</sup> M. WELLER, “The Reality of the Emerging Universal Constitutional Order: Putting the Pieces of the Puzzle Together”, *Cambridge Review of International Affairs*, 1997, at p. 45.

both the national constitutional and the European legal orders.<sup>30</sup>

### III. PLURALIST SCENARIOS (2): INCONSISTENT RULES OF RECOGNITION

In his illuminating analysis of European constitutional pluralism, Barber claims that the *Maastricht-Urteil* decision made explicit the existence of two pairs of inconsistent rules of recognition. There is a first pair of inconsistent rules giving supremacy to different sets of legal rules caused by contradictory claims: while the German constitutional court stated that European law takes effect through the German basic law, the European Court of Justice by contrast regards European law as the highest source of law within the European Union. Similarly, the second pair of inconsistent rules gives adjudicative supremacy to different courts. The reason for this is that, while the German Constitutional Court declared that it has the duty to have the final word on the content of all laws operative in Germany, the European Court of Justice by contrast affirmed that it has the final say on the laws with a European content that are operative in the member states.

These inconsistencies in the fundamental rules of the legal system -and the potential cause for conflict between courts- place lower courts, institutions and citizens in a difficult position, as in case of effective conflict the law will not be able to accomplish its fundamental function of guiding the behaviour of subjects. It seems, however, that so far, and despite the inconsistencies on the supremacy claims, European law has been able to affect the practical reasoning of its citizens and officials. This could be for different reasons: first, it could be the case that the inconsistencies operate only in a rhetorical and not in a practical dimension due to an explicit intention of judges to avoid possible conflicts; second, it could also be the case that lower courts decide to apply European law without seeking the mediation of constitutional courts, implicitly ignoring with this act the supremacy claim made by national constitutional courts.<sup>31</sup>

In the first case, both national constitutional courts and the European Court of Justice avoid, in an exercise of judicial minimalism, ruling on the validity of European law. Legal controversies are resolved by reference to specific rules and low-level principles and therefore the courts' legal

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<sup>30</sup> See N.W. BARBER, "Legal Pluralism and the European Union", *supra* note 22; see also N. WALKER, "The Idea of Constitutional Pluralism", *supra* note 21.

<sup>31</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal*, ECR, 1978, at p. 629; the lower courts of the member states should not follow the incorrect decision of higher courts.

reasoning rests in what Sunstein labels as “incompletely theorised agreements”; that is, an exercise of incomplete theorisation of the law when the determination of ultimate validity of EU law is not absolutely relevant for the resolution of the controversy.<sup>32</sup>

In the second case, lower courts have a commitment towards the authority of the European Court of Justice; that is, a commitment to resolving their possible disagreements by the application of a set of rules, or by membership to that set of rules, or by relying on the decision of the European Court. The issue at stake is whether lower courts are able to simultaneously commit to both their national constitutional court and the European Court.

#### I. *Incompletely theorised agreements*

The assumption under the idea of incompletely theorised agreements is that judges conceal the true basis of their decision in the name of social consensus. The law-applying officials faced with disagreements prefer not to provide deep justifications for their judgments, relying instead on legal rules and low- and mid-level principles to summon the required support. The aim is then to reach an ‘overlapping consensus’; that is, a convergence amongst the possible different political or moral views of lower courts and citizens. As Sunstein affirms, “if judges disavow large-scale theories, then losers in particular cases lose much less; they lose a decision, but not the world; they may win in another occasion”.<sup>33</sup> However, the idea of incompletely theorised agreements is difficult to apply equally to national constitutional courts and the European Court of Justice, as their interpretive practices have been characterised by the use of deep-level justifications for their decisions. In the case of national constitutional courts, the *Solange I*, *Solange II* and *Maastricht-Urteil* decisions are exponents of this deep-level theorisation by the German Constitutional Court.<sup>34</sup> In the case of the European Court of Justice, early path-breaking decisions deducted a constitutional framework distinct from that of traditional international law from the treaties through a highly theorised reasoning, assuming by this the autonomy and completeness of European law.<sup>35</sup> Therefore, incomplete theorisation is not an adequate way to frame

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<sup>32</sup> C. SUNSTEIN, *Legal Reasoning and Political Conflict*, Oxford, Oxford University Press, 1996.

<sup>33</sup> *Ibid.*, at p. 41.

<sup>34</sup> See, for a concise analysis of the legal reasoning of other European constitutional courts on the issue of supremacy, J. BAQUERO CRUZ, “The Legacy of the Maastricht-Urteil and the Pluralist Movement”, *supra* note 24, at pp. 397-406.

<sup>35</sup> See M.P. MADURO, “Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism”, *supra* note 4; who affirms that “the Court was not simply concerned with ascertaining the aim of a particular legal provision; it also

the courts' legal reasoning in the European context, as they do not particularly refrain from deeply justifying their decisions.

## 2. *Lower courts' commitment*

When judicial officials commit themselves to an authority they are constraining their future selves to act in conformity with the authority's directives. But can officials be committed to two contradictory authorities, as constitutional pluralism seems to propose? This seems difficult from the point of view of the rationality of the participants in legal practice. If we accept that judicial officials are not all alienated participants, they must be committed to do their part in the creation and maintenance of a unified system of rules; and, in order to do that, they must look at the same tests for validity as the other participants.<sup>36</sup> Once this is reached, the system will be unified in two senses: first, the rules of the system would pass the same tests for admission; and second, the participants will look at the same rules when guiding their conduct and evaluating the conduct of others. If officials commit themselves to two contradictory authorities, however, their commitment will amount to nothing, as one commitment cancels the other and vice-versa. If the lower courts of the member states are committed both to the authority of their national constitutional courts and to the authority of the European Court of Justice, the formal goal of the creation and maintenance of a unified system of rules will not be possible to achieve, as both authorities will make contradictory claims regarding the supreme authority in the system.

## 3. *A way out: Incomplete rule of recognition and theoretical inconsistency*

There are two plausible ways out of this pluralist trap. The first view affirms that the two inconsistent sets of supremacy rules -inconsistent rules of recognition giving supremacy to different sets of legal rules and inconsistent rules of recognition giving adjudicative supremacy to different courts- are just the result of the incompleteness of the rule of recognition. But they are not themselves rules of recognition, precisely because of the impossibility for lower courts to be committed to two contradictory

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interpreted that rule in the light of the broader context provided by the EC (now EU) legal order and its constitutional *telos*; there is a clear association between the systemic (context) and teleological elements of interpretation in the Court's reasoning; it is not simply the *telos* of the rules to be interpreted that matters but also the *telos* of the legal context in which these rules exist; we can talk therefore of both a teleological and a meta-teleological reasoning in the Court".

<sup>36</sup> An alienated worker has the 'participatory' intention to contribute to the collective enterprise but she does not have the 'group' intention that such project be successful; see C. KUTZ, *Complicity: Ethics and Law for a Collective Age*, Cambridge, Cambridge University Press, 2000, p. 92.

authorities.

The rule of recognition of a legal system does not necessarily need to provide solutions to all legal problems, such as the ultimate validity of the rules of European law within municipal legal systems. However, European courts have arrived at contradictory conclusions on the very same issue and there is some ground to believe that there are in fact two sets of simultaneous and inconsistent rules of recognition, if one considers the rule of recognition as a customary rule which is determined by the practices of the law-applying organs. Nevertheless, as it has been explained above, it is not possible to be committed to these two sets of inconsistent rules. Indeed, in such a case, the minimal requirements for the existence of a commitment would fail and, in the absence of a commitment, lower courts will not be able to guide their conduct. The incompleteness of the rule of recognition derives then from this impossibility of being committed to two inconsistent rules and entails conceiving the supremacy issue as an open question.<sup>37</sup>

In spite of the incompleteness of the rule of recognition, lower courts are able to guide their conduct simply because they defer to the same authority structure. Deference to the same authority structure is different from deference to an authority. To defer to the national constitutional court is to defer to an authority, and the same happens with deference to the European Court of Justice. Lower courts can also defer to a weaker hierarchy, however; and, in this particular case, they can defer to the bargaining structure that arises in the cases in which the issue of supremacy is at stake. If lower courts and judges can guide their conduct and resolve the disputes on a daily basis, it is simply because there is a rather clear delimitation of the power and competences between the diverse authorities. Only in the cases in which supremacy claims are involved would there be these judges and courts appealing to the authoritative structure represented by the bargaining process. This implies a further commitment on the part of higher courts to negotiate with each other until further consensus is reached. Of course, this bargaining does not have to take place explicitly, it is sufficient that some criteria can be drawn from the dialectics of the two judicial levels allowing the resolution of the concrete case.<sup>38</sup>

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<sup>37</sup> See M.P. MADURO, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in N. WALKER, *Sovereignty in Transition*, Oxford, Hart, 2003.

<sup>38</sup> A. ROSAS, "The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue", *European Journal of Legal Studies*, Dec. 2007, at p. 13; who defines horizontal judicial dialogues as the "dialogue taking place between courts which are more or less at the same level".

The second view argues that, if guidance has been possible, it is because lower courts have in fact deferred to the authority of the European Court of Justice without ignoring the authority of their respective constitutional courts. The supremacy claims made by the national courts are seen as theoretical claims that do not affect their practical reasoning and therefore do not need to be ignored. In fact, what this second view stresses is the lack of a regularity of behaviour on the part of lower courts in acting in conformity with the supremacy claims of national constitutional courts to be able to create a (customary) rule of recognition. The second view simply accepts the existence of two sets of inconsistent rules of recognition and argues that, if guidance has been possible, it is because the supremacy issue does not affect the practical reasoning of lower courts. In other words, the debate as framed is a theoretical one and therefore supremacy does not play any relevant role in the mediation between lower courts and their actions; which is what practical authorities are in fact supposed to do. This does not mean that, in the future, the way in which the debate is framed cannot be modified, making inconsistency effective and thus affecting the guidance of courts. Yet, until then, the commitment of the law-applying organs in maintaining a unified system of rules is not incompatible with inconsistency at the level of the rules of recognition. Inconsistency here is just irrelevant.

Both views are plausible and there is indeed little difference between them. The accuracy of each view depends fundamentally on the accuracy of the claim that the supremacy question has a theoretical character. Both views are also consistent with most of the ideas expressed by Ordóñez Solís. The first view relies on the importance of deliberative contexts to foster an atmosphere of cooperation for the resolution of conflicts. The second view relies on a sort of imperfect monism, as the validity of the European law does not depend, in practice, on the municipal order.

#### IV. CONCLUSION

We have argued that the relations between the European and municipal legal systems of the member states are better understood from a pluralist view that does not conceive of the rules of recognition as inconsistent (first formulation), or that does not take inconsistency seriously (second formulation). On this we agree with Ordóñez Solís. Against him, we believe that the classical cosmopolitan approach in which he translates judicial practice is misguided, as it falls into the trap of the global state that we criticised in the first section of this review. It seems that on this point Ordóñez Solís sees the constitutionalisation of international law in terms of the compact entity of a 'world republic'. However this view is incompatible with two main ideas of the book: the emergence of

communicative deliberative contexts visible especially in relation to human rights in regional spheres, and the sort of 'federal' collaboration existing between judges from different legal systems. Because these two ideas are correct the classical cosmopolitanism that Ordóñez Solís claims needs to be reformulated to make room for liberal, federalist and pluralist notions of judicial cosmopolitanism. This being said, even if Ordóñez Solís still has some work to do, his book presents a promising line of thought based on a new form of constitutionalism in which power not only originates in the state, but also in international and supranational organisations, and in which legal arguments need to be put in dialectical context.