DEBATE YOUR ISSUE

EU and national law: which is 'superior'?

LEAD: Ongoing disputes between the EU and some its member states are deeply rooted in the problematic relationship between EU law and national constitutional orders. Whilst the general public remain unaware of these issues, lawyers do not intend to resolve them.

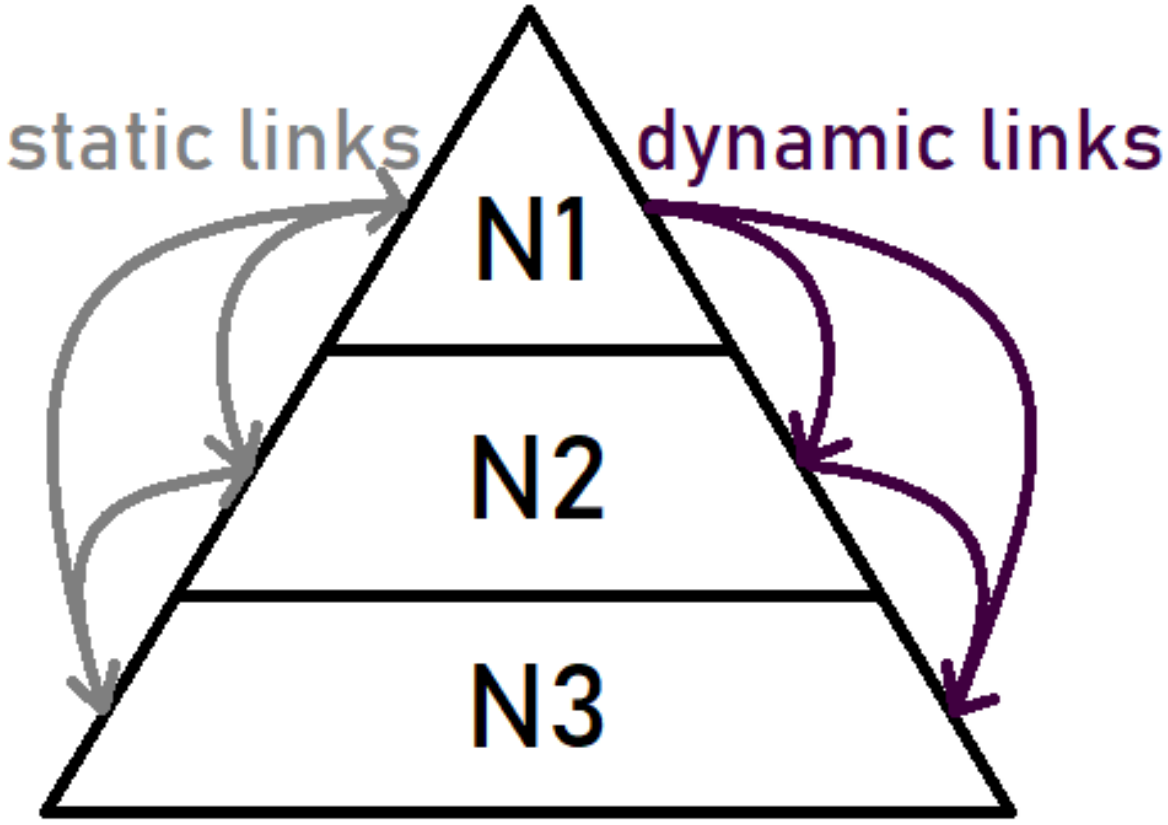
Geneva 1934

Hans Kelsen, a prominent Austrian legal philosopher, had already fled from Hitler's Germany when he published his *Pure Theory of Law* in 1934. At that time, he was well-known for his support for humanism and the 'de-ideologicalisation' of the law. In this sense, he hoped to create a theory of law that was essentially 'pure'. *Pure Theory of Law* was highly influenced by his views and experiences from Austria and Germany.

His theory was inspired by the need to defend the humanist vision of the individual and their freedom from the reductionist aspirations of science, bureaucracy and ideology. These presumptions led him to far-reaching conclusions. For him, law should be seen as a system, which is complete and hierarchical. Its hierarchical nature suggests that norms within the system may occupy a lower or higher position in the order. Kelsen's assumptions regarding hierarchy determined his definition of sovereignty, which can be understood as an essential part of a legal order not subject to any superior rules.

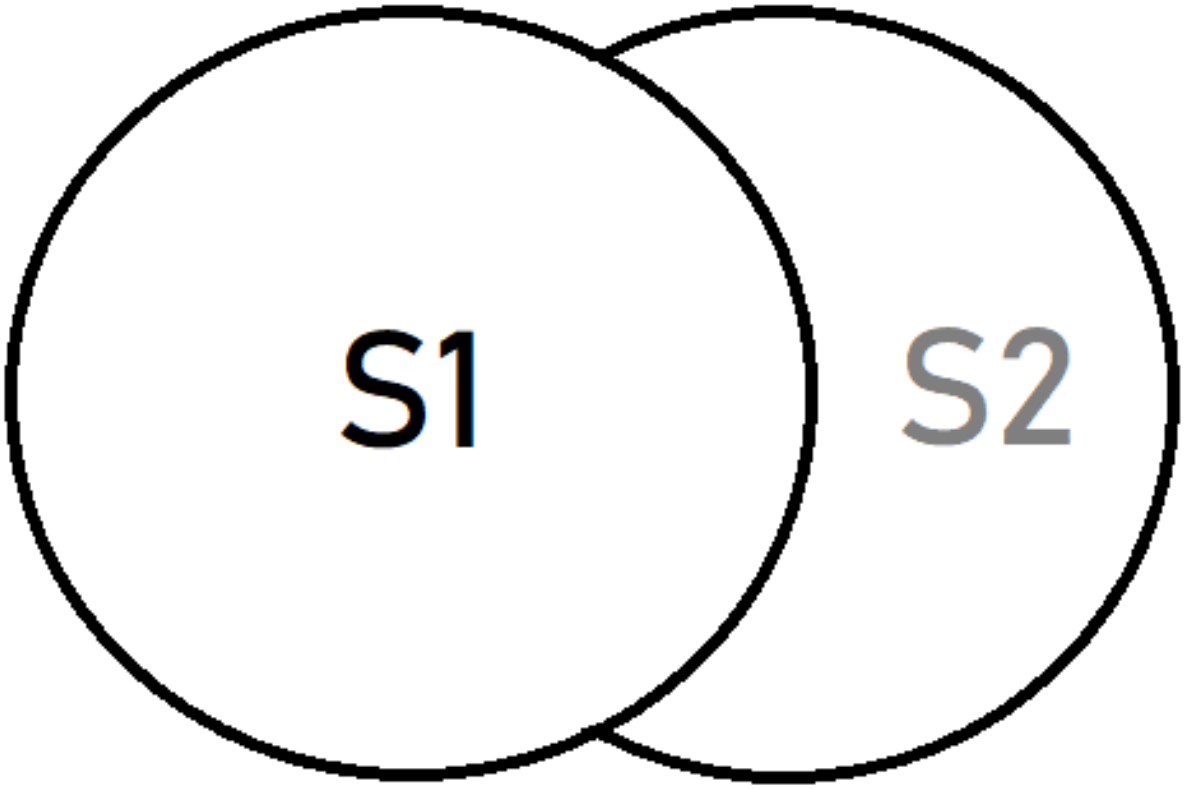
Pyramids and circles

European legal culture is based on common principles that have been agreed upon by successive generations of lawyers and politicians. Kelsen's hierarchy of norms belongs to these foundations. As a result, most Europeans understand any legal system as a pyramid:



Of course, Hans Kelsen was not the first to speak of hierarchy. It can be argued that his statements echoed Aristotle's 'hierarchy of beings', which was brought into legal thought by St. Thomas Aquinas. As early as the 13th century, the priest developed a comprehensive framework for understanding the hierarchical (in)compatibility of human law (*lex humana*) with natural law (*lex naturalis*). Overall, this natural law was viewed as the result of 'divine law' (*lex aeterna*). It appears that Kelsen adopted his model from Adolf Merkl, his colleague at the University of Vienna.The dynamic links pictured above help form a chain of authority. Superior norms within the system confer competence on specific legal actors to establish inferior rules. For example, a constitution gives certain people the power to adopt and implement acts of parliament. At the same time, the static links pictured are 'content-related'. This means that inferior norms should be understood in line with rules that are deemed more important within the system. Of course, the compatibility of these low-ranking rules' content with the wording of superior norms may be challenged.

There are obviously some alternative approaches to this view. A model adjusted to the realities of EU membership was recently proposed in Poland. Ewa Łętowska pointed out that a rigid understanding of hierarchy is inadequate in EU member states' legal orders and leads to disputes over which law is superior in different circumstances. A greater emphasis should be placed on the fact that, following accession, a member state's legal system ceases to exist on its own. Indeed, it becomes 'multicentric' and therefore consists of two sub-systems:



The two circles pictured here are seen from above but seen from the side they may take the shape of a pyramid. The key factor here is the range of the field occupied by the EU and national sub-systems. In some spheres they are independent but in others the overlap is clear. This 'common zone' may be governed by specifically agreed rules when it comes to legal superiority. It should be remembered that the hierarchy of one centre does not guarantee similar powers within another.

It can be argued that this point of view does not contribute much to debate, as it does not properly challenge the concept of hierarchy. It may be said that accession to the EU results in the organisation's rules being included within the domestic hierarchy. This reasoning proved crucial in the British Supreme Court's ruling in the memorable 'Brexit Case' (*R (Miller) v Secretary of State for Exiting the European Union* 2017).

When two norms meet

Kelsen's paradigm has remained popular as it is firmly rooted in the doctrine of modern constitutionalism. Kelsen himself is often viewed as playing a pivotal role in creating this doctrine, as well as the concept of the 'constitutional court'. The heart of constitutionalism is naturally dominated by the supremacy of a written constitution. Of course, EU law often fits uneasily within this framework.

EU law has its own autonomous rules and concepts. These EU principles have developed over the last 60 years largely in line with the verdicts of the Court of Justice of the European Union (CJEU). In its early days, it was as "an obscure court from Luxembourg whose legal declarations were not enough to embarrass the Member States and force them to act in accordance with the Treaty". Later on, however, it was admitted that "located in the fairy-tale principality of Luxembourg, in the careless oblivion of the mighty of this world and the media, CJEU has evolved a constitutional framework for a Europe with a federal structure". This framework would not be feasible without the principle of the primacy of EU law.

The principle of 'primacy' is the cornerstone of EU law, just as the supremacy of a constitution has been the pillar of constitutionalism. In many decisions the CJEU has reiterated that EU law takes precedence over national law in terms of application and that member states cannot override nor repeal Union norms. In cases where national norms are incompatible with EU law, member states should not apply inconsistent provisions.

What happens when a Union norm and national constitutional law collide? The CJEU says that EU norms cannot be questioned and should take their full effect in each country. Of course, national constitutionalists disagree with this understanding. The CJEU follows the principle of primacy, whilst national constitutional tribunals support the supremacy of the constitution over any other rules, including Union norms.

Refractory jurists

It is rare to find situations like those in Estonia or the Netherlands, where the principle of primacy was immediately fully accepted by the authorities. The majority of constitutional courts not only failed to give full effect to the principle of primacy but also determined the place of EU law in their legal systems based on provisions from their own constitutions. Naturally, the primacy of EU law stems from EU law itself, regardless of any national provisions.

National constitutional courts have argued with the CJEU for many years about the scope of the primacy principle. This is exemplified by the changing attitudes of the German Federal Constitutional Tribunal (FCT). In its 1974 judgment *Solange I* the body ruled that EU law may be reviewed in light of the individual rights and freedoms guaranteed by the German constitution. Despite this, the *Solange II* judgment led to the FCT concluding that Germany will also recognise the primacy of EU law regarding fundamental rights, so long as the EU ensures effective protection. This *Solange* doctrine soon spread to other member states. Some constitutional courts, however, continue to maintain that Union norms should be disregarded when they interfere with constitutional rights or freedoms. This was the conclusion of the Italian Constitutional Court in its 288/2010 judgment. All of these judgments are at odds with CJEU rulings, including the cases of *Melloni* and *Åkerberg Fransson*. In these cases the CJEU reinforced its belief in the overriding power of EU law when it comes to fundamental rights.

The power of the constitution in the field of individual rights and freedoms is also clear in Polish legal culture. Constitutionalists in this country go further than the other cases and claim outright that the Polish constitution stands above EU law. Leszek Garlicki, whose handbook on constitutional law is currently being read by new generations of Polish lawyers, is a firm supporter of this view. At the same time, the Polish Constitutional Court has stated that conflicts between Polish internal norms and Union law cannot be solved in favour of the EU.

Why is this important?

Defying EU powers has a long history and has become a key part of constitutional theory and practice in Europe's states. Politicians who challenge the validity of EU actions do so because they feel authorised by common assertions shared within their legal cultures. It is worth noting that many major politicians often are (not necessarily famous) lawyers, as in the case of Poland.

Discussions related to state sovereignty have an equally long history of debate. As aforementioned, sovereignty appeared in Kelsen's thought as the highest position on "the ladder of legal beings" and is inextricably linked with modern constitutionalism. This in turn is widely recognised as a positive development.

It is quite striking that many constitutional traditions shared across European states legitimise defying the EU's legal order in the name of sovereignty.

What can be done about this?

Apart from simply shifting the priorities of legal education in Europe, the notion of state sovereignty should be taken seriously and thoroughly scrutinised as a key concept. Of course, some would argue that speaking of 'sovereignty' as a clear ideal is the result of a misunderstanding. Even if this is the case, it is worth exploring a concept that has remained important for so many legal bodies. In any case, the closer we look at sovereignty, the clearer the concept's limitations. Negligence in approaches to this concept has led to alternative and potentially innovative understandings being forgotten about in legal debate. Gustav Radbruch said that sovereignty is nothing more than being a subject of international law. In this sense, it appears that the EU is sovereign.

In a number of cases the CJEU has reiterated that the EU constitutes a new legal order that is meant to benefit member states, which have voluntarily limited their sovereign rights. At the same time, the CJEU has never pushed the fact that member states have effectively signed up to EU law (pacta sunt servanda) when discussing these matters. Surprisingly, this approach has been kept in CJEU case law. In the case of *Kadi,* the CJEU asserted that the Vienna Convention on the Law of Treaties is a consolidation of customary international law and even directly cited Article 26 from the document. This article codified the *pacta sunt servanda* rule. More importantly, the CJEU also referred to Article 27, which states that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is treated as an international norm and may serve as a convincing justification for the need to respect the primacy of EU law. Discussing the duties of member states in this manner might help the CJEU sound more persuasive.

It is clear that EU politics will remain fraught with difficulties if national politicians continue to speak the language of freely interpreted sovereignty. At the same time, EU institutions must try to make their arguments more clear. Finding a common language could prove vital in moving towards a profound conceptual shift in European legal culture.

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