Introduction

Setting the Stage

The relationship between international and national law has been debated for centuries. Generally, the floor has been divided between two approaches: dualism and monism, mostly as advocated by Hans Kelsen. I argue that, in the light of major developments since their inception, such as the establishment of the European Union (EU), these theories can no longer comprehensively explain the relationship between international, EU and national law. While dualism as developed by Heinrich Triepel liberated the international legal order from an overly dominant national perspective some 125 years ago, it is not well equipped to accommodate the massive overlaps between international, EU and Member State legal orders today. In Hans Kelsen's version, monism is an epistemological theory about what the law might be. It does not provide satisfactory guidance for the doctrinal solution of norm conflicts between international, EU and Member State law. Thus, a key focus of this book is to reconceptualize the theoretical relationship between legal orders. Even though some scholars have doubted the relevance of theoretical inquiries such as dualistic or monistic analyses of the relationship between legal orders, I cannot agree with those who trivialize this theoretical discussion by saying it would be "unreal, artificial and strictly beside the point."[1] If we continue reading Fitzmaurice's view, it becomes clear that this is simply a dualistic argument. Yet current developments, fundamental changes and new phenomena such as the massive increase in international institutions, actors, norms and tribunals as well as adjudicators make it imperative to seek new

[1] Gerald G Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law" (1957) 92 Recueil des Cours de l'Académie de Droit International 1–227 (71).

theoretical concepts. The so-called globalization of law[2] as framed in the famous constitutionalization of international law[3] may be mentioned, among other developments, to elucidate the ever-growing importance of the debate on whether international, EU or national law has the final say.[4]

I start from the assumption that it is essential to have a theoretical concept for the relationship between legal orders because I hold that we cannot discuss this relationship intelligibly in the absence of such a concept. Without a theoretical concept, underlying assumptions often remain implicit and are not addressed clearly.[5] This book is based on the conviction that a common (normative) denominator of international, EU and national law is necessary to solve norm conflicts between overlapping legal orders. Without such a common denominator, we are left with non-normative or unilateral solutions for norm conflicts between overlapping legal orders. Therefore, legal pluralism in whatever shape is no normative option. Global constitutionalism, in contrast, suffers from the shortcoming of presuming too many substantive

[2] In relation to this designation, see Jean-Bernard Auby, "Globalisation et droit public" in *Gouverner, administrer, juger. Mélanges en l'honneur de Jean Waline* (Dalloz 2002) 135–157; Anne Peters, "The Globalization of State Constitutions" in Janne Nijman and Andre Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (Oxford University Press 2007) 251–308; see also David J Bederman, *Globalization and International Law* (Palgrave 2008); Neil Walker, *Intimations of Global Law* (Cambridge University Press 2014).

[3] Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer 1926); Jan Klabbers, *The Constitutionalization of International Law* (Oxford University Press 2009); Oliver Diggelmann and Tilmann Altwicker, "Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism" (2008) 68 Heidelberg Journal of International Law 623–650.

[4] Mattias Kumm, "Who Is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice" (1999) 36 Common Market Law Review 351–386 (384), famously held that "*within a pluralist framework, it does not make sense to speak of a final arbiter of constitutionality in Europe*" [emphasis original] and thus he thought that there are "good reasons to stop asking" the question on "the final arbiter of constitutionality in Europe." He did so by "replying" to a discussion between Theodor Schilling, "The Autonomy of the Community Legal Order: An Analysis of Possible Foundations" (1996) 37 (2) Harvard International Law Journal 389–409, and Joseph H H Weiler and Ulrich R Haltern, "The Autonomy of the Community Legal Order – Through the Looking Glass" (1996) 37 (2) Harvard International Law Journal 411–448.

[5] Compare also András Jakab, *European Constitutional Language* (Cambridge University Press 2016) 1 quoting John Maynard Keynes, *The General Theory of Employment, Interest and Money* (Palgrave Macmillan 1936) 383 concerning economics: "The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist."

values for the envisaged common normative denominator in order to be a helpful concept for the relationship between international, EU and Member State law. Thus, global constitutionalism cannot carry what I term the "burden of universality" and with constitutional pluralism we are likely to end in a "constitutional stalemate."

In this book, I seek to offer new theoretical insights in particular concerning the relationship between international, EU and national law because I hold that the current approaches do not provide satisfactory accounts. Before doing so I will first critically review the current dominant theories (dualism, Kelsenian monism, global legal pluralism and global constitutionalism) on this relationship in Part I. The idea behind this critical reconstruction is to demonstrate the flaws of prominent theoretical explanations of the relationship between legal orders. This is guided by an "evolutionary approach." I am convinced that reconstructing the arguments of dualists, monists, pluralists and constitutionalists will remind us of the historical background of these theories. This will reveal two important insights. First, it highlights which questions were the most important to ask. And, second, we will see how these questions have been answered in the realm of their historical context. This assumes that there is no time-independent theoretical approach to answering pressing questions from different times.[6] We can still learn from earlier theoretical approaches. Yet, due to major developments, we need an up-to-date theoretical approach. This is what I will provide in Part II.

Hence, after rejecting available theories advanced in the first part of the book, I devote the second part to developing my own theoretical account to solve legal norm conflicts of EU law with international law and with Member State law. This is important as this book is guided by the conviction that we need a common denominator for legal norm conflicts if we do not want them to be solved by brute force. In order to find out how we can know which legal order is superior in the case of a norm conflict, I engage with *pacta sunt servanda*, which, arguably, is a foundational legal principle to all three legal orders and can thus serve as a common denominator. When we seek a

[6] See Ralf Michaels, "Law and Recognition – Towards a Relational Concept of Law" in Nicole Roughan and Andrew Halpin (eds) *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017) 90–115 (91): "Questions as to the nature of law are never just definitional or ontological questions; they carry with them ideas of legitimacy, they serve a purpose, and they are always colored by the experience of the time and place in which they are proposed." With further reference in n 2 to Hermann Kantorowicz, *The Definition of Law* (Cambridge University Press 1958), and Julie Dickson, "Towards a Theory of European Union Legal Systems" in Julie Dickson and Pavlos Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 25–53 (26–30).

doctrinal solution to conflicts between legal systems then the following need to be taken into account: (1) if we take the point of view of one of the legal orders as being superior to the other two or (2) if we have a measure external to the legal orders concerned or (3) if we can detect a common denominator to all legal orders involved. In order to establish the latter, I use the generic legal principle *pacta sunt servanda*, which, arguably, is a foundational legal principle to all three legal orders, because the other solutions available are either dualistic/pluralistic/monistic (in a Kelsenian version – not offering doctrinal solutions) or constitutionalist (which are value-laden, with too many values not embraced by all the legal orders involved for doctrinal solutions to work). Concerning (1) and (2), we do not have a common solution to the norm conflict, which is very likely to be unacceptable for one legal order involved, where the norm conflict solution is regarded as brute force. That is why this book follows approach number (3).

The practical question I aim to answer is the following: how can we know who has the final say – international, EU or national law? The way I respond to this question does not follow Kelsenian monism or dualism, or legal pluralism or constitutionalism.[7] I answer it by introducing the theoretical concept of consent-based monism (Part II). In short, consent-based monism aims at reconceptualizing the monism–dualism–pluralism–constitutionalism debate. The intention is to establish whether it is up to EU law (when confronted with international law) or national law (when confronted with EU law) to determine the effect and validity of international or EU law within the "domestic" (constitutional) legal order. Answering this question is essential to provide a theoretically sound reply as to how the relationship between legal orders can be conceptualized and to offer a solution to norm conflicts with EU law – be they norm conflicts between international law and EU law or norm conflicts between EU law and Member State law. In more general terms, I wish to provide a theoretical concept to answer the question of how we can know who has the final say.

This, so goes the argument, allows us to focus on the most important structural characteristics of the relationship between international, EU and national law. Concerning the relationship between EU and Member State law, I generally make the point that the division of competences is decisive. Concerning the external relations of the EU, I aim to show in a rather

[7] If you agree with me that current theories cannot offer a convincing account for norm conflict solution regarding the relationship between international, EU and national law, you can skip the critique of current theories (Part I) and proceed directly to Part II, the explication of consent-based monism.

straightforward way in the last two chapters how norm conflicts between international agreements and EU law as well as between customary international law and EU law can be solved. For such norm conflicts, the approach developed in this book arguably provides for a thin but sufficient common denominator.

This book engages with an innovative idea by applying insights from social contract theory to EU law and its relationship with international as well as Member State law. However, instead of engaging with the usual goals of social contract theories, which are to legitimize and justify moral duties, this book draws on a somewhat more neutral account of social contract theory with the simple aim of a structural analysis of the relationship between international and EU law as well as between EU law and Member State law.

Consent-based monism does not provide a general solution that fits any norm conflict stemming from overlapping legal orders. The purpose of this book is to develop a legal theory that facilitates understanding of the interaction between international, EU and national law. Consent-based monism shares its point of departure with most social contract theories: a hypothetical state imagined as a legal vacuum, denoted as the "legal desert." However, in contrast to political philosophy, the hypothesis behind consent-based monism aims solely to elucidate the structural relationship between legal orders, without saying anything about how legal orders in particular or society in general should be organized. The theory is thus based on an abstract definition of law – the necessary common (normative) denominator – as the binding consensus between natural persons. The basis of what constitutes the fundamental principle *pacta sunt servanda* is not, however, simply presupposed but found after an in-depth analysis of the origins of morality. While the most promising approach to an innate "universal moral grammar" (UMG) as advanced by John Mikhail is critically evaluated and rejected, innate intersubjectivity is identified as key to human cooperation. Its origins are highlighted in neurobiology as well as (developmental) psychology. On this basis, an argument will be established for the normative *pacta sunt servanda* principle.

Against the background of this theoretical foundation, I engage with practice (Part III), applying consent-based monism to the relationship between international, EU and national law. I present a doctrinal analysis of relevant provisions at EU level according to consent-based monism. I am convinced that a theory-based argument on the relationship of EU and Member State law will contribute to key questions of EU law, such as the doctrine of direct applicability or the primacy question between EU law and the fundamental constitutional law of its Member States. This theory will provide a convincing

argument, solving potential tensions between the constitutional courts of the Member States and the Court of Justice of the EU (CJEU). For instance, arguments embedded in a sound theoretical explanation may help to clarify a potential stress ratio between European integration and the concept of (German) "constitutional identity," which, according to the German Federal Constitutional Court, is resistant to integration.[8]

Part III of this book provides an account of the doctrinal relationship between EU and Member State law. First, we will take a look at what a theoretically informed view of the relationship between EU and Member State law looks like in general. Then the book engages with the relationship between international and EU law by analyzing the effect of international agreements and customary international law, arguably the two most important sources of international law, and their effect on the EU legal order. After a doctrinal analysis of the status quo in case law and literature, I submit a somewhat different interpretation based on theoretical insights provided by consent-based monism. Finally, the major conclusions of this book will be outlined.

In brief, this book proposes a theory for international, EU and constitutional lawyers as well as for legal theorists about the relationship between legal orders. My intention is: (1) to present a critique of currently dominating theories; (2) to show in an intelligible theoretical manner my own answers to solving norm conflicts between legal orders; and (3) to demonstrate the practical relevance of this theoretical approach by presenting concrete examples of its application in a doctrinal fashion involving the relationship between the EU and Member State legal orders, as well as international agreements and customary international law and their effect on the EU legal order.

[8] See the case law cited below in Section 7.1.2. For an overview, see Gerhard van der Schyff, "EU Member State Constitutional Identity: A Comparison of Germany and the Netherlands as Polar Opposites" (2016) 76 Heidelberg Journal of International Law 167–191.