The EU as a Confederal Union of Sovereign Member Peoples: Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU

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8 The statist and pluralist challenge

1 Sovereignty as an obstacle: The statist and the pluralist challenges

Sovereignty and integration do not seem natural allies. The absoluteness and centralism associated with sovereignty appear to block supranational cooperation, or forces it to the extreme of forming a new sovereign state.[1] Conversely it seems integration must overcome sovereignty to be successful. Not surprisingly, therefore, sovereignty has been a problematic and divisive concept for EU integration.[2]Yet, if sovereignty and integration are indeed fundamentally incompatible, any confederal attempt to reconcile the two would be inherently futile. Before exploring the potential of a confederal conception of sovereignty for the EU it is, therefore, necessary to first examine this apparent clash between sovereignty and integration, and the theoretical deadlocks that result from it.

To that end this chapter turns to statism and pluralism: Two of the currently most dominant schools on EU integration that together perfectly represent the common assumption that integration and sovereignty conflict, and that substantiate this position with a range of arguments. Both schools hold powerful, yet strongly opposed, views on integration. Sovereignty figures prominently in both, albeit as Saint George in the one and the dragon in the other. Contrasting statism and pluralism therefore provides a useful starting point for the analysis of confederal sovereignty and its potential for the EU. It forces any conception of confederal sovereignty to engage with the strongest and most fully developed arguments against combining sovereignty and integration that currently exist. It also connects the analy-

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1 Cf for instance BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil*, par. 228 or Schütze (2009), 1090 and 1095, including his translation of Jellineks classic position on federalism, illustrating how even in a federal state undivided sovereignty remained with the federate center: 'Whatever the actual distribution of competences, the Federal State retains its character as a sovereign State: and, as such, it potentially contains within itself all sovereign powers, even those whose autonomous exercise has been delegated to the Member States.' Alternatively see D. Wyatt, 'New Legal Order, or Old?' 7 *European Law Review* (1982), 147, who on the basis of this dichotomy forces the EU into the corner of an international organization.

2 See in this regard already the clear language by Monnet, which he had drafted for an earlier version of the Schuman declaration: 'This proposal has an essential political objective: to make a breach in the ramparts of national sovereignty which will be narrow enough to secure consent, but deep enough to open the way towards the unity that is essential to peace.' (Monnet (1978), 296)

sis in this thesis to some of the leading views in the current debate on the nature of the EU, instead of developing it in splendid but sterile isolation. The overview below, therefore, will also form the basis for a more critical appraisal of both schools later in part II, as well as for the attempt to establish a (partial) confederal synthesis between them. For as will be seen both statism and pluralism lead to certain deadlocks in our thinking on European integration. Several of these deadlocks derive from incorrect or unsuitable conceptions of sovereignty, and it is here that a confederal approach can make one of its contributions, as it precisely reduces or circumvents these deadlocks. At the same time the overview also serves to test the confederal approach itself, as it should also be able to incorporate and build on the important insights provided by both schools.

The following sections will first introduce the dichotomy between statism and pluralism (section 2). Subsequently statism will be set out (section 3) beginning with an overview of its academic defence. Based on this overview the key tenets of statism will be briefly outlined, after which we turn to the forceful judicial application of these tenets by the German *Bundesverfassungsgericht* and the vital role played by sovereignty in this application. Section 4 then sets out the academic defence of pluralism, including its use of the EU as a crown witness against sovereignty. Considering that there is no explicit judicial defence of pluralism available, this section then provides several conclusions on the strengths and weaknesses of pluralism, including its powerful attack on statism. After statism has been allowed a rejoinder, two attempts to bridge the dichotomy between statism and pluralism will be briefly discussed (section 5), before some general conclusions on the dichotomy between statism and pluralism, and between sovereignty and integration, are drawn in section 6.

The overview provided will be based on the work of several leading figures from the respective schools. It must be stressed, however, that the aim in this chapter is not to make specific contributions to either statism or pluralism, or to set out in detail the existing – and important– differences within each camp. Rather the aim is to sketch the larger picture, and, abstracting from these internal conflicts, set out the core characteristics of both approaches and their relation to sovereignty.

2 Central dichotomies: National v. international or statism v. pluralism

The EU is commonly placed in the spectrum between the national and the international.[3] Is it a state like entity best approached as a national system,

3 De Witte (2012), 49, 53. For an early example see C. Sasse, 'The Common Market: Between International and Municipal Law', 75 *Yale Law Journal* (1965-6), 659.

or is it an international organisation, a 'creature of international law'?[4] National conceptions tend to suggest further federation as the best way forward for the EU to achieve sufficient stability and to match the Member States in effectiveness and legitimacy.[5] Alternatively they lead to a *sui generis* conception where the EU cannot be made to fit the national framework.[6] Conversely the international view maintains that the EU, as a far-reaching form of voluntary association between states, does not exceed the outer limits of an international organization. [7] For example it derives its powers from the Member States and does not posses any original or ultimate authority of its own accord.[8]

Within this national – international dichotomy a confederal approach can already be of use as a conceptual halfway house. A more fundamental dichotomy, however, should be distinguished, already because it underlies and incorporates the national – international one. This is the dichotomy between *statist* approaches on the one hand, and *non-statist*, or *plural* approaches on the other.[9]

3 The statist – pluralist dichotomy

Statist approaches start from the existing statal framework. The concepts and normative ideals surrounding the nation-state, and the encompassing system for public authority they create, are applied to the EU. The question becomes where the EU fits within this statal framework. It must be stressed that this statal framework *includes* the national – international dichotomy. The inter-national, after all, derives from the statal order.[10] The question whether the EU is national or international, therefore, remains within the statist paradigm.

4 De Witte (2012), 19.
5 See Kinneging (2007), 40 or Mancini (1998).
6 See supra Introduction, section 4.1. on the *sui generis* character of the EU as well as Baquero Cruz (2008), 389.
7 See also the work of Hoffman, especially Hofmann (1966), 862 and 'Reflections on the Nation-State in Europe Today' 21 *Journal of Common Market Studies* (1982), 719.
8 T.C. Hartley, 'The Constitutional foundations of the European Union' 117 *Law Quarterly Review* (2001), 225, 228, 243, also see Milward (1992).
9 Also see in this regard N. Walker, 'European Constitutionalism in the State Constitutional Tradition' 59 *Current Legal Problems* (2006), 51.
10 See for a detailed discussion of this point chapter 9, sections 2 and 4.

Pluralist approaches reject the statal framework itself, which they see as monist and rigid.[11] They strive to develop a post-statal framework, which shows how the EU falls completely outside, and not just in-between, the national and the international.[12] Instead of a statal world with clear centers of ultimate authority, we live in a plural reality where multiple overlapping centers and orders must interact with each other.

Both approaches also flow from two opposing yet necessary logics or methods. On the one hand one can approach the EU from the existing statal theory and see how the EU fits, or should be made to fit. On the other hand one can start from the apparent innovations in the EU that appear to defy the statist framework, and then see how existing theory must be changed or discarded to allow for these innovations and the plural reality they seem to create.[13] Both approaches, however, seem to lead to conflicting outcomes, and hence a dichotomy in the theory of the EU.[14] Neil Walker nicely expresses the logical tension between both approaches where he juxtaposes pluralism with constitutional monism, which is one form of statism:

> 'Constitutional monism merely grants a label to the defining assumption of constitutionalism in the Westphalian age which we discussed earlier, namely the idea that the sole centres or units of constitutional authorities are states. Constitutional pluralism, by contrast, recognises that the European order inaugurated by the Treaty of Rome has developed beyond the traditional confines of inter-national law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states. The relationship between the orders, that is to say, is now horizontal rather than vertical – heterarchichal rather than hierarchical.[15]

The fundamental dichotomy, therefore, does no lie between the state and the international, as the international is a function of the state.[16] Nor does it lie between statism and federation, as a federation is only another variant of the state. The real dichotomy lies between the *statal* and *non-statal* conceptions of public authority, of which pluralism forms one of the most prominent schools. So let us take a closer look at these two schools and this dichotomy between statal and pluralist conceptions.

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11 N. MacCormick, 'The Maastricht Urteil: Sovereignty Now' 1 *European Law Journal* (1995), 264: '(…) the most appropriate analysis of the relations of legal systems is pluralistic rather than monistic, and interactive rather than hierarchical.'

12 J.H.H. Weiler and U.R. Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz', in: A-M Slaughter, A. Stone Sweet and J.H.H. Weiler (eds), *The European Courts and National Courts – Doctrine and Jurisprudence* (Hart Publishing 1998), 331.

13 See in this regard also the comments on normalism v. exceptionalism in Introduction, section 4.1.

14 See discussing this tension, and in a sense its emergence into general awareness at the Maastricht judgment, Baquero Cruz (2008), for instance at 405.

15 Walker (2002), 337.

16 See also N. Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay', 25 *Oxford Journal of Legal Studies* (2005), 587.

4 Statism: The sovereign state as bulwark and safe haven

Statist accounts emphasize the essential position of the state. Be it because democracy is only possible within the sovereign state, because the state embodies and protects a pre-political '*Volk*', because the nation-state is the optimum or only viable form of political organization, or for other reasons, the central postulate is that the sovereign state must not be 'dissolved' in the process of European integration.[17] Because of this vital role of the state it also becomes logically necessary to contain the EU within the realm of international cooperation.[18]

Based on the work of some leading statist scholars, the next sections first introduce statism as developed academically and provide an overview of the key tenets of statism. Subsequently, the analysis focuses on one of the most influential and developed judicial defences of statism and sovereignty: the *Lissabon Urteil* of the German *Bundesverfassungsgericht*.

4.1 Academic statism

The work of Paul Kirchhof epitomizes statism, partially because of its rather pure and undiluted form.[19] He strongly emphasizes the essential role of the state, which must remain the primary and ultimate entity in the organization of public authority. He especially stresses the unique capacity of the state to provide democratic legitimacy.[20] As the EU is not a state, and is not based on a single European people, the EU can never provide an equal – or sufficient – level of democracy.[21] Protecting the state against integra-

17 The danger of 'dissolving' is taken from P. Kirchhof, 'Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland' in: J. Isensee (ed), *Europa als politische Idee und als rechtliche Form* (Duncker & Humblot 1993), 64.

18 See in this regard the qualification of 'supranational organizations' as a species of international organizations in handbooks on the law of international organizations, such as in H. Schermers and N. Blokker, *International Institutional Law: Unity within Diversity* (4th edn, Martinus Nijhoff Publishers 2003), 46. Also see Forsyth (1981), x: 'However, classical theory does not positively indicate why or how states join together voluntarily to create a body capable of legislating for their own citizens – indeed, precisely because of its emphasis on state sovereignty, it tends to make one deeply sceptical of the possibility of such a development, and to deny in the name of theory the reality that exists before one's eyes.'

19 So explicitly so in his academic work that one may safely assume the same for his previous position within the Bundesverfassungsgericht, not least as Judge Rapporteur of the *Maastricht Urteil* (BVErfGE 89, 189 (1993).

20 Kirchhof (2010), 737.

21 'Due to its indirect legitimation through the peoples of its members (*Staatsvölker*) and not through a European people (*Staatsvolk*), the European Union cannot lay claim to the legitimation, the universal nature and the power of re-innovation of a constitutional state.' Kirchhof (2010), 739 and 743.

tion, therefore, is necessary to protect democracy itself. But the state is of even more fundamental importance for human life than democracy alone:

> '(…) without the safety of a state, the human being remains without peace, reliable liberty under the rule of law, the secure frame of professional and personal development, future provisions and existential safety.(…) The end of history was proclaimed, but that, finally, led to the insight of founding states so that the preconditions of a free development of the people would be established.'[22]

The sovereign state must, therefore, remain the foundation of all political organization. A position which necessarily entails that 'European public authority is ancillary to state authority, which grows out of and rests upon the state foundation.'[23]

As a non-statal entity the EU can also not have a 'real' constitution. The: 'term 'constitution' suggests the emergence of statehood – the ultimate source of a legal order, *absolute* primacy, the authority of constitution making of the *people* (*pouvoir constituant*), and the presence of an *exclusive* and basic political structure.'[24] This fundamental and exclusive nature of a constitution means that two real constitutions cannot coexist in the same territory. As a consequence, any claim that the EU *does or should* have a real constitution attacks the constitutions and independent existence of the Member States. Talk of EU constitutionalism, therefore, is not a harmless borrowing of terms. It threatens the very basis of political and legal organization: the state.[25]

Under this statist approach the concepts of state, people, democracy, and constitution are bound together.[26] The notion of *state sovereignty* captures this unity. It safeguards all that is fundamental and necessary for a well ordered public authority. As a result 'Every state demands sovereignty, the ultimate and final power to ensure domestic law and peace, in order to preserve independence from other states and to represent community in relationships with third parties. *Sovereignty protects the state's cohesion* (…)' Kirchhof is obviously well aware of the high level of integration already

22 Idem, 755.

23 Cf also Hartley (2001), 235.

24 Idem. Similarly see Boom (1995), 209.

25 Kirchof (2010), 740. Also see p. 744: 'Hence, the constitutional states' independence, the characteristics of their constitutions and the achievements of their constitutional history would get pulled into vortex of a European constitution and would eventually become lost within it.' Note that logically within the statist framework the granting of constitutional status to one entity means removing that status from the other. Statism cannot, therefore, be simplistically be seen as one side of a pluralist account without completely denaturizing it.

26 For the extremely thick normative and historical conception of 'people' relied on by Kirchhof as an additional objection to European constitutionalism and democracy see Kirchof (2010), 747-748. Equally linking these concepts Grimm (1995), for instance at 291.

established, and does try to accommodate far-reaching integration. He acknowledges that 'membership of a state in the European Union's union of states *affects* its sovereignty.'[27] Yet this effect does not exceed the standard practice of sovereigns to cooperate and enter into mutual, binding legal relations.[28] Therefore:

> 'Membership in the European Union leaves the Member States' sovereignty with them, in the sense of final responsibility for the public authority exercised by the European Community and its present responsibility vis-à-vis its people. The question regarding sovereignty does not remain open: (…). The democratic state keeps the internal and external sovereignty together and accounts for its recognition within the European Union vis-à-vis the people.'[29]

The EU, therefore, derives its authority from the Member States alone, and not from the people directly.[30] A hierarchical reality that also means that EU law can only take effect within the limits set by the respective national constitutions.[31] This assessment does not deny the high level of integration within the EU, nor the need for that integration. The EU 'calls for the reconsideration of statehood open to the world'.[32] Kirchhof even accepts that 'The treaties constitute the basic order of the Community, which (…) is *partially superior* to the Member States' constitutions.'[33] Within this frame-

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27 Kirchof (2010), 741, 747-748. The EU also 'calls for the reconsideration of statehood open to the world and a sovereignty open to Europe.'

28 In the words of De Witte: Member States act '(…) as the *Herren der Verträge*, bound by nothing else than their respective national constitutional rules and by the rules of international treaty law; they act as 'independent and sovereign states have freely decided [..] to exercise in common some of their competences.' De Witte (2012), 36. He rightly adds that 'the fact that the Member State governments act as 'Masters of the Treaty text' does not mean that they also control what happens with the Treaties once they enter into force.' Which is of course another point. See on his qualification of the EU as an international organization also De Witte (2010), 324.

29 Cf Grimm (1995), 285: 'That was the birth of the modern State, which raised itself above society, now conceived of as privatised, and saw its attribute in sovereignty, understood as supreme irresistible power over society.'

30 Kirchof (2010), 744. See similarly Grimm (1995), 290 and T. Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' 17 *Harvard International Law Journal* (1996), 394.

31 Kirchof (2010), 743, 746. At the same time, however, Kirchhof urges judicial cooperation, and efforts by all parties to prevent the primacy question from even being posed, 'The judiciary fosters the culture of standards, equalisation and co-operation, not of predominance, submission and rejection. To this extent, Europe offers the chance to discover anew the classic legal ideal of balance of powers. (p. 759) .

32 Kirchhof (2010), 741, and 747: 'These states' functions have always exceeded the individual state's capacity (…) Hence, states depend on co-operation in overarching organisations.'

33 Idem, also: 'On the other hand, the ECJ is the ultimate interpreter of European law, and as a result interprets Union institutions' competences and powers at the expense of the domestic constitutional institutions.(…) Furthermore, the development of substantive constitutional law is strongly influenced by European law.'(p. 745). Also see Grimm (1995), 297.

work of cooperation, however, the states remain '(…) independent – and in this regard non-connected (…) because unlike the EU they have been truly 'constituted.'[34]

Fundamentally, therefore, the EU can be no more than a side-wheel.[35] The *sovereign state* remains the basis for political organization. The EU is not capable of taking over from the state, and must, in the interest of all, also not aspire to do so.[36]

Dieter Grimm, also a former judge in the *Bundesverfassungsgericht*, has developed a milder version of statism.[37] He also sees the statal context as the only one able to provide the conditions necessary for a true democratic process.[38] At the EU level, on the other hand, 'even the prerequisites' for democracy 'are largely lacking', let alone actual democracy itself.[39] These prerequisites, furthermore, such as a European party system, citizens' movements, European media or a common language 'cannot simply be created.' Retaining the state, and upholding its primacy and ultimate hierarchy, therefore, is again a demand of democracy itself: 'The achievement of the democratic constitutional state can for the time being be adequately realised only in the national framework.'[40] This does not mean that 'the political form of the nation-State ought to be preserved for its own sake'. Grimm even admits that 'the nation-State, understood as a political unit that regulates its internal affairs autonomously, is something whose time is past.'[41] Supranational cooperation is required to address this challenge, but must necessarily stay within the limits imposed by democracy, and therefore by the statal system.[42]

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34 Kirchof (2010), 741, my emphases. Note the use of 'partial' and of the term 'superior' instead of supremacy or primacy. On p. 746 it is phrased even more restrictive as 'European law has limited primacy over the Member States' constitutional law *according to the Member States' order of application*'.

35 P. Kirchhof, 'The Balance of Powers Between National and European Institutions', 5 *European Law Journal* (1999), 225.

36 Kirchof (2010), 757.

37 For instance he rejects the notion of a 'Volksgemeinschaf [ethnic community ILF]' as the only basis for true democracy. Kirchof (2010), 297.

38 Cf Grimm (1995), 293. 'The democratic nature of a political system is attested not so much by the existence of elected parliaments, (…) as by the pluralism, internal representativity, freedom and capacity for compromise of the *intermediate area of parties, associations, citizens' movements and communication*. Where a parliament does not rest on such a structure, which guarantees constant interaction between people and State, democratic substance is lacking even if democratic forms are present.'

39 Grimm (1995), 294.

40 Grimm (1995), 297.

41 Grimm (1995), 297.

42 See also D. Grimm, 'The Constitution in the Process of Denationalization' 12 *Constellations* (2005), 460 and D. Grimm, 'Comments on the German Constitutional Court's Decision on the Lisbon Treaty. Defending Sovereign Statehood against Transforming the European Union into a State', 5 *European Constitutional Law Review* (2009), 353.

The statist perspective is obviously not just academically defended by former judges of the *Bundesverfassungsgericht*. Hartley, for instance, also strongly defends a statist approach, including the claim that the Member States remain the sovereign and ultimate authorities.[43] His rather Kelsinian approach starts from the qualification of the EU as a creature of *law*. As such it cannot but depend on its own legal foundation, being the legal systems of the states that created it.[44] Any other claim would require a radical change of the current '*Grundnorm*'. In turn this would entail that 'sovereignty had been transferred to the Union.'[45] Such a radical change is legally not possible, already because the national constitutional courts, gatekeepers of the authority the EU now relies on, would not allow it.[46] As a result: 'The Member States remain sovereign.'[47] Any claim that denies this basic fact, and proclaims the EU to have an independent or supreme authority, can only do so by denying reality, and thus by 'a wave of the jurist's magic wand.' Such grand, constitutional ambitions for the EU, therefore, suffer 'from a reality deficit'.[48]

4.2 Empirical statism

In addition to these predominantly theoretical claims, based on the nature of *inter alia* democracy and a legal system, statism can also draw on more empirical research in the field of international organization.[49] Especially so on Liberal Intergovernmentalism, which emphasizes the continued centrality of the state. The forceful work of Moravcsik plays a leading role in this field.[50] Leaving formal legal and theoretical arguments to one side, he points to the continued predominance of actual power that remains with

43 For another passionate British statist perspective see the work of H.W.R. Wade, especially: 'The Legal Basis of Sovereignty' *Cambridge Law Journal* (1955), 172, 'Sovereignty and the European Communities' 88 *Law Quarterly Review* (1972), 1, 'What has Happened to the Sovereignty of Parliament?' 107 *Law Quarterly Review* (1991), 1, and 'Sovereignty – Revolution or Evolution?' 112 *Law Quarterly Review* (1996), 568.

44 Hartley (2001), 225, 228, 243, Hartley (1999), 148, 179.

45 Hartley (2001), 232. A claim that would be 'overwhelmingly *rejected*' and therefore means that 'The theory of constitutionalisation (…) is wrong.'

46 Hartley (1999), 160-61, similarly Schilling (1996), 397.

47 Hartley (1999), 179. For a French variant of statism, further linking sovereignty and the state by postulating a necessary and exclusive relation, see A. Pellet, 'Les Fondements Juridiques Internationaux du Droit Communautaire', in: *Academy of European law: Collected Courses of the Academy of European law* (vol. V Book 2, Kluwer Law International 1997), 229: 'L'identité entre souveraineté et forme étatique est totale: toute entité souveraine est nécessairement un Etat et tout Etat est nécessairement souverain.'

48 Hartley (1999), 181.

49 Also see Hoffman (1966) and Hoffman (1982).

50 Moravcsik (1993), 473, A. Moravcsik, *The Choice for Europe. Social Purpose and State Power From Messina to Maastricht* (Cornell University Press 1998) and A. Moravcsik 'The European Constitutional Settlement', in: K. McNamara and S. Meunier (eds) *Making History: European Integration and Institutional Change* (OUP 2007), 50.

the states. In terms of key resources as money, enforcement power or legitimacy the EU does not even come close to its Member States. It are the preferences and actions of these 'critical actors', that determine EU action, and ultimately the process of integration itself. Far from eclipsing the states, the EU should be perceived within the existing statist framework as 'an international regime for policy co-ordination.'[51] From that perspective the EU rather strengthens,[52] or even rescues, the state.[53]

4.3 The key tenets of statism

Based on the overview given above, and for the purposes of this thesis, the key tenets of statism can be outlined as follows.

First and foremost statism starts from the ultimate authority of the state (1). It is the state that remains the foundation and apex of public authority.[54] Usually this claim is also linked to democracy: (2) the state is the essential habitat of democracy, whereas the EU does not offer the same democratic safeguards or even lacks the capacity for true democracy altogether.[55] A claim which is often supported (3) by the lack of a European people or *demos*,[56] and (4) with empirical claims on the remaining centrality and unique resources of the state, for instance in terms of legitimacy, democratic process, money or administrative capacity.[57]

Several further elements then flow from this central position of the state. To begin with (5) the authority of the EU can only be derived from the ultimate authority of the state,[58] and (6) therefore is inherently subject to, and circumscribed by, this higher authority.[59] Any act which violates these limits is *ultra vires* and therefore does not bind the national legal orders.[60]

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51 A. Moravcsik and F. Schimmelfennig, 'Liberal Intergovernmentalism', in: A. Wiener and T. Diez (eds), *European Integration Theory* (2nd edition, OUP 2009), 68. This does not mean, however, that institutions, or the EU as a whole, does not matter, just that they are not in the drives seat.

52 A. Moravcsik, 'Why the European Community Strengthens the State' Centre for European Studies, *Working paper series No. 52* (Harvard University 1999).

53 Milward (1992).

54 Kirchof (2010), Grimm (2005), Hartley (2001).

55 Grimm (1995), 293-4, 297.

56 See on this point also L. Siedentop, *Democracy in Europe* (Columbia University Press 2001).

57 'The EU, like other international institutions, can be profitably studied by treating states as the critical actors in a context of anarchy.' Moravcsik and Schimmelfennig (2009), 68. This does not mean, however, that institutions, or the EU as a whole, do not matter, just that they are not in the drivers seat. Also see Moravcsik (1993), 473, or Moravcsik (2007), 50.

58 Hartley (2001), 228, 243, Hartley (1999), 148.

59 Maduro (2006), 507-8, including footnotes 12 and 13. Decision 170, *Granital* of 8 June 1984 by the Italian Constitutional Court and by the Belgian *Cour d'arbitrage* judgment no. 12/94, *Ecoles Europeenes*, of 3 February 1994 (Moniteur Belge 1994).

60 See paradigmatically BVerfGE 89, 155 (1993) *Maastricht Urteil* par. 88-89.

(7) Ultimate supremacy can, already for these reason, only lie at the national (constitutional) level,[61] and, therefore, be wielded by national constitutional courts alone.[62] Equally the EU (8) cannot have a real constitution, at least not in a meaningful sense of the term.[63] Consequently, and as recognized by the Treaty, (9) the Member States remain the Masters of the Treaties. They retain the full power to amend the Treaties, withdraw or even abolish the EU altogether.[64]

Lastly, and as a further result of all former tenets, (10) the EU must remain within the conceptual space left by the state:[65] As long as it does not become a state it must be limited in authority and status to a level which does not undermine the minimum authority and the ultimate hierarchy that necessarily accrue to states.[66] The residual conceptual space this leaves to the EU is then often, though not necessarily, linked to the construct of an international organization, which may or may not be *sui generis*.[67]

All in all, therefore, statism requires that integration take place within the boundaries of the sovereign state alone. Having established these theoretical tenets of statism, we now turn to their judicial application in practice. This judicial application has been particularly relevant for the development and impact of statism, and forms one of the key legal realities that any viable theory on the constitutional structure of the EU should take into account.

4.4 Application: Judicial statism

Probably the most impressive support for statism comes from the many national constitutional and highest courts that have adopted statist approaches.[68] Perhaps not surprising, – they have been established to

61 Schilling (1996), 399.

62 As phrased by Chalmers, '(…) all the highest national courts enjoy a de facto veto over the development of the Community legal order.' D. Chalmers, 'Judicial Preferences and the Community Legal Order' *Modern Law Review* (1997), 180. Also see Hartley (1999), 160-61, or Schilling (1996), 397.

63 Kirchhof (2010), 755, or Boom (1995), 209.

64 Art. 48 and 50 TEU, also see on these points chapter 2, section 2.4.3. and 2.5.3. on amendment and secession in the EU.

65 Cf Pellet (1997), 229.

66 Grimm (2005), 460.

67 For a strong defense of why the EU should still be seen as an international organization, though not necessarily linked to other statist tenets set out above, see De Witte (2012).

68 This statist approach by national courts is often creatively posited by pluralist as proof of their theory. In all seriousness, however, it cannot be claimed that from their *internal* legal perspective these courts accept true pluralism in the sense of waving the ultimate hierarchy of their own constitutions and accepting a fundamental heterarchy. Nevertheless qualifying these courts as true pluralists would then make it impossible not to be a pluralist except by surrendering to a higher authority, making the label trite.

uphold their national constitutions – almost all of these courts have defended the ultimate supremacy of their national constitutions.[69] Sovereignty generally features prominently in these judgments. Central and Eastern European constitutional courts have been particularly outspoken in defending the sovereignty and independence that was so recently regained.[70] To complete our overview of the statist approach to sovereignty we now turn to one particularly well developed and influential sample of judicial statism: the *Lissabon Urteil* of the German Bundesverfassungsgericht. A judgment by one of the most influential constitutional courts in the EU in which sovereignty plays a vital role, and which forms a key point of reference for any discussion on statism, sovereignty and European integration.

4.4.1 The Lissabon Urteil: The statist challenge of the Bundesverfassungsgericht

For decades, the *Bundesverfassungsgericht* (BVG) has played both a leading and a controversial role in the debate on European integration.[71] The *Lissabon Urteil* forms one of its central contributions to this debate.[72] To date it is the Court's most developed attempt to conceptualize the EU as a union of sovereign states (*Staatenverbund*), and thereby to provide a convincing statist paradigm for European integration.[73] Even though it has been developed

69 See for the history of this development generally Oppenheimer (1994) and (2003). For further examples see for instance Mik (2006), 390-91, the Czech Constitutional Court judgment in Landtova Pl. ÚS 5/12, or the Polish Constitutional Court in its judgment of 11 May 2005, K18/04. Even the Spanish Constitutional Court, although most politely, eventually retains ultimate primacy for the national constitution. (See its Declaration 1/2004 of December 13 2004 on the Constitutional Treaty, (BOE number 3 of 4 January 2005) par. 35, 55 et seq.). Further see Besselink (2007), 9 or Baquero Cruz (2008), 397.

70 See generally A. Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (CUP 2005), or Mik (2006), 390-91.

71 See already BVerfGE 31, 145 (1971), but the saga traditionally starts from BVerfGE 37, 271 (1974) *Solange I* and and BVerfGE 73, 339 (1986) *Solange II*, to continue with BVerfGE 89, 155 (1993) *Maastricht Urteil*, BVerfGE 102, 147 (2000) *Banana Market*, BVerfGE 113, 273 (2005) *European Arrest Warrant*, and BVerfGE 118,79 (2007) *European Emission Certificates* and post Lisbon BVerfGE 1 BvR 256/08, 1 BvR 263/09, 1 BvR 568/08 (2010) *Data Retention*, BVerfGE 2 BvR 2661/06 (2010) *Honeywell*, BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*, BVerfGE 2 BvE 8/11 (2012) *Sondergremium*, and BverGE 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 be 6/12 (2012) *ESM Treaty*. See in general, amongst the vast literature inspired by this earlier case law, M. Herdegen, 'Maastricht and the German Constitutional Court: Constitutional restraints for an Ever Closer Union' 31 *CMLRev* (1994), 235 or M. Payandeh, 'Constitutional Review of EU Law after *Honeywell*: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice' 48 *CMLRev* (2011), 9, as well as the references below.

72 2 BvE 2/08 (2009) *Lissabon Urteil*. For citation this chapter will use the English official translation available on the website of the Court at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html. References to the case will, for reasons of brevity, only mention 'Lissabon' with a paragraph number.

73 For earlier attempts see in its case law also see Aziz (2006), 293.

by important case law since,[74] the *Lissabon Urteil*, therefore, remains the central case for our discussion of statism and sovereignty. This especially as in its core the *Lissabon Urteil* is a fundamental defence of sovereignty and the state.[75] A defence of sovereignty as a central concept for the organization of political authority, but foremost a defence of *German* sovereignty. A defence for which sovereignty is normatively armoured with the notion of 'democracy', welded onto the concept of 'state', and developed into an ultimate barrier against too far-reaching integration.

For reasons of efficiency no general summary of the judgments will be given.[76] This chapter will therefore only give a very brief overview of the case, before engaging those parts of the judgment relevant for our purposes: the statist use of sovereignty by the BVG, and the resulting limits on European integration. A forceful defence of sovereignty that any viable notion of confederal sovereignty must be able to counter or incorporate.

4.4.2 Background and brief overview of the Lissabon Urteil

In the *Lissabon Urteil* the BVG checked if the Lisbon Treaty went beyond the level of integration allowed by the German constitution. In its earlier case law the BVG had already established two boundaries in this regard: human rights[77] and *ultra vires*.[78] It now added a third: identity review:[79] 'the Court reviews whether the *inviolable core content of the constitutional identity of the Basic Law* pursuant to Article 23(1)(3) in conjunction with Article 79(3) of the Basic Law is respected.'[80] The German Constitution does not allow integration that would violate this core. If such integration is nevertheless

74 See especially BVerfGE 2 BvR 2661/06 (2010) *Honeywell* and BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*.

75 Thym (2009), 1796, T. Lock, 'Why the European Union is Not a State. Some Critical Remarks', 5 *European Constitutional Law Review* (2009), 407. See also the dissenting opinion from Justice Landau to BVerfGE 2 BvR 2661/06 (2010) *Honeywell*, par. 97 and 102.

76 Many excellent general discussions are already available. See for instance Thym (2009), Schönberger (2009), F. Schorkopf, 'The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon; 10 *German Law Journal* (2009), 1220, C. Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon', 10 *German Law Journal* (2009), 1259, R. Bieber, 'Comments on the German Constitutional Court's Decision. 'An Association of Sovereign States'', 5 *European Constitutional Law Review* (2009), 39, Grimm (2009), 353.

77 BVerfGE 37, 271 (1974) *Solange I*, and BVerfGE 73, 339 (1986) *Solange II*.

78 *Maastricht Urteil*, par. 49. Also confirmed in the *Lissabon Urteil*, for instance par. 240.

79 This can be usefully applied as a separate test, but conceptually comes closer to a further development of the ultra vires logic itself, only now applied to the German Constitution and its wide but limited authority to support European integration. See further A. Cuyvers, 'Een soeverein hof bewaakt de soevereine staat om het soevereine volk te behoeden voor een soeverein Europa: Het Lisbon Urteil als these en antithese voor de verhouding van Nederland tot de EU' in: J.M.J. Rijn van Alkemade and J. Uzman (eds) *Soevereiniteit of pluralisme? Nederland en Europa na het Lissabon-Urteil* (Wolf Legal Publishers 2011), 49 et seq. See also *Lissabon* par. 218 or 226.

80 Lissabon par. 340.

desired, the only way to do so is for the constituent power of the people to adopt a new constitution which subsumes Germany into a European federate state.[81]

The nature and content of this new identity test, including its relation to democracy, will be discussed in more detail below. Here it suffices to say that the BVG ultimately held that the Lisbon Treaty did not violate the German Constitution. Before reaching that conclusion, however, the BVG first denied even the *capacity* of the EU to ever develop into a true democratic polity. This because the EU can never equal the democratic legitimacy produced within a state, at least not without transforming into a state itself.[82] Nevertheless the EU does posses certain democratic elements.[83] At the moment the nature and level of these democratic elements suffices for the competences that have been transferred so far.[84] Further transfers of sovereign powers may alter this balance, and require further democratic checks at the European or the national level.[85] As the capacity for democracy on the EU level is limited, however, so must the maximum level of powers that may be delegated to the EU be limited as well.

The Lisbon Treaty, therefore, survived review. Yet it did so with multiple alarms ringing, and with future trap wires being set, at least in theory. It is against this general background that the specific treatment of sovereignty in the *Lisbon Urteil* must be seen.

4.4.3 A sovereign people under a sovereign constitution in a sovereign state

The *Bundesverfassungsgericht* takes protecting sovereignty seriously. The term sovereignty occurs 73 times in the reasoning of the judgment. Even more impressive is that both the state, the people, and the constitution turn out to be sovereign, with the BVG as the (sovereign?) watchdog for all these sovereigns. Paragraph 216, for instance, holds that 'the basic law not only assumes sovereign statehood, but guarantees it', and paragraph 298 'Even after the entry into force of the Treaty of Lisbon the Federal Republic of Germany will remain a sovereign state.' Notwithstanding this sovereign state paragraph 334 declares the 'the continuing sovereignty of the people', whereas paragraph 340 talks about '(…) the sovereignty contained in the last instance in the German constitution.'

81 Lissabon par. 228.
82 See amongst others Lissabon paras. 272, 280, 286
83 For instance Lissabon paras. 271 et seq.
84 Lissabon paras. 272, 278, 280, 286.
85 In a measured warning shot that did not endanger the Treaty of Lisbon itself the BVG did, in this line, demand amendments to the national legislation accompanying the Treaty which would better secure the role of the German Parliament in the use of art. 252 TFEU and other flexibility clauses. See Lissabon paras.406 et seq, and for the German repair legislation the Federal Law Gazette No. 60 of 24 September 2009.

Comparing the different uses, a sovereign *state* is explicitly assumed in paragraphs 216, 224, 226 229, 235, 240, 247, 249, 275, 278, 287, 298, 299, 329, 339, 343 and 351. The sovereign people make an appearance in paragraphs 208, 209, 218, 334, 179 and 347.[86] Paragraphs 179, 216 340, en 339 nominate the constitution as the sovereign. Interestingly, a combination of the three appears possible as well, as in paragraph 231:

> 'In a functional sense, the source of Community authority, and of the European constitution that constitutes it, are the *peoples* of Europe with their democratic *constitutions* in their *states*.'[87]

Here ultimate authority lies with the state, the people and the constitution together, creating a kind of sovereign trinity.[88] Everyone is allowed to be sovereign, it appears, except the EU.

Considering the central position of sovereignty in the argumentation of the BVG this lack of clarity, intentional or not, is not very helpful. This miraculous multiplication of sovereigns within one legal order also seems hard to square with the concept of sovereignty itself, certainly in the way the BVG apparently understands it. Most often, however, it is the *state* that is declared the sovereign. More importantly, even where other entities as the people or the constitution are referred to as 'sovereign', this sovereignty is ultimately redirected to the state through the notion of democracy, effectively endowing the state with sovereignty again. This linkage between state, sovereignty and democracy greatly increases the centrality of the state in the reasoning of the Court, and deserves closer attention.

4.4.4 Democracy as the normative armour of the sovereign state

Just as the academic supporters of statism, the BVG merges democracy, sovereignty and the state together. Democracy forms the normative core and power source of this construction.

The BVG starts with art. 38(1) GC, that guarantees the right to vote. Via the argument that an *effective* right to vote[89] also requires a well functioning democratic system, this right to vote, together with art. 20(1) and 20(2) GC, becomes a fundamental right to a democratic polity.[90] As art. 20 GC falls under the 'eternity clause' of art. 79(3) GC, this right belongs to the invio-

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86 Lissabon 280 en 281 further indicate, however, that there can be no sovereign European people.

87 As will be discussed in chapter 8 this holy trinity might, from a different perspective, offer a useful starting point to link the case law of the Bundesverfassungsgericht to the notion of confederal sovereignty. Also note that, against the views of Kirchof, the Treaties are here referred to as a 'European Constitution.'

88 See, for instance, also Lissabon paras. 347 and 350.

89 Lissabon 167.

90 See for instance Lissabon 208-210. A right that even goes back to the even more fundamental value of human dignity enshrined in art. 1 GC.

lable core of the constitution.[91] And it is this inviolable core of democracy on which the ultimate primacy of the German constitution is founded. Consequently, each argument against the ultimate primacy of German law is automatically transformed into an argument against democracy.

The BVG subsequently postulates a sovereign state as the *conditio sine qua non* for this democratic core.[92] The Court supports this linkage with the claim that a true democratic process requires a certain critical mass of content and influence.[93] To exaggerate the point, where the competences of the German federal government are reduced to the management of parks and other public greenery, the right to vote for this government looses its value. As a result, there could be no more real democratic process in Germany anymore, simply because there would be no power to control democratically. Certain key areas of public authority, therefore, need to remain under the control of German politics:

> 'European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain *sufficient space for the political formation of the economic, cultural and social circumstances of life*. (…) Essential areas of democratic formative action comprise, inter alia, *citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights*, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of *language*, the shaping of circumstances concerning the *family and education*, the ordering of the freedom of opinion, of the press and of association and the dealing with the *profession of faith or ideology*.[94]

Democracy requires that all these areas remain under the control of one single political system. They may not be divided over separate centres of authority. For this single political control the BVG only sees one candidate: the sovereign state, that 'globally recognized form of organization of a *viable* political community.'[95]

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91 Art. 79 (3) GC reads: '(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.'

92 Lissabon 224, also see 226.

93 Lissabon 218, 226, 244 and 246. See also BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*, par. 98: 'The right to vote also comprises the fundamental democratic content of the right to vote, that is, the guarantee of effective popular government.', as well as par. 101.

94 Lissabon 248 (my italics). Also see 252 et seq. for a further determination of this critical democratic mass. The Court does nuance this enumeration, for instance by not excluding all EU influence in these fields but only requiring that sufficient control is maintained. For a confirmation of this line, and its application to the issue of revenue and expenditure see BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*.

95 Lissabon 224.

Only a sovereign state, therefore, is capable of bringing all these fields under democratic government. As a consequence, any attack on the sovereign state entails an attack on democracy as well. As paragraph 248 puts it: 'the safeguarding of sovereignty demanded by the principle of democracy.'

In this way the sovereign state has been normatively armoured with nothing less than democracy itself, a powerful shield against integration. Proponents of further integration in these key areas become opponents of democracy. The EU itself, furthermore, is certainly obligated to respect these national core competences, seeing how it is founded on the value of democracy.[96]

4.4.5 The case of sovereignty and democracy v. integration

The *Lissabon Urteil* develops a fundamental defence of the sovereign state as the heart-lung machine of a people under democratic self-rule.[97] For that reason, it sets some limits to the maximum level and form of integration under the current German constitution,[98] and denies the ultimate primacy of European law.[99] Within these limits, however, the German constitution, and the BVG, is '*Europarechtfreundlich*'.[100]

The judgment provides an important contribution to the discussion on sovereignty and the EU. It therefore must be addressed by any confederal approach to the EU, certainly one which relies on sovereignty as a foundation rather than a nemesis of integration. The judgment also exposes several weak spots in competing plural conceptions of European integration, and therefore is an essential part of the theoretical background developed here. The position of the Court, for instance, seems to conform better to the current political reality, which hardly qualifies as cosmopolitan, than pluralism does.

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96 Art. 2 and 6 TEU.

97 See, for instance, Lissabon 224 and 226. Also Thym (2009), 1796.

98 Lissabon 228, 263-4, 252 et seq. 'What has always been deemed especially sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the police monopoly on the use of force towards the interior and of the military monopoly on the use of force towards the exterior (2), the fundamental fiscal decisions on public revenue and public expenditure, with the latter being particularly motivated, inter alia, by social-policy considerations (3), decisions on the shaping of circumstances of life in a social state (4) and decisions which are of particular importance culturally, for instance as regards family law, the school and education system and dealing with religious communities (5).'

99 For instance Lissabon 330.

100 The judgment certainly contains many positive and constructive elements, not the least of which is its outcome. For early constructive judgments, furthermore, see already the acceptance by the BVG in 1967 that EU law trumps *ordinary* statutes, even if adopted at a later time, BVerfGE 22, 293 (1967) and BVerfGE 31, 145 (1971). The theoretical core of the Lisbon judgment nevertheless lies in setting limits. Under due recognition, and appreciation, of its constructive elements, and the obvious overall constructive attempt to prevent an open conflict, this chapter focuses on these limits.

Similarly it seems to better capture the factual balance of power between the Member States and the EU.[101]

Fully in line with the tradition of the BVG, however, the judgment is also highly contested, and appears to be based on several theoretical black holes.[102] Even though the often decried reference to a pre-political '*Volk*' has disappeared,[103] in its stead new far-reaching positions have been adopted on issues as democracy, sovereignty, and the relation between both. Positions that partially rest on unsupported generalizations, or rather unconvincing assumptions, such as the claim that only 'one man one vote' systems can be truly democratic.[104]

These positions also lead to equally problematic challenges, such as defining the substance of democracy and hence the limits of integration. The opportunistic and somewhat unconvincing selection of limits provided by the BVG in the Lisbon judgment testifies to the difficulties this raises.[105] The further nuancing concerning the actual *policing* of these borders in the *Honeywell* judgment suggests the BVG itself is very aware of this difficulty as well: The indication that it will only act in exceptional cases after the ECJ has been consulted, and even then granting the ECJ a 'Fehlertoleranz', can hardly be seen otherwise.[106] The EMU cases highlight similar weaknesses within the specific area of revenue and expenditure, where for instance

101 Concerning the political climate see the rise of populist an often anti-EU parties across Europe. As to the political power of the Member States the recent sovereign debt crisis provides an illuminating example, where the Member States, and with them the European Council, took control. See the discussion on the EMU crisis from the confederal perspective in part III. Further see Editorial Comments 'An ever Mighty European Council' 46 *CMLRev* (2009), 1383, and for a sober and factual analysis of the still immense and dominant power of the Member States, A. Moravscik, 'The European Constitutional Compromise and the Neofunctionalist Legacy, 12 *Journal of European Public Policy* (2005), 349, and Moravscik (2001). Based on this analysis one could even wonder if the *Bundesverfassungsgericht* does not feel itself *to* threatened by the EU.

102 C. Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigone at Sea', 10 *German Law Journal* (2009), 1209, Thym (2009), 1795.

103 See the far thinner conception of the people, for example, in Lissabon par. 251. Further see Thym (2009), 1816, as well as the difference between the approaches of Kirchhoff and Grimm set out above.

104 Editorial, 5 *European Constitutional Law Review* (2009).

105 See also D. Halberstam and C. Möllers, 'The German Constitutional Court says 'Ja zu Deutschland', 10 *German Law Journal* (2009), 1241, 1249-1251.

106 BVerfGE 2 BvR 2661/06 (2010) *Honeywell*, par. 60, 61 and 66. Similarly see the deferential application of Lisbon BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*. Note also that the BVG is exclusively competent to declare an EU act *ultra vires*, which at one level sits uneasily with the logic of being *ultra vires* itself but does reduce the danger of judicial 'accidents'. Further see the critical dissent by Justice Landau on what he sees as 'excessive requirements', 'shying away' from enforcing limits, and a deviation from the limits established by the *Lissabon Urteil*, and Payandeh (2011), 9.

'only a manifest overstepping of extreme limits is relevant.'[107] Several other unconvincing assumptions and consequences mar the approach of the BVG as well. Foremost amongst these is the fact that it blocks a necessary evolution in democracy by locking the people in the state instead of empowering them externally.

These problematic weaknesses will be further discussed below, where it will be seen to what extent a confederal notion of sovereignty may provide a more constructive and viable alternative to the reasoning of the BVG, or may alternatively help to strengthen the approach of the BVG by providing a more suitable notion of sovereignty.[108] For example confederal sovereignty may allow the BVG to protect sovereignty in a way that does not obstruct democracy from adapting to interdependence.

Be of these objections what they may, however, they do not detract from the fact that the BVG has chosen to defend the sovereign state. Its view, furthermore, is not just one of the many opinions (this one included) on the relation between the EU and the Member States. It is the judicial *qualification* of that relation by the highest court of a not unimportant Member State. As a result it is a determining factor in the same phenomenon of integration it aims to describe, a legal observer-effect so to speak.[109] Even if one disagrees with the BVG, therefore, any alternative vision will have to incorporate the fact that a key player like the BVG continues to approach the EU as a union of sovereign states. An approach in which it is followed by many other constitutional and supreme courts.

The challenge from statism, therefore, is clear: integration within the boundaries of the sovereign state alone. Sovereignty is embraced as a core value, linked to several other vital values as democracy, state, nation and constitution, and subsequently developed as the ultimate bulwark against advancing integration.

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107 In BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*, par. 131. More generally see par, 124 et seq, where the BVG retreats to the procedural safeguard of *Bundestag* 'control' of 'fundamental budgetary decisions.' See on this procedural safeguard also BVerfGE 2 BvE 8/11 (2012) (*Sondergremium*) and BverGE 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 be 6/12 (2012) *ESM Treaty*, for instance par. 198 et seq. For discussion see A. von Ungern-Sternberg 'Parliaments – Fig Leaf or Heartbeat of Democracy? Case note to German Constitutional Court Judgment of 7 September on the *Euro Rescue Package*' 8 *European Constitutional Law Review* (2012), 304.

108 See below chapter 10 section 4.

109 The observer effect in physics ponts to the fact that the act of observation may actually affect the object being observed. Similarly the BVG cannot rule on the process of European integration without affecting it.

5 Pluralism: Overcoming sovereignty and our darker selves

Pluralism challenges the statist approach at its root: [110] it rejects hierarchy itself, and with it the central and ultimate position of the sovereign state.[111] Between the legal systems in the EU there is no ultimate hierarchy, but only a heterarchichal reality wherein multiple independent centres of authority co-exist.[112] And as there is no apex, the state cannot claim to be it. In the words of Neil MacCormick, one of the founding fathers of EU pluralism:

> 'So relations between states *inter se* and between states and Community are interactive rather than hierarchical. The legal systems of member-states and their common legal system of EC law are distinct but interacting systems of law, and hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another. It follows also that the interpretative power of the highest decision-making authorities of the different systems must be, as to each system, ultimate.'[113]

Or as formulated by the equally leading mind of Neil Walker:

> 'Constitutional pluralism recognizes that in the post-Westphalian world there exists a range of different constitutional sites and processes configured in a heterarchichal rather than a hierarchical pattern, (…).'[114]

In reaching this conclusion pluralists generally start from precisely those EU novelties that seemingly defy hierarchy and the statal framework. Novelties that require novel thinking: 'We must try to take seriously the unique and novel character of this 'mixed commonwealth' [EU], and aim for theoretical perspectives that respect its uniqueness and novelty rather than wedging it into old stereotypes.'[115] Walker even points to an epistemological necessity for a pluralist approach: truly *knowing* either the EU or the national systems and their respective claim to authority, and representing them as independent constitutional centers, requires a 'different way of knowing and ordering, a different epistemic starting point and perspective with regard to each

110 This section discusses pluralism in its relation to the EU, and not the more general theory of (legal) pluralism that underlies it. See for this theory more generally G. Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' 13 *Cardozo Law Review* (1992), 1443, or J. Griffiths, 'What is Legal Pluralism?' 24 *Journal of Legal Pluralism* (1986), 1.

111 Cf also M. Avbelj and J. Komarek, 'Four Visions of Constitutional Pluralism' *EUI Working Papers* 2008/21, 2, also introducing pluralism as a reaction to 'the statist origins of classical constitutionalism'.

112 K-H. Ladeur, 'Towards a Legal Theory of Supranationality – The Viability of the Network Concept', 3 *European Law Journal* (1997), 331.

113 MacCormick (1999), 118.

114 Walker (2002), 317. Note though that Walker does try to combine, or at least connect, his pluralism within an overall and continuing development in political organization, an does not see it as a radical break from modernity, which significantly adds to the attractiveness of his views. See also Walker (2012), 57.

115 MacCormick (1999), 156.

unit(y);'[116] As a result there simply is no meta-position, or an 'Archimedean point', from which we can simultaneously know both units, let alone connect them or subject one to the other. As a result even knowing the EU is impossible without adopting a pluralist framework.

By clinging to a statist perspective, or even by searching for a form of non-statal hierarchy, we therefore miss the essence of the EU, and with it its great potential. It is like approaching a cubist Picasso as a Rubik's cube that needs ordering. Instead of welcoming the liberation and possibilities it entails, one tries to destroy it by reducing it to that which it has transcended.

Challenging the existence, and necessity, of one ultimate rule, – be it a Kelsinian *Grundnorm*, a Hartian rule of recognition, or a natural law truth – lawyers should therefore stop trying to understand the European legal order as an either/or between the Member States and the EU.[117] They should accept the fact that each distinct legal order follows a different hierarchy if pushed to the extreme. Continuing to search for the primary egg or supreme chicken will not provide a (conceptual) answer for the EU authority conundrum.[118]

Once heterarchy is embraced concepts like a sovereign state no longer seem tenable. Trying to comprehend a plural reality from an intrinsically hierarchical concept as sovereignty is impossible. As Kumm states: 'Constitutional pluralism (…) allows us to reconceive legitimate authority and institutional practices in a way that makes do without the ideas of the state, of sovereignty, of ultimate authority, and of 'We the People' as basic foundations of law and the reconstruction of legal practice.'[119] From the elementary particles of public authority states and sovereignty become 'passing phenomena of a few centuries.'[120] An overcoming of hierarchy that also conforms with several more post-modern assumptions that often inform pluralism, such as the impossibility of objective or absolute foundations, knowledge, objectivity or truth.[121] Clearly such ontological or epistemological assumptions sit uneasily with the idea of hierarchy as such, let alone with sovereignty.

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116 N Walker (2002), 337.

117 See for one of the founding fathers: N. MacCormick, 'Beyond the Sovereign State', 56 *Modern Law Review* (1993), 1, MacCormick (1995), 259, or MacCormick (1999).

118 Although sometimes, when push comes to shove, an eventual hierarchy is accepted. See for an example Kumm (1999) or Maduro (2006).

119 M. Kumm as quoted in Avbelj and Komarek (2008), 34. The EU is 'post-statist, post-nationalist and post-positivist' (p. 27).

120 MacCormick (1993), 1. Also see D.M. Curtin, *Postnational Democracy: The European Union in Search of a Political Philosophy* (Kluwer 1997), 50-51.

121 See for a challenge to knowledge that would (almost) make one quit academia and spend life on matters that one can talk about, the work of Ludwig Wittgenstein, for instance in *Über Gewissheit* (edited by G.E.M. Anscombe and G.H. von Wright, Harper 1972).

5.1 The EU as crown witness against sovereignty

For theories claiming, or prophesising, the demise of sovereignty as a useful construct the EU understandably forms a crown witness.[122] The argument generally goes as follows.[123]

First, it is illustrated how within the EU the once mighty sovereign state has lost its position at the apex of political organization, and can no longer be considered sovereign. And indeed, even though states have bound themselves by treaties for centuries,[124] including via a range of international organizations, no other organization of states has had such a significant impact on the functioning of its members as the EU.[125] One only has to enumerate some of the key developments to drive the point home. Member States, for instance, no longer hold the exclusive supreme legislative or judicial power, traditionally considered key marks of sovereignty.[126] Some have even surrendered their entire monetary policy, another key mark.[127] EU law claims to trump all national law, including constitutional law.[128] Even in fields where the EU has no competences Member States are still bound to respect the negative limits imposed by EU law. Directly or indirectly, therefore, EU law affects even the most sensitive areas such as healthcare, education, collective bargaining, social housing, immigration, benefits, criminal law, and taxes. [129]

The rapidly developing notion of citizenship, furthermore, increasingly prevents Member States from giving preferential treatment to their own citizens.[130] Further limitations flow from the different layers of fundamental

122 See N. MacCormick, 'Liberalism, Nationalism and the Post-Sovereign State' 44 *Political Studies* (1996), 555 or Walker (2006), 3. See for a clear example MacCormick (1993), 1, who calls the sovereign state a 'passing phenomena of a few centuries'.

123 Also see Bellamy (2006), 168, 175. Hinsley (1986), 121.

124 In 2100 BC already a treaty was concluded between the rulers of Lagash and Umma concerning their boundary. (A. Nussbaum, *A Concise History of the Law of Nations* (MacMillian 1954), 1-2), whereas the Greek City-States had a system of treaties as well as an 'external policy', such as for example the Delic Union. Also see: J. Shaw, *International Law* (5th edn. CUP 2003), 16. In line with the points described above, the hypothesis of this chapter is that the EU is exactly so threatening because it for the first time confronts internal and external sovereignty on a large scale by applying the (constitutional) logic of internal sovereignty on the external relation between states. Of course it is already quite curious that the *beginning* of the modern system of nation-states is placed in the *treaties* underlying the peace of Westphalia.

125 See for example the famous analysis of Lenaerts: 'There simply is no nucleus of sovereign power that the Member States can invoke, as such, against the Community.' (Lenaerts (1990), 220).

126 At least under the perspective of EU law. Even statists as Kirchhof and Grimm, furthermore, accept this impact of the EU as a fact. See chapter 8, section 4.1.

127 See chapter 9, section 3.1.

128 Case 6/64 *Costa v E.N.E.L.*, Case 11/70 *Internationale Handelsgesellschaft*, Case 106/77 *Simmenthal*.

129 See for a more detailed discussion and references above chapter 3, section 2.4.

130 See for example C-73/08, *Bressol*.

rights that are supranationally defined and enforced.[131] The new developments regarding economic policy and budgetary control only confirm this trend: they affect money and fiscal policy, the heart and soul of politics.[132] All these qualitative changes in the role and power of the state, furthermore, cannot be masked by a formalistic focus on the (theoretical) power of the Member States as 'Masters of the Treaties'.

Once it has thus been established that the Member States can no longer be considered sovereign, the second step in the argument points out that the EU has not assumed sovereign statehood either.[133] Although the EU has an impressive array of powers and claims supremacy over Member State laws, it lacks too many vital elements, such as executive capacity, an army or a people of its own, to be considered sovereign.[134] As neither the EU nor the Member States are sovereign, the necessary conclusion seems to be that somewhere in creating the '*sui generis*' structure of the Union, sovereignty has left the building.[135]

The conclusion that the EU has rid us and itself of sovereignty is then often further supported with one or more of these additional arguments.

To start with one can point to the reality, and impressive potential, of authority-conflicts within the EU that simply have no (legal) solution.[136] The most famous of these is the simmering conflict between the Court of Justice and the different constitutional and supreme courts set out above. Such conflicts illustrate that there is no clear and linear hierarchy, no ultimate or sovereign authority which can settle these questions. Instead, multiple 'highest' points exist, neither of which can command or overrule the other.

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131 These now include *inter alia* the strongly overlapping EU Charter, the European Convention on Human Rights and the General Principles of EU law. See exploring the limits of these regimes Von Bogdandy *et al* (2012a).

132 See for a discussion of the EMU crisis and the responses so far below chapter 13, section 2.

133 See MacCormicks famous comparison with virginity on this point: Sovereignty can be lost without another gaining it. (MacCormick (1999), 126.

134 Here pluralists and statist agree. See however the opinion of advocate general La Pergola in *NIFPO and NIFF*, case C-4/96 [1996] ECR I-681, footnote 7, holding that the Community had concluded a treaty 'acting as a single sovereign entity.'

135 As Europa carried off by Zeus. Also see the qualification of the EU as a 'non-sovereign commonwealth of post-sovereign states', by N. MacCormick, 'Democracy, Subsidiarity and Citizenship in the "European Commonwealth', in: N. MacCormick (ed), *Constructing Legal Systems. 'European Union' in Legal Theory* (Kluwer 1997), 338-39.

136 For a recent example see the Czech Constitutional Court judgment of 31 January 2012, *Landtova* Pl. ÚS 5/12, rejecting a preliminary ruling of the ECJ as fundamentally mistaken and creating an open conflict for which no further legal solution exists, at least not between the legal orders involved.

Secondly, there is the normative argument against sovereignty. Sovereignty is rejected as morally problematic in itself. The sad track record of devastation by sovereign states, both within heir borders and outside, is used to show how sovereignty has contributed to some of the worst abuses in history. In addition, reliance on sovereignty stands in the way of new and morally superior ways of organizing the world. Ways which emphasize cooperation and individual rights rather than power and the right to be left alone. [137] The dialogue made necessary by the lack of a single highest authority is hence turned into a normatively superior form of political organization with a vital civilizing effect

Lastly, just as statism, these theoretical arguments are often supported further by a more empirical analysis: in the interdependent world of today any notion of sovereignty is outdated anyway. Vital areas such as the economy, basic resources, the environment, migration, or security have outgrown the state, and can only be tackled through cooperation. Interdependency has thereby reached such a high level that talk of an absolute and unlimited sovereign state is outdated at best. More likely, however, it should be qualified as a dangerously foolish state of denial for those not capable of grasping today's complex reality, and are desperately clinging to the security of a less dynamic past.[138]

5.2 The key tenets of pluralism

Obviously many relevant differences exist within the plural universe of pluralism. At the same time, taking together the observations above, it is possible to identify several key elements underlying and uniting pluralist approaches, also in their shared resistance to statism.

First and foremost, (1) pluralism denies and rejects hierarchy. Instead a fundamental heterarchy between different legal orders or centers of authority is posited.[139] (2) The state is one (important) of these authority centers, also because it houses the national legal system. Yet it no longer is the sole or

137 See for example, MacCormick (1999), 117, N.W. Barber, 'Legal Pluralism and the European Union', 12 *European Law Journal* (2006), 328, or Walker (2006b), 11 et seq.

138 See amongst many others J. Camilleri and J. Falk, *The End of Sovereignty? The politics of a Shrinking and Fragmenting World* (Edward Elgar Publishers 1992), or K. Ohmae, *The End of the Nation State. The Rise of Regional Economics* (Free Press 1995).

139 Cf Baquero Cruz (2008), for instance 412, 414-415, describing pluralisms 'rejection of any sort of hierarchy'. Further see A. von Bogdandy, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' 48 *CMLRev* (2011), 1417, Ladeur (2007), 331, M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 *European Law Journal* (2005), 262, M. La Torre, 'Legal Pluralism as an Evolutionary Achievement of Community Law' 12 *Ratio Juris* (1999), 182, or MacCormick (1993), 1.

ultimate one.[140] Instead (3) public authority is dispersed over multiple and pluriform centres of governance,[141] including international organizations, committees, networks, and even companies.[142] The far-reaching and intrusive characteristics of the EU (4) far exceed the boundaries of a mere international organization, and form clear proof of this statal decline.[143] Such a plural organization of government is also (5) the only possible one for a globalizing and plural reality.[144]

The lack of a (statal) hierarchy also means that (6) no single centre can claim ultimate supremacy: a plural reality entails the existence of multiple conflicting claims to supremacy which are all valid from the internal perspective of their own legal orders.[145] Both the national constitutional courts and the ECJ are, therefore, right, albeit within their own legal orders.[146] As 'no legal solution'[147] exists to authority conflicts between them, therefore, the different centres of authority (7) need to rely on cooperation and dialogue to prevent and solve such conflicts.[148] Generally this need is then (8) embraced as a normative victory as well.[149] Cooperation based on dialogue (or even 'multilogue') [150] transcends the less civilised, and in a sense less liberal, reliance on formal authority. It requires discussion,[151] and thereby, one

140 'Whenever we should date the emergence of the sovereign state, and wherever we may locate its first emergence, it seems we may at last be witnessing its demise in Europe, through the development of a new and not-yet-well-theorized legal and political order in the form of the European Union.' MacCormick (1999), 125.

141 Pernice (2002), 511.

142 Chalmers, Davies and Monti (2010), 199, P.L. Lindseth, ''Weak' Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union.', 21 *Oxford Journal of Legal Studies* (2001), 145, and Lindseth (2010), for instance p. 21 et seq.

143 The EU goes 'well beyond' the 'status of international organization' (Douglas-Scott (2002), 260). See De Witte, (2012), 50 for a clear enumeration, and rejection, of the general arguments against qualifying the EU as an international organization, and therefore as inside the normal statist-IO framework. For a similar overview of facts with the opposite qualification see Schütze (2012), 60-61.

144 MacCormick (1999).

145 At least once the 'internal' perspective of these different legal systems is adopted and respected. MacCormick (1995), 259.

146 MacCormick (1999), 141.

147 'Acceptance of a radically pluralist conception of legal systems entails acknowledging that not every legal problem can be solved legally. (…) The problem is not logically embarrassing, because strictly speaking the he answers are from the point of view of different systems. But it is practically embarrassing to the extent that the same human beings or corporations are said to have and not to have a certain right. (…). MacCormick (1999), 119.

148 F. Mayer, 'The European Constitution and the Courts', in: A. von Bogdandy and J. Bas (eds), *Principles of European Constitutional Law* (1st edn. Oxford, Hart, 2006), 323. I. Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action', 15 *Columbia Journal of European Law* (2009), 349, A. von Bogdandy, 'Founding Principles of EU law: A Theoretical and Doctrinal Sketch' 16 *European Law Journal* (2010), 95.

149 See for instance Mayer (2006), 323.

150 Maduro (2006), 513.

151 Avbelj and Komarek (2008), 20.

hopes, communication, (rational) argumentation and taking the perspective of 'the other'.[152] Requirements that may transcend the (severe) downsides of the absolute and authoritarian state, as well as its simplistic world view.[153]

5.3 The fit and failure of pluralism

Considering its tendency to take meta-positions, or at least external positions, it is hardly surprising that constitutional pluralism is especially popular, or even dominant, in academia.[154] Its intellectual and post-modern flair appeals to key values in academia, where it is also not burdened with the responsibility of taking individual decisions but with grasping overall reality. As a result, however, we cannot, nor do we need to, go into a judicial application of pluralism. Rather, as mentioned, pluralism tries to claim the statist point of view retained by national constitutional courts as proof of its own position. Consequently we can proceed with some concluding remarks on pluralism and its rejection of statism and sovereignty, before we move on to that statist rejoinder, and some bridging attempts.

For based on the tenets set out above, pluralism attacks statism as thoroughly outdated. It is an ostrich-like reaction to a brave new world. A reaction which equals clinging to the abacus in an age of quantum computing. Consequently it cannot begin to grasp the reality of the EU. A fact also illustrated by the statist reliance on some highly formal arguments, like the right to secession or the requirement of unanimous Treaty amendment, which purportedly preserve the ultimate authority of the state. Important facts, which, however, do not capture the substantive reality in the EU, just as the formal legal fact that in theory all land belongs to the British crown does not portray a realistic image of the real estate market in the UK. Statism should, therefore, be abandoned for a pluralist understanding that can think beyond the binary divide in states and international organizations:

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152 See classically the work of Weiler, for instance, J.H.H. Weiler, 'Why Should Europe Be a Democracy? The Corruption of Political Culture and the Principle of Toleration', in: F. Snyder (ed), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart Publishing 2000), Weiler (2000) or Weiler (1999) especially chapter X: 'To be a European Citizen: Eros and Civilization'.

153 Von Bogdandy (2010), 95, Pernice (2009), 349, Walker, (2006b), 11 et seq., Maduro (2006), 501, Kumm (2005), 262, J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (Polity Press 1999), 118 et seq., MacCormick (1999), 117 or D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press 1998), for instance 135.

154 Also J.H.H. Weiler, 'Introduction' in J.H.H. Weiler and G de Búrca (eds.), *The Worlds of Constitutionalism* (CUP: Cambridge, 2011) p. 1.See for some academic views closely related to the bench, however, A.W.H. Meij, 'Circles of Coherence: On Unity of Case law in the Context of Globalisation', 6 *European Constitutional Law Review* (2010), 84, and A. Voßkuhle, 'Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' 6 *European Constitutional Law Review* (2010), 175.

> 'As noted earlier in our critique of state-centredness, to try to explain the new emerging post-Westphalian order in one-dimensional terms, by reference to national delegation, Intergovernmentalism and the traditional law of international organisations, is to try to force square pegs into round holes, and to understate the extent and distort the character of the transformation which is underway.'[155]

Jointly these arguments lead to the conclusion that we are in need of another, post-sovereign, paradigm to structure and understand the EU, and with that the future of public authority.[156] Pluralism consequently fits with the experiences of globalisation and the apparent loss of control that accompanies it. As such it contains a great deal of valuable insights, and rightly forces attention to the complexity of reality and the multiplicity of interconnected public and private processes taking place simultaneously.

At the same time pluralism has the tendency to be destructive in the sense of removing too much of the foundation that, for instance, statism is working so hard to retain. Little is given in return, furthermore, especially if one does not dare to put too much stock in the inherent value of pluralism or voluntary cooperation. In addition pluralism might have the tendency to underestimate the power retained by the states, and may focus too exclusively on a few plural phenomena. These potential weaknesses in pluralism will be further discussed below, after we have been able to explore the conceptual development of sovereignty, and can relate those findings to the concept of sovereignty implicitly assumed by pluralism. At this point, however, it suffices to conclude that pluralism forms a direct challenge to sovereignty as it is commonly understood, and in certain ways even appears to be its complete opposite or negation. Consequently the pluralist conception of integration challenges any confederal conception of sovereignty as just another doomed attempt to re-establish some hierarchy in a fundamentally plural reality.

5.4 The statist rejoinder

In their turn statist generally reject pluralism as a special branch of wishful thinking.[157] Pointing to the remaining centrality of the state they claim the high ground of realism, and continue to pour some cold water on what they see as overheated theoretical enthusiasm. For instance, pluralism would not provide enough stability, but instead replaces 'established institutions, approved values and reliable political experiences' with hopes of cooperation and self-restraint.[158] It also fails as a concept of law, as it cannot solve

155 Walker (2002), 337.
156 MacCormick (1999), Walker, (2006b), or Schiemann (2007), 475.
157 Hartley (1999) and Hartley (2001). For a further discussion see also chapter10 sections 4 and 5, containing a confederal criticism on both schools.
158 Kirchhof (2010), 736.

conflicts.[159] Instead pluralism leads back to precisely the sort of politics and power struggle the EU was intended to prevent.[160] Also, it is argued that pluralists tend to rely on a highly restrictive understanding of international organization. One that does not give enough credit to the flexibility and potential of international law, and falsely increases the paradigm shattering 'uniqueness' of the EU.[161]

Overall, from the statist perspective, the pluralists seem to loose themselves in some important but less than revolutionary innovations in the EU. Swept off their feet by these innovations, and guided more by their hopes than a sober appraisal of actual political power and legitimacy in the EU, these exceptions are declared the rule.

6 The statist – pluralist divide: Bridging attempts

As the overview above confirms, a divide exists between statist and pluralist accounts, their views on sovereignty, and the two basic approaches to the EU they represent. A divide that is especially problematic as both views contain much of value, but at the same time contain dangerous weaknesses as well, as they so effectively point out in each other.

Now of course a wealth of possibilities lies between the strong statism of Kirchof and the 'radical' pluralism of MacCormick.[162] Some of these possibilities developed do also reduce the gap between the two approaches in their purest forms. At the same time these generally seem unable to escape the gravitational pull of either one basic approach in the end; ultimately some hierarchy is accepted with all the risks of monism, or it is rejected, with all the risks and instability of pluralism.

Nevertheless these attempts to bridge the divide again contain much of value, certainly for a confederal approach that seeks to establish a viable confederal middle ground for the EU. Before we continue to the confederal approach suggested in this thesis, therefore, it is useful to briefly discuss some of these bridging attempts. Especially interesting in this regard is the sub-category of 'constitutional pluralism'. A sophisticated branch of pluralism that attempts to establish some structure in plurality whilst steering clear of ultimate and formal hierarchy.

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159 Of course this reduction in the 'utility of law as a determinate guide to conduct at least in the area of conflict' is recognized by several well developed conceptions of pluralism, but even these may skip too easily over the fact that precisely in these cases of conflict guidance is necessary, and appeals to pluralist perceptions may become attractive, also as an abuse. The quote is from MacCormick (1999), 102.

160 See for instance, also for a further and forceful critique on pluralism, Baquero Cruz (2008), 389.

161 De Witte (2012), 21. Similarly Hartley (2001), 225 et seq.

162 Such as his own later version of pluralism under international law: MacCormick (1999), 121.

Constitutional pluralism illustrates the difficulty of bridging the statist – pluralist divide, and hence the potential contribution of a confederal middle ground. But it equally shares the 'constitutional intuition' of confederalism in its quest to combine statism with pluralism, or a certain foundation with far-reaching heterarchy. As will be seen below, therefore, a confederal approach may particularly contribute to further develop constitutional pluralism.

6.1 Constitutional pluralism: Constitutionalizing plurality without hierarchy

Constitutional pluralism tries to regain some coherence and system within the limits of plurality through the use of constitutionalism. In a sense it thereby takes the notion of a constitution from the statist camp and attempts to make it switch sides.[163] Within this extra-statal notion of constitutionalism coherence can then be pursued in various ways.

Kumm, for example, postulates several overarching values in a Dworkinian attempt to create a *substantive* superstructure without establishing a *formal* hierarchy.[164] All EU legal orders share 'the basic constitutional principles of political liberalism: the rule of law, democracy, human rights, complemented by subsidiarity (..).'[165] Coordination of these legal orders should be based on these shared substantive values. Decisions should not depend on a formal and preordained primacy of either the national or the EU legal order, but on the best fit with these values.

Kumm's approach does create some structure and coherence without (formal) hierarchy. It equally stimulates debate and dialogue on the content of these values. Yet though the values he enumerates are broadly shared, his approach does not break free from more radical pluralism in the end. For only where agreement already exists on these values and their specific application is no authority structure (or EU) needed. Where agreement remains absent, however, no specific interpretation can be imposed.[166] That is, unless one accepts some formal hierarchy to apply these values, this approach relies on a enlightened, liberal revival of natural law theory where all authority derives from substantive correctness and conformity with supreme values. By replacing a formal hierarchy by a substantive hierarchy,

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163 Cf Kumms notion of 'Constitutionalism Beyond the State' in Kumm (2005), 262. See for the vehement rejection of any such attempts at recruitment Kirchof (2010) strongly denying the viability of constitutional language outside the state. In any event this feat does require softening constitutionalism, and hence freeing it from some of the thicker normative layers surrounding it, which also reduces the very normative force required by pluralism. Also see Schilling (1996), 389 and Schütze (2012), 67.

164 Kumm (2005), 262.

165 M. Kumm as quoted in Avbelj and Komarek (2008), 26.

166 Cf in this regard the challenge to any form of authority by R.P. Wolff, *In Defense of Anarchism* (University of California Press 1998).

therefore, we revive the classical natural law problem: who may authoritatively formulate and apply these values? Unless we assume agreement, and hence assume away the problem we want to solve, we return to a radical heterarchy, even within national legal systems.[167] A heterarchy which threatens even the thin concept of law as defined by Fuller.[168] What is more, the far from hypothetical risk arises that both the ECJ and the state courts will simply rely on such substantive arguments and values to establish an ultimately procedural and hierarchical claim to supremacy.[169] In addition the combination of a post-modern logic of pluralism with the existence of some form of substantive, knowable and intersubjectively valid, values, even if based on discourse, seems problematic. In a sense the attempt to avoid formal hierarchy thereby leads to the assumption of a substantive hierarchy even more inimical to the roots of pluralism itself.[170]

6.2 Heterarchy under Contrapunctual principles

Instead of creating order through substantive principles one can also attempt to take the sharper edges of pluralism by relying on overarching *procedural* principles.[171] Participants in the different legal orders within the EU should follow certain procedural axioms that would prevent conflict and ensure a harmonious functioning of the EU legal order. Maduro's 'Contrapunctual' principles provide a clear example of the strengths, and weaknesses, of such an approach.[172] What is needed to 'manage the non-hierarchical relationship between the different legal orders and institutions' is a set of 'Contrapunctual principles:[173]

> 'In a sense, for pluralism to be viable in a context of a coherent legal order there must be a common basis for discourse. Such a basis is a set of principles shared by all the participants that, while respecting their competing claims of authority , guarantees the coherence and integrity of the European legal order. These are understood as framework principles that characterise the form of European legal pluralism and regulate the relation among the different national legal orders and between these and the EU legal order.'[174]

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167 See on this risk Cuyvers (2011), 49 et seq.

168 L. Fuller, *The Morality of Law*, (2nd ed, Yale University Press 1969), especially chapter 2.

169 Cf in this regard the reasoning of the ECJ in *Kadi I*, finding that it alone is able to define and protect the substantive values in play. Joined cases C-402/05 P and C-415/05 P *Kadi I*.

170 See in this regard also the epistemological defense of pluralism by Walker discussed above.

171 As an intermediate option, and with a strong Kelsinian streak, one could also opt for a pluralism between the EU legal orders, yet under the overarching system of international law. See, for instance, MacCormick (1999), 119-121 or N. MacCormick, 'Risking Constitutional Collision in Europe?' 18 *Oxford Journal of Legal Studies* (1998), 517. Here as well, however, the actual controlling force of international law remains vague, as it must remain if it is not to undermine pluralism as such.

172 Maduro (2006), 520.

173 Idem, p. 523.

174 Idem, p. 524.

Such a procedural framework can indeed reduce conflict, and may accurately describe the efforts by different actors in the EU to prevent conflict. Yet these procedural principles ultimately run into the same barriers as the substantive values relied on by Kumm. They even do so more spectacularly due to their formal nature. A clear risk exists of postulating a superior overarching system that ultimately undermines real pluralism,[175] which means that the escape in proceduralism cannot dissolve the tension between the (legal) need for some (limited) form of hierarchy and pluralism.[176]

This tension is already visible at the level of language. Maduro states, for example, that: 'these are the principles to which all actors of the European legal community *must* commit themselves (…). This commitment is *voluntary* but it may still be *presented* as a limit to pluralism'[177] Undoubtedly due to a lack of imagination, this does beg the question: if the commitment is not voluntary (must) how does this fit with pluralism? Yet if it is voluntary, how does it provide a limit? Equally the more free and friendly use of 'principles' is sometimes replaced by the less plural sounding contrapunctual 'rules'.[178]

The implied hierarchy in contrapunctual law becomes even more obvious once one takes into account the three actual rules or principles it entails. For instance 'each theory must be constructed so as to adjust and adapt to the competing theories'.[179] Simply translated this means that the different legal systems may not seek, or at least not maintain, conflict. Yet this makes the logic, or envisioned 'solution' circular: One prevents conflict by imposing a rule that each system should prevent conflict. The same goes for the principle whereby each system is prohibited to affirm its identity in 'a manner that either challenges the identity of the other legal orders or the pluralist conception of the European legal order itself.'[180] Again conflict is conceptually removed by prohibiting it (without claiming hierarchy). A requirement, furthermore that does not seem to fit with the current case law of most national constitutional courts or the primacy claim of the ECJ.[181]

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175 Notice in this regard the assumption of something like an overarching EU *legal* order: 'The European legal order should be conceived as *integrating* the claims of validity of both national and EU constitutional law' Idem, p. 524.

176 For an *institutional* alternative, aimed at resolving potential conflicts not by posing substantive or procedural values but by creating an institution to resolve them (based on the principles it sees fit) see the proposal by Weiler for a Constitutional Council comprised of national and EU judges: J.H.H. Weiler, 'The European Union Belongs to its Citizens: Three Immodest Proposals', 22 *European Law Review* (1997), 150.

177 Maduro (2006), 524.

178 Idem, p. 525.

179 Idem.

180 Idem, p. 526.

181 For a recent example see the decision of the Czech constitutional Court of 31 January 2012, *Landtova* Pl. ÚS 5/12, or the different national judgments regarding the European Arrest Warrant. See J. Komarek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles", 44 *CMLRev* (2007), 9.

Thirdly it is suggested by Maduro that 'When national courts apply EU law they *must* do so in such a manner as to make these decisions fit the decisions taken by the European Court of Justice but also by other national courts.'[182] Not only does this rather delimit freedom under pluralism, it also imposes a truly herculean task on judges: even Dworkin only required a fit within one legal order.[183] Perhaps the best illustration of this implicit hierarchy, however, is that Maduro himself finds it necessary to put the word independent between quotation marks where he eventually states that: 'The integrity and coherence of the pluralist legal order will stem from the *obligation* of any national legal order to construct their *'independent'* conception of EU law in a manner that is compatible with the other conceptions and with a coherent European legal order.' Direct hierarchy between the ECJ and the national courts is replaced by a perhaps even more stringent obligation towards higher principles of contrapunctual law.[184] As a result, when one takes these principles seriously they seem hard to square with true pluralism and its rejection of hierarchy. When one does not, they do not solve the problem of plural chaos implicitly accepted by Maduro.[185]

Perhaps this problem could already have been expected, seeing how the comparison Maduro makes with music ignores that the harmonious balance in a piece of music has been predetermined by an omnipotent composer, and is safeguarded by a conductor. Rarely does one put 28 musicians with highly different instruments and musical training in a room without sheet music and says: play! Especially not where one wrong note may have the weight and effect that supreme court rulings have. For changing the political rule of a continent is not the same as musicians jamming or improvising, and as the previous 'concert of Europe' has shown, false notes may carry grave consequences. For most fundamentally supreme courts are not musicians, and the legal rule of a continent is not a piece of music.

182 Maduro (2006), 528.

183 A problem equally applying to the substantive values of Kumm.

184 Maduro (2006), 538.

185 Would one leave adherence to these principles fully voluntary, one would, it seems, simply return to Weilers genuinely plural, and self-declared 'noble', notion of 'constitutional tolerance'. Constitutional tolerance 'is premised on the need of the legal orders of the Member States *voluntarily* to accept the constitutional discipline demanded by the European legal order, even absent a constitutional demos.' Under this approach, for instance, the 'French and the Italians' are 'invited to obey'. Weiler (2012), 12-13 (italics in original) and Weiler (2000), for the original concept. Clearly such hopes of nobility and voluntary compliance question not just the nature of law, but even the need for law. Conceptual issues aside, statist, or cynical commentators may point to the fate of the Stability and Growth Pact, or the suspension of Schengen obligations by France and Italy, for some serious doubts as to the survival chances of nobility when faced with strong national self interest or identity.

7 Conclusion: A sovereign either/ or?

A fundamental dichotomy seems to lie between sovereignty and integration, and hence between statism and pluralism. For the moment one supports a meaningful notion of sovereignty, as the statists do, one is seemingly forced to establish and defend all kinds of sovereignty-based limits to integration. A task that not just appears herculean, but also far too static. Rejecting sovereignty altogether in a plural embrace of integration, however, also leaves one with some rather fundamental gaps and problems. How, for instance, to ground public authority without sovereignty? Or why would one accept any form of authority at all, not just within the overarching international legal order, but even within national legal systems?[186] For once the anti-hierarchical genie is out of the lamp, it is hard to prevent it from spiriting away all formal hierarchy.

To complicate matters, both approaches convince on some points whilst falling short on others. Statism increasingly struggles to accommodate the current realities of integration within a statal framework. Vice versa pluralism struggles to relate its claims to the existing, and still vital, statal structures or any other form of foundation for that matter. As a result it remains rather ethereal and academic, lacking the capacity to solve conflicts or carry much weight.[187] Certainly not the amount of weight it offloads unto itself from the shoulders of the state.

Several insightful and constructive attempts have been made to reduce the divide between both approaches. Yet these also seem unable to really emancipate themselves from either linear hierarchy or radical pluralism.[188] Consequently we seem trapped in an unattractive dichotomy: statism or pluralism, established theory or *tabula rasa*, foundation or flexibility, sovereignty or the EU.

As indicated this thesis explores the potential of a confederal conception of sovereignty. A conception which could soften the juxtaposition between the views described above, and between sovereignty and integration more generally. For example it could allow a high level of operational heterarchy *within* a more exceptional but clear confederal hierarchy. A goal worth striving for as it would allow us to take the best of both camps, whilst helping to strengthen the constitutional foundation of the EU. In this quest for such a confederal conception of sovereignty the following chapter turns to the conceptual development of sovereignty itself: Is the concept of sovereignty really as absolute and as anathema to integration as it seems?

186 See Cuyvers, (2011), 481.
187 Chalmers, Davies and Monti (2010), 199.
188 Cf the conclusion of Baquero Cruz (2008), 414: '*tertium non datur*'.