TRANSNATIONAL LAW

Rethinking European Law and Legal Thinking

Edited by

MIGUEL MADURO

KAARLO TUORI

and

SUVI SANKARI

3

Beyond the archetypes of modern legal thought

Appraising old and new forms of interaction between legal orders

ENZO CANNIZZARO AND BEATRICE I. BONAFÈ

1. Monism and dualism in contemporary legal experience

For more than a century, the landscape of relations between legal orders has been dominated by monism and dualism. From the beginning, these two doctrines have tended to assert themselves as comprehensive and mutually exclusive: antithetical paradigms of legal thought. Ever since, their confrontation has featured the evolution of legal thinking and still echoes in legal literature. In the course of the decades, many voices have recurrently been raised, invoking against this theological dispute and calling for abandonment of theoretical schemes regarded as relics of a different era.[1] Nonetheless, monism and dualism still resist and defy every attempt to construct alternative legal doctrines.

In our view, the reason for their enduring success consists in an apparent paradox.

On one hand, monism and dualism as such have never been applied in practice. No contemporary legal order can be defined as fully monist or fully dualist. Good reasons exist to believe that their integral application would create more problems than they could solve. Recurrently, voices have been raised that the time is ripe to abandon them. In other words,

This chapter as a whole is the product of cooperation between the two co-authors. However, it is possible to determine the sections that ought to be attributed to each of them: Enzo Cannizzaro is the author of sections 1, 2 and 3, and Beatrice I. Bonafè is the author of sections 4, 5 and 6.

[1] See e.g. I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008), p. 33; more bluntly, A. von Bogdandy, 'Pluralism, direct effect, and the ultimate say: on the relationship between international and domestic constitutional law', 6 *International Journal of Constitutional Law* (2008), 397–413 at 400.

it seems that these conceptions are inapplicable in practice and only exist as purely ideal schemes.

On the other, monism and dualism are constantly referred to as the conceptual basis of legal discourse in relations between legal orders. Every endeavour to demonstrate their obsolescence clashes with the objection that no alternative scheme has been satisfactorily devised.

The reason for their persistence in legal discourse lies in the fact that monism and dualism do not have normative value. They do not establish rules, nor do they produce obligations. They are legal archetypes that we use to materialise our conception of legal orders and in which we channel the ways we conceptualise the relations between legal orders.[2] In other words, we use the term monism to indicate the universality of legal experience and the unity of political power. We use the term dualism to indicate that the existence of a plurality of legal orders is perfectly conceivable and established in practice.

Even from a practical viewpoint, the two terms depict mental archetypes of modern legal and political thought. Monism expresses a tendency towards extroversion and the idea that beyond the parochial values of each state legal order exist universal values constituting the common axiological turf of mankind. Dualism tends rather to express a tendency towards introversion, and the idea that the superior values of modern state orders, based on well-developed standards – the rule of law and democracy – are to be protected against threats from the barbarian, external legal experience.

However, to see in the struggle between monism and dualism a mere logical or theological dispute conceals the very point at stake in this centennial controversy. This dispute essentially concerns the degree of openness of a particular legal and political order and its propensity to accept values originating from the outer world: *Völkerrechtfreundlichkeit* v. *Völkerrechtfeindlichkeit*. In this regard, monism and dualism correspond to two rhetorical figures that fill the imagination with historical and cultural suggestions: a virtuous dualism seen as a barrier erected

[2] A major misconception that surrounds these two notions is that they are immutable concepts that accompany the evolution of legal thought without being significantly touched upon by it. This is largely a commonplace. A glance at history proves abundantly not only that each of these notions has changed over time, but also that their respective roles *vis-à-vis* the other have changed in a sort of a never-ending game of hide and seek. For more details of this development, see E. Cannizzaro, *Diritto internationale* (Turin: Giappichelli, 2012), p. 449.

by democratic orders against intrusion from outside barbarians, on one hand; a virtuous monism seen as a door open to the universal application of common values, on the other. This also explains why most, if not all, modern legal orders are based on a blend of monism and dualism, both in their normative and in their jurisprudential dimensions.

2. A minimum denominator: legal orders as legal monads

In spite of these antithetical implications, in their traditional version, these two doctrines rest on the same logical premise, namely the principle of exclusivity of legal orders;[3] what Kaarlo Tuori terms the black box theory.[4]

According to the dualist version of that theory, contemporary legal experience reveals the existence of a plurality of legal systems, each claiming sole authority to determine the legal nature of its rules. The monist version does not contest the premise of the exclusivity of legal orders. It simply contends that, in contemporary legal experience, the various territorial communities of the globe only constitute the component parts of a unique global community. While the legality of the rules of each component part is determined on the bases of states' legal orders, the ultimate authority to determine the legal nature of the universal legal order rests with international law.

Not only, therefore, are monism and dualism far from being irreconcilable but they also constitute two conceptual variants of the same, positivist theory. Furthermore, they also constitute the indispensable corollary of that theory, in the sense that one who accepts that legal orders are necessarily exclusive can hardly escape this choice of alternatives: either each legal order is legally self-contained and autonomously determines its relations with other legal orders, or each legal order forms part of a wider, possibly universal, legal order that possesses the ultimate authority to determine relations between its component parts.

Thus, in spite of their apparently antithetical vision of the legal experience, monism and dualism share a common premise. Being based on the principle of exclusivity, both doctrines are totalitarian, in the sense

[3] See C. Grzegorczyk, F. Michaut and M. Troper (eds), *Le positivisme juridique* (Paris: LGDJ, 1992), p. 34.

[4] K. Tuori, *Critical Legal Positivism* (Farnham: Ashgate, 2002).

that they both accept the premise that a legal order is either completely dependent or completely independent.[5]

However, this scheme, underlying the entire doctrine of legal positivism, is under severe challenge in contemporary law. A plethora of scholarly writings warns us that no contemporary legal order is fully dependent or fully independent.[6] Increasingly, the very premise of legal positivism – namely, the principle of exclusivity of legal orders – is challenged. Increasingly, too, practice reveals that this principle does not correspond to the needs of the contemporary world, which are rather based on constant interrelations between different legal orders. And increasingly it appears as little more than a *fictio iuris*, useful perhaps to conceptualise legal relations based on the notion of sovereignty, but certainly not depicting the reality. Legal orders are deemed to be interdependent, interconnected, permeable with each other or even porous.

However, behind this shared perception has emerged no legal doctrine that proves capable of replacing the traditional conceptual paradigm. Nor is there any merit in the view that no legal doctrine is needed and, instead, a case-by-case determination should be resorted to for the solution of practical problems deriving from the coexistence of legal orders. This recurrent exhortation undoubtedly advocates a practical approach, which appears the most opportune after decades of theoretical intoxication. However, it falls short of providing guidance to theorists and practitioners. In the absence of an objective conceptual framework, a pragmatic approach cannot but rely on personal preference, thus creating uncertainty and multiplying legal conflicts.

Hence, in spite of the many developments in legal theory, dualism and monism still stand as almost insurmountable mental paradigms defying every attempt to set them aside. We know much about the many ways in which legal orders relate to each other,[7] but still we are incapable

[5] For an analysis of the principle of exclusivity of legal orders and the relationship between international and municipal law, see B. I. Bonafè, 'International law in domestic and supranational settings' in J. d'Aspremont and J. Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014, forthcoming).

[6] See in general J. Nijman and A. Nollkaemper, 'Introduction' in Nijman and Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (Oxford: Oxford University Press, 2007), p. 2.

[7] For the relevant practice of states see P. Eisemann (ed.), *The Integration of International and European Community Law into the National Legal Order* (The Hague: Springer, 1996); D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement. A Comparative Study* (Cambridge: Cambridge University Press, 2009); D. Shelton (ed.), *International Law and*

of answering the fundamental question about the ultimate authority to determine these interrelations.[8] Speaking in cosmological terms, we know much about the universe in which we live but we are still incapable of determining whether there is only one universe, albeit split into a finite or infinite number of subparts, or rather whether we have more than one universe and whether they are closed or open. At the current stage of conceptual development, this incapacity may make monism and dualism in a sense 'indispensable doctrines' and, ultimately, account for their astonishing success. Alternatively, more attention should be drawn to the way in which legal orders actually interact.

3. A methodological premise: relations between rules or relations between orders?

In this chapter, we do not intend to propose a new doctrine on the relationship between legal orders. Our attempt is more modest by far. We intend to explore some practical arrangements by which contemporary legal orders, without necessarily abjuring their ultimate authority, tend to refer to each other and, by so doing, to limit the paralysing effects of the principle of exclusivity.

Observing this practice of mutual recognition may thus sketch the contours of an emerging scheme, in which legal orders are not mutually exclusive but rather establish unilateral forms of coordination. This perspective tends to de-potentiate the perennial theoretical dispute between monism and dualism. It also seems more apt to accommodate the complex interrelations occurring within the thick network of rules of various origins, international, supranational, and national.

This scheme is based on the obvious premise that the contemporary legal environment is composed of a variety of legal rules of different origin and functions. This is the effect of a process of constant reference from one order to another, which might sometimes give the idea of a sort of transitional law. For the purposes of this study, it is unnecessary to determine the theoretical implications of this phenomenon and, in particular, the nature of this constant cross-reference.

Domestic Legal Systems. Incorporation, Transformation, and Persuasion (Oxford: Oxford University Press, 2011).

[8] See e.g. A. Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011), p. 301.

If we accept the premise that legal orders tend constantly to refer to each other, the question arises as to how to determine and to apply the law that apparently derives from a legal order different from that in which it is applied. Our point is that this is a complex operation, which ought to take into account, for example, the origin and the function assigned to single rules within the system from which it emanates. In other words, it is necessary not to consider single rules in isolation, as pure normative propositions; rather, law must first be examined in the context of its original system, in the light of its own set of fundamental values, its normative dynamics and its own set of instrumental rules. This hypothesis therefore tends to take into account rules not so much at their abstract legal value but rather as the final product of a process of making and determining laws that takes place in another legal system. It is this final product, and not legal provisions considered as abstract sources of law, that must be implemented and enforced through internal remedies.[9]

In the following paragraphs, we propose to demonstrate the existence of a practice of cross-reference between legal orders. For this purpose, we will consider the functioning of some of the techniques that judges tend to apply in order to avoid what they perceive as an improper implication of the doctrines of legal solipsism. Obviously, we do not intend to demonstrate that these techniques apply in every possible situation and that a new conceptual model has emerged and replaced the classic schemes. What we intend to do is only to identify the possible direction of a conceptual development the contours of which have yet to take definite shape.

Some techniques will be analysed that seem to have reached a sufficient stage of elaboration: namely the margin of appreciation, consistent interpretation and equivalent protection. Although very different from one another, these techniques are based on analogous theoretical premises.

[9] The idea that international rules must be considered within domestic legal orders, not so much in terms of abstract normative value but rather as part of the international legal system, was the origin of considerable misconception in the past. In particular, it inspired the assumption that these rules are exclusively enforced through international legal enforcement mechanisms; and, in consequence, that international rules should not be enforced through the system of remedies in the domestic legal order. For a preliminary assessment of the use and misuse of this perspective, see E. Cannizzaro, 'The neo-monism of the European legal order' in Cannizzaro, P. Palchetti and R. A. Wessel (eds), *International Law as Law of the European Union* (Leiden: Brill, 2012), pp 35–58.

4. The margin of appreciation doctrine

Elaboration of the margin of appreciation doctrine is commonly attributed to the European Court of Human Rights,[10] but it has a much wider scope of application.[11] It has been and still is applied by other European and international courts, notably the International Court of Justice. This doctrine combines recognition of the normative competence of domestic legal orders with limited international review.[12]

The most interesting aspect of the margin of appreciation doctrine is that it ensures a degree of flexibility in the application of international obligations by acknowledging that, in certain areas, domestic legal orders are better placed than international courts to set normative standards.[13] Thus, when international obligations do not require strict uniformity of national law provisions, a variety of national measures – which take into

[10] See *Belgian Linguistic* case (App. Nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64) [1968] 1 EHRR 252, and previously the Report of the ECommHR in the *Lawless* case (App. No. 332/57), 19 December 1959.

[11] According to Y. Shany, 'Toward a general margin of appreciation doctrine in international law?', 16 *European Journal of International Law* 5 (2006), 907–40 at 909: 'the same considerations which have led to the creation of "margin of appreciation type" doctrines in the domestic law of many states (especially in the field of administrative law) and in the context of specific international regimes (most notably under the European Convention on Human Rights), also support the introduction of the doctrine into general international law'. The extensive body of literature regarding the margin of appreciation includes S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2000); Y. Arai-Takamashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the European Court of Human Rights* (Antwerp: Intersentia, 2001); A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press, 2012).

[12] For this reason the doctrine of a margin of appreciation has also been criticised. According to J. Brauch, 'The margin of appreciation and the jurisprudence of the European Court of Human Rights: threat to the rule of law', 11 *Columbia Journal of European Law* (2005), 113–50 at 115, it should be abandoned because it endangers protection of fundamental rights to some degree. See also E. Benvenisti, 'Margin of appreciation, consensus, and universal standards', 31 *New York University Journal of International Law and Politics* (1999), 843–54. For a supportive view see R. MacDonald, 'The margin of appreciation' in MacDonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (Dordrecht: Springer, 1993), p. 63; E. Kastanas, *Unité et diversité. Notions autonomes et marge d'appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l'homme* (Brussels: Établissements Émile Bruylant, 1996), p. 331.

[13] See e.g. H. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Dordrecht: Martinus Nijhoff, 1996); E. Brems, *Human Rights: Universality and Diversity* (The Hague: Brill, 2001).

account the specific features and needs of national communities and at the same time pursue the purpose dictated by international law – can be said to be compatible with international law. In such cases, international law accepts a certain margin of discretion within national legal orders and even recognises their primary role in moulding the content of international obligations. Accordingly, the margin of appreciation doctrine can be described as recognition of a certain discretion at the disposal of state legal orders to determine conformity to international obligations.[14]

The doctrine is consistently applied in order to recognise the normative competence of domestic legal orders to regulate the exercise of rights conferred on individuals by international law.

This scheme, also well known in less recent practice, was recently applied by the ICJ in the *Case concerning the dispute relating to navigational and related rights.*[15] A treaty concluded in 1858 established Nicaragua's sovereignty over the San Juan River, but affirmed Costa Rica's navigational rights 'for commercial purposes' on the lower course of that river. The Court was asked to review domestic legislation adopted by Nicaragua which, according to Costa Rica, contravened its right of free navigation. The Court held that 'Nicaragua has the power to regulate the exercise by Costa Rica of its right of freedom of navigation under the 1858 Treaty', provided that domestic legislation is compatible with the general principles set out therein (namely, Costa Rica's right of free navigation).[16] In particular, the measures adopted by Nicaragua had to pursue a legitimate purpose and not be discriminatory or unreasonable. Consistently with this approach, some measures adopted by Nicaragua were found to be incompatible with Costa Rica's right to free navigation because they could not be justified on the ground of a legitimate purpose or were excessive.[17] An analogous approach was also adopted by the International Tribunal for the Law of the Sea (ITLOS) in a 2011 Advisory Opinion.[18] When asked to indicate the measures that a sponsoring state should adopt in

[14] M. Hutchinson, 'The margin of appreciation doctrine in the European Court of Human Rights', 48 *International and Comparative Law Quarterly* 3 (1999), 638–50 at 649; T. O'Donnell, 'The margin of appreciation doctrine: standards in the jurisprudence of the European Court of Human Rights', 4 *Human Rights Quarterly* 4 (1982), 474–96 at 495.

[15] *Case concerning the Dispute regarding Navigational and Related rights*, Judgment, ICJ Reports 2009, para. 213.

[16] *Ibid.*, para. 87. [17] *Ibid.*, paras 119 (legitimate purpose) and 123 (excessive).

[18] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Seabed Dispute Chamber (2011).

order to discharge its duties under Articles 139(2), 153(4) and Annex III, Article 4(4) of the Convention, the Seabed Dispute Chamber recognised that 'policy choices on such matters must be made by the sponsoring State'.[19] However, while determination of specific measures is left to the 'discretion' of states, in order to be compatible with the Convention those measures should be 'reasonably appropriate'.[20]

Even more telling is the application of this doctrine in integrated international systems such as that established by the founding treaties of the EU and by the ECHR.

The search for a balance between the need to safeguard the effectiveness of Convention rights and the need to leave a significant margin of discretion to states features the entire case law of the ECtHR. It may suffice to recall, by way of example, the jurisprudence concerning Article 6 of the ECHR. In a recent case relating to compatibility of the institution of the lay jury with Article 6, the Court reaffirmed that it is not its task to standardise the variety of European legal systems: 'A State's choice of a particular criminal justice system is in principle outside the scope of the supervision carried out by the Court'.[21] Accordingly, the 'Contracting States enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems are in compliance with the requirements of Article 6'.[22] It follows that the Court will limit its review to respect for general principles set out in the Convention.[23]

On a similar conceptual scheme is based the doctrine of the procedural autonomy of the Member States of the EU. In the absence of specific EU law remedies, 'it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights that citizens have from the direct effect of Community law',[24] provided that domestic remedies are consistent with the requirement of effectiveness and proportionality.[25]

The doctrine of the margin of appreciation has been paradigmatically applied in order to strike a fair balance between the international obligations and public policy objectives of states.

[19] *Ibid.*, para. 227. [20] *Ibid.*, paras 228–30.

[21] *Taxquet* v. *Belgium* (App. No. 926/05) [2010] ECHR 1806, para. 83.

[22] *Ibid.*, para. 84. [23] *Ibid.*, paras 85–92.

[24] Case 33/76 *Rewe* [1976] ECR 1989, para. 5; see also Case 45/76 *Comet* [1976] ECR 2043, para. 13.

[25] Today those general principles are enshrined in Article 19 TEU.

An example in international judicial practice is provided by the *Fisheries* case decided by the ICJ in 1951.[26] The Court held that even 'in the absence of rules having [a] technically precise character', the Norwegian delimitation remained nonetheless 'subject to certain principles which make it possible to judge as to its validity under international law'.[27] The recognition that 'the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it', inevitably led the Court to accept that national measures could be subject to limited review only concerning their consistency with general principles of international law.[28]

An analogous conceptual scheme underlies some of the most famous trends in the case law of the ECJ/CJEU and of the ECtHR.

It is common knowledge that the ECtHR has applied the margin of appreciation doctrine to confer a large, albeit not unlimited, discretion on States party to the Convention to determine the level of protection of collective interests that can lawfully interfere with the human rights equally protected by the Convention.[29] The Court has recognised in general terms that 'State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these

[26] *Fisheries* case *(United Kingdom* v. *Norway)*, Judgment, ICJ Reports 1951, p. 116.

[27] *Ibid.*, p. 132.

[28] See *Case concerning the Gabcikovo-Nagymaros Project*, Judgment, ICJ Reports 1997, p. 7, para. 40.

[29] The breadth of the margin of appreciation seems to depend on a number of factors: the relative importance of public policy objectives as opposed to the fundamental character of the individual interest at stake. The existence or inexistence of a consensus among states can contribute to the fundamental character of a public policy objective and to the level of protection that can reasonably be claimed. See G. Letsas, 'Two concepts of the margin of appreciation', 26 *Oxford Journal of Legal Studies* 4 (2006), 705–32; I. de la Rasilla del Moral, 'The increasingly marginal appreciation of the margin-of-appreciation doctrine', 6 *German Law Journal* 7 (2006), 611–24. In *Evans*, the ECtHR held: 'Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted . . . Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider' (*Evans* v. *United Kingdom* (App. No. 6339/05) ECtHR 2007–I, para. 77). In a recent case, the ECtHR held that notwithstanding the existence of a '*clear trend* in the legislation of Member States', the '*emerging* consensus is not, however, based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State' (*SH et al.* v. *Austria* (App. No. 57813/00) [2011] ECtHR, para. 96, emphasis added). In any case, the precise threshold to be met to demonstrate a 'consensus' can hardly be regarded as well settled and the very notion of 'consensus' is still undergoing a process of gradual refinement.

requirements'.[30] Accordingly, the scope of judicial review was limited to the proportionality of states' measures.[31]

In a similar vein, in what is universally known as the doctrine of mandatory requirements,[32] the ECJ/CJEU has recognised a broad, but not unlimited, discretion for Member States to determine the level of protection of public policy objectives that can justify interference with free movement in the internal market.[33]

Impressively, international courts apply the margin of appreciation doctrine in a consistent manner. When discretion is accorded to domestic legal orders, the national measure is subjected to a limited international review concerning the legitimate aim pursued by the measure and applying a necessity/proportionality/reasonableness test. The domestic measure is never put into question *per se*; it is its compatibility with the purposes of the international regime that is tested.

The ultimate objective of the doctrine is to reconcile a plurality of divergent interests.[34] This goal is achieved by limiting review by international courts of domestic measures and considering this review as subsidiary to domestic normative intervention. The margin of appreciation doctrine is based on the acceptance that in certain cases priority should be accorded to the normative competence of domestic legal orders. Therefore, the basic assumption of the doctrine is the explicit or implicit recognition of the normative competence of domestic legal orders in certain areas of law.[35] International supervision is not excluded but it is significantly circumscribed and never puts into question the normative competence of domestic legal orders. Thus, the doctrine, which is built on the fundamental, assumed acceptance of 'external' normativity, ensures a certain degree of unity between different legal orders pursuing common goals.

[30] *Handyside* v. *UK* (App. No. 5493/72) Series A (1976) No. 24 ECtHR, para. 48; see also more recently *Otto Preminger Institut* v. *Austria* (App. No. 13470/87) Series A (1994) No. 295–A ECtHR, para. 50.

[31] For some recent decisions see *A, B, C* v. *Ireland* (App. No. 25579/05) [2010] ECtHR 2032, on abortion; *Schalk and Kopf* v. *Austria* (App. No. 30141/04) [2010] ECtHR, on same-sex marriage; *Lautsi* v. *Italy* (App. No. 30814/06) [2010] ECtHR, on religion.

[32] Case C–83/94 *Leifer* [1995] ECR I–3231, paras 35–6; see also Case C–273/97 *Sirdar* [1999] ECR I–7403, paras 27–8.

[33] J. Gerards, 'Pluralism, deference and the margin of appreciation doctrine', 17 *European Law Journal* 1 (2011), 80–120.

[34] See MacDonald, note 12 above, pp 123–4; Kastanas, note 12 above, pp 223 and 439.

[35] See e.g. Letsas, note 29 above, in whose view both the structural and the substantial concept of the margin of appreciation imply a recognition of the normative competence of the State parties in fostering collective interests to the detriment of protecting individual rights.

5. The canon of consistent interpretation

Consistent interpretation presents us with a logically reversed situation. The margin of appreciation doctrine is based on recognition of the competence of the domestic legal order to contribute in determining the content to be given to some indeterminate international notions. The doctrine of consistent interpretation seems to entail acknowledgement by domestic legal orders of the existence of an external normativity to which some sort of priority is granted in determining internal law.

The situations that will be taken into account are essentially those in which domestic courts rely upon a technique of consistent interpretation in order to apply domestic law in harmony with international law.

Practice of reliance on consistent interpretation by domestic courts is so abundant that an exhaustive account can hardly be given.[36] This technique is used to interpret the implemention of domestic legislation whether the implementing purpose is explicit[37] or implicit.[38] It is used to interpret domestic law in harmony with general international law[39] or treaties,[40] be they duly incorporated or not.[41] It is even used to solve cases that are not governed by binding international obligations.[42] In spite of the different legal grounds adduced to justify its application,[43] the

[36] According to G. Betlem and A. Nollkaemper, 'Giving effect to public international law and European Community law before domestic courts. A comparative analysis of the practice of consistent interpretation', 14 *European Journal of International Law* 3 (2003), 569–89, the spontaneous practice of states coupled with the required *opinio iuris* could give rise to a customary duty of consistent interpretation.

[37] See for example German Constitutional Court, *Görgülü*, Judgment No. 1481/04 (2004); Peru, Supreme Court, *Callao Bar Association* v. *Congress of the Republic*, ILDC 961 (2007).

[38] See in particular US Supreme Court, *Murray* v. *Schooner Charming Betsy*, [1804] 6 US (2 Cranch) 64; Supreme Court of the Netherlands, NJ 1992, 107, para. 3.2.3; Kenya, High Court of Nairobi, *RM and Cradle* v. *Attorney-General*, (2008) 1 KLR (G&F) 601.

[39] See for instance Supreme Court of Canada, *Mugesera* [2005] 2 SCR 100, para. 126.

[40] See e.g. Supreme Court of Canada, *Suresh* v. *Canada* [2002] 1 SCR 3, paras 96–8; Israeli Supreme Court, *Kav La'oved* v. *Israel* [2006] HCJ 4542/02.

[41] See e.g. High Court of Australia, *Minister of State for Immigration and Ethnic Affairs* v. *Ah Hin Teoh*, [1995] HCA 20, 128 ALR 358, paras 26–7; Supreme Court of Canada, *Baker* v. *Canada* [1999] 2 SCR 817, para. 69.

[42] See in particular South Africa, Constitutional Court, *S* v. *Makwanyane*, 3 SA 391 (1995); US Supreme Court, *Lawrence* v. *Texas*, 539 US 558 (2003).

[43] The legal basis of the duty of consistent interpretation is commonly to be found in domestic law. It is no longer exceptional to find specific national provisions (either in the constitution or in national legislation) laying down an express duty to interpret internal law consistently with international law. See e.g. Art. 16(2) of the Portuguese Constitution; Art. 18(3) of the Serbian Constitution; Art. 10(2) of the Spanish Constitution; Art. 233 of the South African Constitution; s. 2 of the UK Human Rights Act 1998. More often

doctrine of consistent interpretation is certainly one of the favourite tools for ensuring implementation of international obligations at the municipal level.[44]

In particular, consistent interpretation can be a very effective instrument to prevent normative conflicts.[45] The idea is frequently accepted that conflicts between international and municipal law should be prevented from arising by using interpretation techniques.[46] In a further development, the doctrine can also entail the need to interpret domestic law instrumentally, in order to secure the objectives and the full effect of international law.[47]

In a sense, connected with the doctrine of consistent interpretation is the tendency of domestic courts to rely on judicial determination of international rules by international courts and tribunals. For example, when applying or interpreting national law domestic judges tend to rely on the interpretation of the ECHR adopted by the European Court of Human Rights, even where such interpretations have no formal binding effect.[48] By so doing, they tend to recognise that the provisions of the ECHR should be understood in the light of the object and purpose of the Convention, conceived as a living instrument, and, therefore, carry the

consistent interpretation is a judge-made canon based on a presumed intention of the legislature to act in conformity with international law. Less frequently, domestic courts affirm that consistent interpretation is directly grounded in international law. This is for example the case with the duty of consistent interpretation with (and under) EU law.

[44] See e.g. UKHL *Ex parte Brind* [1991] 2 WLR 588; Italian Constitutional Court, judgments 348 and 349/2007.

[45] With respect to EU law see G. Betlem, 'The doctrine of consistent interpretation. Managing legal uncertainty', 22 *Oxford Journal of Legal Studies* 3 (2002), 397–418.

[46] See with respect to international law Betlem and Nollkaemper, note 36 above; and, with respect to EU law, F. Casolari, 'Giving indirect effect to international law within the EU legal order. The doctrine of consistent interpretation' in Cannizzaro, Palchetti and Wessel (eds), note 9 above, pp 395–415.

[47] According to Betlem and Nollkaemper, note 36 above at 588, '[t]he impact of the principle of construing domestic law consistently with supranational law in both legal systems further mitigates the clear distinction between Community law and public international law. In both situations, the courts recognize that there is a binding rule of law, higher in the hierarchy, and that the domestic law is to be construed so as to give effect to that rule of international law.'

[48] For an analysis of consistent interpretation in a different legal framework see T. Cottier and K. Schefer, 'The relationship between World Trade Organization law, national and regional law', 1 *Journal of International Economic Law* (1998), 83–122; G. Iorio Fiorelli, 'WTO as a parameter for the EC legislation through the "consistent interpretation" doctrine' in C. Dordi (ed.), *The Absence of Direct Effect of WTO in the EC and in Other Countries* (Turin: Giappichelli, 2010), p. 121; G. Gattinara, 'Consistent interpretation of WTO rulings in the EU legal order?' in Cannizzaro, Palchetti, and Wessel (eds), note 9 above, pp 269–87.

meaning given to them by the jurisprudence of the ECtHR.[49] Most interestingly, this approach seems based on the recognition of a particular competence with which international courts are entrusted under international law.[50]

More generally, consistent interpretation is a special form of judicial deference that domestic courts exercise with respect to international law. It allows the latter to permeate the domestic legal order and hence to ensure a certain coordination between international and municipal law. This doctrine is premised on the recognition that certain areas of law are better governed by 'external' rules that should somehow be allowed to mould the 'internal' legal order.[51]

6. The doctrine of equivalent protection

The doctrine of equivalent protection provides a particularly interesting example of a technique devised to coordinate legal orders. The doctrine is premised on the mutual recognition that every legal order has the competence to determine the conditions under which its rules are valid, even where they are to produce effects in another legal order. This is

[49] In *Dorigo* the Italian Court of Cassation assented to giving effect to a decision of the ECtHR concerning Italy because, among other reasons, the European Court is 'the body institutionally authorized to interpret and apply the provisions of the Convention' (Judgment No. 2800 [2007], para. 6).

[50] See, for example, Italian Constitutional Court, decision 348/2007, para. 4.6. Another example of judicial deference to the case law of an international court is provided by the German Constitutional Court decision in the *Consular Notification* case, Judgment No. 2115/2006. The Court held that 'für Staaten, die nicht an einem Verfahren beteiligt sind, haben die Urteile des Internationalen Gerichtshofs Orientierungswirkung, da die darin vertretene Auslegung Autorität bei der Auslegung der Konvention entfaltet', para. 61. This duty of consistent interpretation is derived from the nature of the Court, which is the principal judicial organ of the United Nations, and the specific interpretative competence it has under the Protocol to the Vienna Convention on Consular Relations. Since Germany has accepted the competence of the Court, its entire case law should provide guidance in the interpretation of domestic legislation: 'Voraussetzung hierfür ist, dass die Bundesrepublik Deutschland Partei des einschlägigen, die in Rede stehenden materiell-rechtlichen Vorgaben enthaltenen völkerrechtlichen Vertrags ist und sich – sei es, wie im Falle des Fakultativprotokolls zum Konsularrechtsübereinkommen, vertraglich, sei es durch einseitige Erklärung – der Gerichtsbarkeit des Internationalen Gerichtshofs unterworfen hat', para. 62.

[51] In this regard, it can be noted that the limits of consistent interpretation can all be understood as a priority accorded to 'internal' normativity. Consistent interpretation is typically inapplicable when normative competence has already been or can only be exercised at the domestic level, that is, when international law is in blatant contrast with municipal provisions, national fundamental principles or domestic final-judicial decisions.

possible when the conditions for validity established in the two legal orders involved – the one in which the rules are drawn up, and the one in which they are designed to produce effect – are homogeneous.

Although designed to solve a practical problem – namely, how to secure for fundamental human rights satisfactory protection *vis-à-vis* external rules without imposing respect for internal standards – the doctrine has a broad field of application and can theoretically apply to various situations in which the problem arises of which standard must be applied to determine the validity of external rules. Thus, equivalent protection can ensure coordination between legal orders in a wide spectrum of cases.

In its 'vertical' dimension, the doctrine ensures an orderly interaction between domestic legal orders and international law. Indeed, the doctrine has been elaborated in the courts of a number of EU Member States in order to avoid scrutiny of EU measures with human rights, provided that the EU offered 'equivalent protection' in that particular field of law. This is, notoriously, the case with the ruling of the German Federal Constitutional Court in *Solange II*[52] and of the Italian Constitutional Court in *Frontini*.[53] In these cases, the two Courts adopted an analogous scheme, that consists in the recognition that, under certain conditions, the existence of 'external' normativity (the EU legal order) can replace internal normativity. Where these conditions are absent, the classic scheme re-emerges, the internal system is reinsulated and it overrules external normativity.

In broader terms, the doctrine was recently relied upon by the French Conseil d'État in *Arcelor*. The Conseil d'État recognised in principle that the domestic judge will assess the conformity of a measure with French constitutional rules or principles only where EU law does not sufficiently ensure effective protection of such domestic rules or principles.[54]

Thus, the equivalent protection doctrine is not solely relied upon with the purpose of recognising the competence of another legal order and

[52] BvG, *Solange II* 73, 339 (1986).

[53] Corte Costituzionale, *Frontini*, judgment n. 183 of 27 December 1973.

[54] Conseil d'État, Assemblée, *Arcelor*, n. 287110 (2007): the 'juge administratif, saisi d'un moyen tiré de la méconnaissance d'une disposition ou d'un principe de valeur constitutionnelle, *(doit) rechercher s'il existe une règle ou un principe général du droit communautaire qui*, eu égard à sa nature et à sa portée, tel qu'il est interprété en l'état actuel de la jurisprudence du juge communautaire, *garantit par son application l'effectivité du respect de la disposition ou du principe constitutionnel invoqué*; . . . s'il n'existe pas de règle ou de principe général du droit communautaire garantissant l'effectivité du respect de la disposition ou du principe constitutionnel invoqué, il revient au juge administratif d'examiner directement la constitutionnalité des dispositions réglementaires contestées' (emphasis added).

accepting that its provisions providing for equivalent protection can be applied to the detriment of national law. It also has an internal impact. Equivalent protection directs the domestic judge in the choice between application of national law and an equivalent, 'external' rule.

In its 'horizontal' dimension, the equivalent protection doctrine ensures an orderly interaction either between different international convention regimes or between different domestic legal orders. In the first situation, the doctrine was originally applied by the ECtHR with respect to EU law and subsequently extended to other international organisations.

A frequently mentioned example comes from the relationship between the system of the ECHR and the EU legal order. In *Bosphorus*,[55] the ECtHR upheld, although through quite a tortuous line of argument, that the legal system of the EU would be exempt from scrutiny if equivalent protection for human rights were provided within it. Accordingly, judicial review of EU law has been restricted to situations in which EU protection of human rights was manifestly deficient. In the presence of a system to protect human rights equivalent to, even if not necessarily identical with,[56] that offered by the Convention, the ECtHR was ready to grant primary competence to that 'external' system.[57] That primary competence, however, could be reversed, and full scrutiny of consistency with the Convention could be reinstated, if the protection secured by that external system fell below the level of equivalence.[58]

The features of the doctrine are twofold. First, it is based on a structural homogeneity among legal orders. Second, it is based on a high level of mutual trust, to admit that the fundamental functions of one might be delegated to the other. It is unlikely that the doctrine could apply in relations

[55] *Bosphorus* v. *Ireland* (App. No. 45036/98) ECHR 2005–VI. See more recently, *Kokkelvisserij* v. *The Netherlands*, Admissibility Decision (App. No. 13645/05) [2009] ECtHR.

[56] *Ibid.*, para. 143: 'it is primarily for the national authorities, notably the courts, to interpret and apply domestic law even when that law refers to international law or agreements. Equally, the Community judicial organs are better placed to interpret and apply EC law.'

[57] *Ibid.*, para. 155.

[58] *Ibid.*, para. 156:

> If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights.

among legal orders inspired by different values. However, the doctrine can also be used to promote the evolution of legal orders. In *Kadi*,[59] the ECJ seemed to point out that full review of EU acts implementing Security Council Resolutions in the light of EU fundamental rights could be attenuated to correspond with development of a system to protect human rights within the UN system.[60] The promotional nature of the doctrine – together with the mutual recognition that every legal order controls the validity of its own rules – is fraught with far-reaching implications and reveals the tendency of modern legal orders to overcome the absolute version of the exclusivity principle through a reciprocal acceptance of exclusivity.

This assumption is proved by the further expansion of the doctrine well beyond its original scope. In *Gasparini* the ECtHR applied the doctrine of equivalent protection to the NATO Claims Commission.[61] The same logic lies behind the 'alternative remedies' doctrine applied in the Court's case law relating to Article 6 ECHR in order to ensure its protection even in situations in which the international rules on immunity apply.[62]

More recently, the doctrine has been applied to the relationship between different domestic legal orders. In *Larix*,[63] the CJEU upheld the consistency with EU law of Austrian legislation that prohibits the promotion of gambling organised legally in another state where the legal order of the foreign state does not afford a level of protection for gamblers at least comparable to the level provided in Austria.[64] Interestingly, the CJEU made it clear that clauses unilaterally imposing domestic standards on foreign states would be inconsistent with EU law.[65] In other words, requiring that foreign protection be 'identical' to the domestic level of protection would frustrate the purpose of the equivalent protection doctrine.

The doctrine of equivalent protection as developed in the case law discussed suggests a few general remarks. The doctrine relies on the basic

[59] Joined cases C–402/05P and C–415/05P *Kadi and Al Barakaat* [2008] ECR I–6351.

[60] *Ibid.*, para. 256.

[61] *Gasparini* (App. No. 10750/03), [2009] Admissibility Decision, ECtHR: 'les Etats membres ont l'obligation, au moment où ils transfèrent une partie de leurs pouvoirs souverains à une organisation internationale à laquelle ils adhèrent, de veiller à ce que les droits garantis par la Convention reçoivent au sein de cette organisation une "protection équivalente" à celle assurée par le mécanisme de la Convention'.

[62] See B. I. Bonafè, 'The ECHR and the immunities provided by international law', 20 *Italian Yearbook of International Law* (2010), 55–71.

[63] Case C–176/11 *Larix*, nyr.

[64] Art. 56 of the Austrian Federal Law on Gambling of 28 November 1989 (BGBl. I, 620/1989, in the version published in BGBl. I, 54/2010).

[65] *Larix*, note 63 above, para. 32.

assumption that concurrent normative competence will be recognised by separate legal orders. In both its vertical and horizontal dimensions, the final decision on the application of 'external' equivalent rules rests on the legal order of the forum. Nonetheless, the doctrine of equivalent protection ensures unilateral coordination between legal orders because it allows entire sets of 'external' normativity to be applied internally. This mechanism is profoundly different from the traditional tool of *renvoi* that allows only specific external provisions to be applied internally. In particular, coordination between different and separate legal orders is essentially possible because both the 'internal' and the 'external' legal orders *share* common (even though not identical) standards in discharging analogous functions. Accordingly, 'internal' control over the exercise of 'external' competence is very limited, and basically rests on the criterion of 'manifest unlawfulness'.[66] Thus, the equivalent protection doctrine ensures unity and diversity at the same time, because it relies on pursuit of common goals, on one hand, and accepts flexibility in the application of equivalent means of protection in different legal orders, on the other.

7. Attenuating legal solipsism?

The foregoing analysis has focused on a selection of techniques that aim at coordinating different legal orders. They are all premised on recognition of a sphere of external normativity that makes a legal order feel less alone in the universe.

In spite of its technical character, the practice referred to above seems thus to reveal the emergence of relations between legal orders that escape the alternative between supremacy and subordination, and are rather based on mutual recognition and cooperation. This observation should not prompt the facile but simplistic conclusion that a new model has already emerged, replacing the old monist and dualist schemes, and capable of providing a coherent and comprehensive explanation encompassing all the possible relations among legal orders. Reality seems still very far from this hasty conclusion. In their normal intercourse, legal orders still exhibit their enduring claim to exclusivity; still retain their pretence to be the only source of normativity.

[66] K. Kuhnert, '*Bosphorus* – double standards in European human rights protection?', 2 *Utrecht Law Review* 2 (2006), 177–89; F. Hoffmeister, '*Bosphorus Hava Yollari Turizm* v. *Ireland*, App. No. 45036/98', 100 *American Journal of International Law* 2 (2006), 442–8.

Our analysis has thus produced a modest result, if any. It has demonstrated that the absolute version of the principle of legal solipsism, around which the classic archetypes of modern legal thought are still hinged, is not a necessary postulate and can be challenged. In fact, it is questioned by some apparently minor events that, however, as a whole seem to show that a different legal scheme is well possible and that such archetypes might be overcome.

The thrust towards this possible development is that contemporary legal orders – be they considered autonomous and fully fledged or rather as subparts of a unitary order – tend to refer to each other and to delegate certain normative functions to one another. This observation, albeit of limited scope, is promising from a theoretical viewpoint.

Recognition of the primary competence of a certain legal order to discharge its own functions – with the corollary that the results of this process are assumed as such in another legal order – entails the relativisation of the principle of exclusivity. The claim to uniqueness, which stands at the basis of the modern concept of legal orders, may then be gradually replaced by a scheme in which mutual recognition and tolerance take their place.

Nonetheless, this does not entail disappearance of the claim by any legal order to the ultimate power to determine, unilaterally, the conditions under which its own rules are valid, as well as the conditions upon which mutual recognition is accorded. However, the myth of the ultimate power will be excluded from applying to particular fields of normative competence (through mutual recognition) and balanced with gradual emergence of a consistent practice of legal interactions among legal orders.

4

The cosmopolitan constitution

ALEXANDER SOMEK

1. Constitutionalism 3.0

During the late twentieth and early twenty-first century, the authority of constitutional law has undergone significant transformations. By and large, these transformations are manifest in greater international interdependence and in democratic processes having a diminishing capability to control social life within their political bounds. Constitutional law needs to recognise now that it is addressed to 'market-embedded states',[1] over which their real power of action is narrowly circumscribed unless they 'pool' their sovereign powers to address common concerns. When it comes to such combinations, administrative problem-solving is likely to predominate.

I posit, by way of introduction, that these three developments can be accurately accounted for by constructing three ideal types of constitutionalism taken from history. They provide useful guideposts in a seemingly endless ocean of perplexity.

Constitutionalism 1.0 stands for the old-fashioned project to create and to sustain limited government. The basic means thereto are jurisdictional constraints and negative rights. The constitution is understood as a written document, which has ideally been authored by 'the people' or 'the nation'. Its proper application is informed by constitutional interpretation. It remains an open question whether the meaning of the constitution is to be authoritatively divined by the judiciary or by a representative body that most closely resembles the people themselves, in its composition and orientation. Interestingly, constitutionalism 1.0 appears to be incapable of arriving at a conclusive answer to this question.

Constitutionalism 2.0 assigns to the constitution an even more important role. Its norms are supposed to guide the creation of *optimal*

[1] See W. Streeck, *Competitive Solidarity: Rethinking the 'European Social Model'* (Cologne: Max Planck Institute for the Study of Societies Working Papers, 1999).