

Legal Pluralism and the European Union

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Abstract: *This article advances a pluralist model of a legal system. It claims that a legal system is pluralist when it contains inconsistent rules of recognition that cannot be legally resolved from within the system. The first part of the article sets out the model, demonstrating why it requires a departure from the classical accounts of law advanced by writers such as Hart and Kelsen. The second half applies this model to actual legal orders: first, to Rhodesia during the crisis of 1965, and then to the legal orders of the European Union. It is argued that there are interesting and important points of similarity between the two.*

Legal pluralism has suddenly become fashionable. Escaping the confines of law and anthropology, it is now common to argue that Europe's intermingling legal systems demand a pluralist interpretation. Implicit within this call is the assumption that pluralism is a novel and controversial way of understanding legal orders; that the classical, state-centred, models of legal systems cannot accommodate this new phenomenon. This article seeks to advance a modest account of legal pluralism and its significance for Europe. It is a modest account because it has so few enemies: many contemporary writers on jurisprudence, such as Raz and Finnis, would probably be comfortable with its claims. It is, however, sufficiently controversial to be interesting: Hart, Kelsen, and Dworkin would all dissent from its conclusions. This controversy enables the article to avoid the central problem that has beset recent work on pluralism: its remarkable popularity. Some recent writers have turned modesty into a vice: 'pluralism' has become so thin a theory that virtually all respectable writers on legal philosophy would endorse their claims. If everyone is a pluralist, pluralism ceases to be an interesting theory—it amounts to little more than the application of standard models of legal systems to a new factual situation.

This article will argue that a legal system can contain multiple rules of recognition that lead to the system containing multiple, unranked, legal sources. These rules of recognition are inconsistent, and there is the possibility that they will, in turn, identify inconsistent rules addressed to individuals. In addition, pluralist systems lack a legal mechanism able to resolve the inconsistency; there is no higher constitutional body that can resolve this dispute through adjudication or legislation. Consequently, pluralist legal systems contain a risk, which need not be realised, of constitutional crisis; of officials being compelled to choose between their loyalties to different public institutions.

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There are, then, three claims that must be explained and defended if this pluralist account of a legal order is to appear plausible and interesting. First, the meaning of 'inconsistent' in this context, and whether it is possible for legal rules to be inconsistent. Second, can a legal system contain legally irreconcilable inconsistent rules of recognition? Third, it must be shown that legal systems with inconsistent rules of recognition are more than rare, brief, aberrations; that the pluralist model of legal systems is helpful in explaining important features of common legal orders. This task will be accomplished by a close examination of the Rhodesian crisis of 1965, which will be presented as a brief but clear example of a pluralist legal order, and then the model will be applied to the more opaque question of the relationships between European and domestic legal orders. Hopefully, the utility of the abstract jurisprudential tools developed in the first half of the article will be demonstrated by the practical conundrums resolved in the second.

I What is Legal Pluralism?

In the 1970s and 1980s a group of academics emerged who described themselves as 'legal pluralists'.¹ They insisted on the significance of rules that were outside the traditional boundaries of 'law' as conventionally understood; norms that were not found in cases or statutes. Early writers were preoccupied with the integration of customary law into the legal system; in particular, the ways in which imperial legal systems had accommodated, incorporated, and limited religious and tribal law.² Sociolegal writers paralleled the trend, focusing on the rules that condition people's lives and refusing, or attempting to refuse, to distinguish between 'legal' and 'non-legal' rules.³ Though providing a healthy antidote to myopic concentration on domestic law as a form of social ordering, the contribution of these 'pluralists' was rather less controversial than they supposed. Though they frequently defined themselves against the work of established writers on jurisprudence—in particular Hart and Kelsen—much of what they asserted was compatible with those they sought to oppose. The suggestion that a legal system can recognise and incorporate rules from other legal systems was hardly revolutionary. Kelsen had already explained how a legal system could incorporate the rules of a separate system in the context of a discussion of conflict of laws cases.⁴ In Kelsen's work the apparent conundrum of the courts of one state applying the law of another is quickly resolved: there is a rule of the domestic system that identifies and validates the foreign law, and, in so doing, transforms it into a rule of the domestic system. Exactly the same applies when the legal system recognises tribal or religious laws: they are recognised by a rule of the national legal system and become part of it. Furthermore, the claim that other normative systems bear on an individual and have a practical impact as great as, or greater than, law is also commonplace. Again, Kelsen had engaged with this objection.⁵ Though it is unarguable that the rules that apply to a

¹ See generally, J. Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1.

² For instance, M. B. Hooker, *Legal Pluralism—An Introduction to Colonial and Neo-Colonial Laws* (Oxford University Press, 1975).

³ S. Moore, 'Law and Social Change: the Semi-Autonomous Social Field as an Appropriate Subject of Study', (1973) 7 *Law and Society Review* 719; Griffiths, *op. cit.* note 1 *supra*, 38–39; See also, E. Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. W. L. Moll (Russell & Russell, 1936).

⁴ H. Kelsen, *General Theory of Law and the State*, trans. A. Wedberg, (Harvard University Press, 1945) 243–248.

⁵ *Ibid.*, 24–28, discussing Ehrlich, *op. cit.* note 3 *supra*.

person will have many sources, law has essential qualities that set it apart from other sets of rules—and much of the rest of Kelsen's work was an attempt to outline these special features. These differences, of course, need not imply that law is more important than other normative systems. It is telling that legal pluralists often felt the need to then distinguish between law, by which they meant all of the norms that bore on a person, and a sub-category of 'state law' or 'legal propositions', which would have been roughly synonymous with law in Kelsen's sense.⁶ There is, then, a suspicion that the dispute is rather shallow; that the legal pluralists have used the word 'law' to signify a wider set of things to those identified by Kelsen, but that, under a different label, they share a similar concept with him.

An alternative strand of legal pluralism focused on inconsistency, or contradiction,⁷ between rules. Pluralism, on this account, claims that there can be contradictory 'legal mechanisms' that apply to single factual situations.⁸ Once again, this form of pluralism might be less controversial than it first appears. As Griffiths points out, many of the supposed contradictions identified by these writers are resolvable.⁹ For instance, Vanderlinden presents the legal distinction drawn between the clergy and the laity in the middle ages as an example of a legal contradiction explicable within a pluralist model. In fact, all that the example illustrates is that the clergy enjoyed special privileges within the ordinary legal system. As a consequence of this privilege, different rules applied to the clergy and laity: no contradiction has been shown. Furthermore, it is equally unremarkable to find contradictions arising between the rules of different normative systems: all sensible accounts of law leave space for conflicts between law and morality. The lesson of these examples is not that contradiction is not central to pluralism, but that it is actually quite hard to find examples of genuine and interesting legal contradictions.

Most recent writing on pluralism in the context of the European Union, seems closer to the first strand than to the second; however, elements of both are required if a distinctive pluralist account is to be articulated. In what follows, a pluralist model of a legal system will require both multiple sources of law, and, also, the possibility of inconsistency between legal rules. In the following two sections these claims will be explored further, and contrasted with the work of Hart, Kelsen, and Dworkin.

II Inconsistent Legal Rules

Two arguments have been advanced against the very possibility of inconsistent rules existing within legal systems, both of which have their origins in the work of

⁶ See, for example, M. Chiba, 'Other Phases of Legal Pluralism in the Contemporary World', (1998) 11 *Ratio Juris* 228; A. Hellum, 'Actor Perspectives on Gender and Legal Pluralism in Africa', in H. Petersen and H. Zahle (eds.), *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth Publishing, 1994), 15.

⁷ For reasons explained later I prefer 'inconsistency' to 'contradiction'—though for present purposes they can be used interchangeably.

⁸ J. Vanderlinden, 'Le Pluralisme Juridique: Essai de Synthèse', in J. Gilissen (ed.), *Le Pluralisme Juridique* (Université de Bruxelles, 1971), 19. See also: S. Merry, 'Legal Pluralism', (1988) 22 *Law and Society* 869, at 870; R. de Lange, 'Divergence, Fragmentation and Pluralism', in Petersen and Zahle *op. cit.* note 6 *supra*; A. Arnaud, 'Legal Pluralism and the Building of Europe' in the same volume; N. MacCormick, 'Juridical Pluralism and the Risk of Constitutional Conflict', in N. MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999).

⁹ Griffiths, *op. cit.* note 1 *supra*, 12–14.

Kelsen.¹⁰ The first argument is that ranking rules and other legal principles always eliminate apparent inconsistencies. The second is that in seeking to understand the law we ought to assume that rules cannot be set in inconsistency: we should, or, perhaps, must, treat the law as a meaningful whole and not as a collection of disparate rules.

A The Claim That Ranking Rules Always Eliminate Apparent Inconsistencies

Kelsen's first argument against the possibility of inconsistency was that legal systems invariably included principles to resolve such problems. Rules providing for the hierarchical ranking of legal sources, or, when this ran out, the maxim *lex posterior derogate priori*, ensured that valid legal norms could not be set in inconsistency.¹¹ This assertion can be swiftly disposed of—these ranking rules are as much a matter of positive law as any other rule and law makers are able to alter them.¹² Consequently, whilst it will often be possible to resolve apparent inconsistencies through these rules, this need not always be the case. Sometimes the ranking rules may not provide an answer, or may themselves be inconsistent. Indeed, even the *lex posterior* maxim is not beyond dispute: where two rules in a statute contradict precedence is now given to the later provision, but Lord Ellesmere claimed precedence should be given to the earlier.¹³

B The Claim that the Logical Principle of Non-Contradiction Compels us to Conclude that the Apparent Inconsistencies do not Exist

Kelsen's second argument was more subtle. In seeking an understanding of law, the logical principle of non-contradiction demanded that we not conclude inconsistent rules governed the same situation.¹⁴ There are three ways in which this claim could be fleshed out. The first elaboration would take Kelsen as claiming that principles of logic necessarily form part of the substance of all normative orders; that the principle of non-contradiction is, in some sense, a rule necessarily present in all normative systems. The second elaboration would take Kelsen as claiming that all forms of legal interpretation require certain fundamental assumptions, which include the principle of non-contradiction; on this argument, the principle of non-contradiction is, somehow, inherently part of every legal order. The third elaboration would take Kelsen as claiming that, as judges are bound to resolve the case before them, only one of the two purportedly inconsistent rules can be held valid. This claim could either be taken as a consequence of either of the first two elaborations, or as a separate claim resting on the rather unKelsenian assertion that the law is what the courts will declare it to be.

¹⁰ Kelsen, *op. cit.* note 4 *supra*, 407–408; H. Kelsen, *The Pure Theory of Law*, trans. M. Knight (University of California Press, 1967), 205–208. Kelsen abandoned this claim, though he never fully explained the reasons for his change of mind: J. Harris, 'Kelsen and Normative Consistency', in R. Tur and W. Twining (eds), *Essays on Kelsen* (Oxford University Press, 1986), S. Munzer, 'Validity and Legal Conflicts' (1973) 82 *Yale Law Journal* 1140, at 1164.

¹¹ Kelsen *op. cit.* note 10 *supra*, at 206.

¹² S. Paulson, 'On the Status of the *Lex Posterior* Derogating Rule', in R. Tur and W. Twining (eds), *Essays on Kelsen* (Oxford University Press, 1986). See further, P. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press, 2005), 305–306. For an example of such judicial reflection, see the discussion in *Thoburn v Sunderland District Council* [2003] QB 151 of statutory hierarchy.

¹³ Discussed in L. Fuller, *The Morality of Law* (rev. edn, Yale University Press, 1969), p. 68.

¹⁴ Kelsen, *op. cit.* note 10 *supra*.

The second and third arguments are eerily similar to those advanced by Ronald Dworkin, in his claim that legal problems have ‘right’ answers. If Dworkin is taken as claiming that all, rather than most, legal questions have a right answer, he is also compelled to deny the possibility of inconsistent legal rules.¹⁵

a) The First Elaboration: That the Principle of Non-Contradiction Necessarily Forms Part of all Normative Orders

The first elaboration of Kelsen’s objection against inconsistent rules arising within legal orders built on the claim that all normative orders must embody the principle of non-contradiction. This might be glossed as a version of the old adage that ‘ought implies can’. There are two objections to this claim.

First, it is not immediately obvious why it should be thought that principles of logic, in particular the principle of non-contradiction, should be applied to ethical reasoning. This is a proposition that needs to be argued for rather than just assumed. Those who seek to introduce the principle must either explain how truth values can be attributed to moral imperatives, or explain how questions of the logic of norms can be distinguished from questions of their truth.¹⁶ Without wishing to be dragged too deeply into these metaphysical conundrums, the presence of the principle of non-contradiction must depend to a considerable extent on the particular ethical framework adopted. There are certainly some moral systems that lack space for inconsistent obligations. Most obviously, a utilitarian would not accept that a person can be faced with inconsistent moral obligations. Ought always implies can in the strongest sense in this moral universe: ultimately, there is only one obligation—the duty to maximise happiness. However, other ethicists do see a place for inconsistent moral obligations. Most strongly, some have argued that a person may be faced with a direct contradiction: be both obligated to act, and obligated not to act. So, for example, as the king, Agamemnon is under an obligation to sacrifice his daughter to save the campaign, whilst as a father he is under an obligation never to harm his children.¹⁷ More weakly, some have argued a person can be faced with moral dilemmas in which it is impossible to fulfil two simultaneous obligations that are empirically contradictory.¹⁸ For example, where a lifeguard sees two drowning swimmers, but only has time to save one. To counter the claim that all normative orders must contain the principle of non-contradiction, we can advance these theorists as evidence that moral frameworks can operate without the principle. At the very least, these examples show that the principle is not a necessary part of every plausible normative system. It appears that the hope of establishing a

¹⁵ R. Dworkin, ‘On Gaps in the Law’, in P. Amselek and N. MacCormick (eds), *Controversies about Law’s Ontology* (Edinburgh University Press, 1991), R. Dworkin, ‘No Right Answer?’, in P. M. S. Hacker and J. Raz, eds., *Law, Morality and Society* (Oxford University Press, 1978). Munzer, *op. cit.* note 10 *supra*, 1156–1162.

¹⁶ J. Jørgensen, ‘Imperatives and Logic’, (1937–1938) 7 *Erkenntnis* 288; S. Coyle, ‘The Possibility of Deontic Logic’, (2002) 15 *Ratio Juris* 294. For an example of the first strategy, see: G. Volpe, ‘A Minimalist Solution to Jørgensen’s Dilemma’, (1999) 12 *Ratio Juris* 59. For an example of the second, see: G. von Wright, *Logical Studies* (Routledge, 1957), p. vi.

¹⁷ P. Foot, ‘Moral Realism and Moral Dilemma’, (1983) 80 *Journal of Philosophy* 379.

¹⁸ T. Nagel, ‘The Fragmentation of Value’, in T. Nagel, *Mortal Questions*, (Cambridge University Press, 1979); B. Williams, ‘Ethical Consistency’, in B. Williams, *Problems of the Self* (Cambridge University Press, 1973). Neither Nagel nor Williams distinguish between the stronger and weaker forms of moral inconsistency presented here. See Munzer, *op. cit.* note 10 *supra*, at 1144, applying the distinction to legal inconsistency.

system of deontic logic independent of particular systems of moral philosophy is too ambitious, and that the principle of non-contradiction need not be present in every plausible normative order.

One way around this problem is to recast deontic logic as the logic of propositions of morality. Von Wright experimented with using propositions about norms as the basis of deontic logic.¹⁹ Whilst it might not be possible to talk of the truth or falsity of a norm, it is certainly possible to talk of the truth or falsity of a proposition about a norm. So, the proposition 'drivers are under an obligation not to park on double yellow-lines' cannot stand alongside the proposition 'drivers are not under an obligation not to park on double yellow lines'.²⁰ Unless these statements describe the products of different normative systems, they are set in contradiction: it cannot both be the case that there exists and that there does not exist such an obligation. In this limited sense, then, the principle of non-contradiction does apply to both ethics and to law. But although the principle of non-contradiction applies to assertions about the existence of norms, this does not show that the principle applies to norms themselves. It could still be the case that 'drivers are under an obligation not to park on double yellow-lines' and also that 'drivers are under an obligation to park on double yellow-lines'.²¹ Here, the two obligations conflict, rather than two statements about a single obligation. If deontic logic is confined to propositions about norms rather than applying to norms themselves, it is hard to see how it could help clarify ethical reasoning, beyond the assistance already provided by propositional logic.²²

Second, even if it is the case that the principle of non-contradiction necessarily applies in systems of ethics, it does not follow from this that it necessarily applies in systems of law. Von Wright has expressly excluded legal systems from its reach.²³ Though it may be desirable that rules within a legal order not contradict each other, this, according to von Wright, is not a logical truth about such orders. Legal systems are artificial normative structures, and, as such, are not constrained to comply with all the dictates of logic.

b) The Second Elaboration: that the Principle of Non-Contradiction Necessarily Forms Part of all Legal Orders

This second objection to the claim that all normative systems must contain the principle of non-contradiction shades into a response to the alternative reading of Kelsen's objection to contradiction. The alternative reading took Kelsen as claiming that there was something special about legal orders that entailed the principle of non-contradiction operated within them. It could be the case that even though the principle is not a necessary part of all normative orders, it is still a necessary part of all legal orders. Indeed, some closure rules do have an unusual place within the legal system. Raz has shown how the closure rule permitting all that is not forbidden by law is inherent in

¹⁹ See G. A. von Wright, *Norm and Action* (Routledge, 1963), p. viii; G. A. von Wright, *op. cit.* note 16 *supra*, at 32.

²⁰ This also holds for law: the propositions 'there is a rule obligating doing *x*' and 'there is not a rule obligating doing *x*' cannot both be true.

²¹ So, to transpose into the legal world again, 'there is a rule obligating doing *x*' and 'there is a rule obligating not doing *x*' could stand.

²² Coyle, *op. cit.* note 16 *supra*.

²³ G. A. von Wright, 'Deontic Logic', (1999) 12 *Ratio Juris* 26, 32–33.

all legal systems.²⁴ This is a maxim that flows from the practice of identifying legal rules from legal sources: the law-applying institution needs to identify a reason to act, but does not need to identify a reason not to act. Where there is no rule forbidding an action, the law-applying institution has no basis for punishing the action, and the action is permitted. Perhaps a similar argument could be made for the principle of non-contradiction, showing it to be rooted in the very practice of law? It seems unlikely: it is hard to imagine how the principle of non-contradiction could be deduced from the practice of legal reasoning. It is not a complete closure rule: though it tells us that contradiction is not permitted, it does not tell us which of the two contradictory rules should be preferred. As the answer to this question will depend on the particular system in which the inconsistency has arisen, there is no room for a general legal principle against contradiction. Furthermore, even if the maxim decreeing that all that is not forbidden is permitted is a *prima facie* principle of every legal system, it is certainly not a necessary rule of a legal system. It is possible, if difficult, to imagine a system functioning without such a rule.²⁵ Similarly, the principle of non-contradiction might not form part of the legal order, or, perhaps, some inconsistencies, in particular over the jurisdiction of constitutional institutions, might lie beyond the power of the courts to resolve.

c) The Third Elaboration: Inconsistent Rules Cannot Exist Because Judges are Compelled to Resolve Legal Disputes

The final interpretation of Kelsen's objection to contradiction between laws read him as claiming that such situations were impossible because judges are compelled to reach a decision in each case put before them. In essence, the law is what the judges say it is, and as the court must always reach decisions about disputes there is no room for contradictory rules. Setting aside the question of whether it is plausible to imagine Kelsen lapsing into this unsophisticated form of realism, and taking the objection on its own terms, a few arguments can be advanced against the realist position. These points will not show the objection fails: a convinced realist can always evade criticism at the cost of increasing artificiality. The best that can be done is to try to explain why the objection appears attractive, and illustrate some situations where the realist position is less persuasive. A spectrum of positions can be identified. At one extreme, there are those cases in which a superficial contradiction can be resolved through the application of normal principles of interpretation. A citizen faced with a superficial contradiction between an old statute forbidding an act and a new statute permitting it can apply ordinary principles of statutory interpretation and resolve the conflict. In slightly more difficult cases the dispute may reach the court, but this may not show that there was a contradiction within the law: perhaps the dispute is tricky, but a 'right answer' can be found. These situations shade into cases where the contradiction cannot be resolved through the application of principles of interpretation and hierarchy, but the court is competent to resolve the conflict by choosing to prioritise one rule over another. It would be rare for a court to acknowledge that it was exercising its law-making, rather than interpreting, function in these circumstances.²⁶ The important difference between

²⁴ J. Raz, 'Legal Reasons, Sources and Gaps', in J. Raz, *The Authority of Law* (Oxford University Press, 1979), esp. pp. 75–77.

²⁵ Perhaps the system could grant a law-making discretion to the judge to decide whether any new action was forbidden or permitted.

²⁶ J. Finnis, 'The Fairy Tale's Moral' (1999) 115 *Law Quarterly Review* 170. But see where a court identifies its own earlier contradictory decisions, and claims the right to choose between them: note 29 *infra*.

these cases and those discussed earlier is that when the courts act creatively the citizen cannot know how the dispute will be resolved in advance of the decision: for the citizen, but not for the court, there is an irresolvable conflict. Lastly, there are those cases in which the court is not competent to resolve the inconsistency. This may be because only a higher court is able to resolve the conflict or, more dramatically, because the conflict centres on the relative authority of the court and another body. The example of parliamentary privilege, discussed later in this article, is a case where the dispute could be resolved by Parliament, but neither the Commons nor the courts are free to determine the question.²⁷ In more extreme cases some inconsistencies may not be resolvable by any institution within the constitution.²⁸

The realist objection to the possibility of inconsistency is attractive because it captures the frequent possibility of resolving such situations through interpretation and application of the hierarchy of rules. Most legal questions have determinate legal answers. However, the realist position has a number of uncomfortable consequences. First, the realist struggles to distinguish situations where there is a pre-existing legal answer to an apparent contradiction, and those where there is not. Sometimes apparent contradictions do not need the creative intervention of the courts in order to be resolved. Here, the law is not what the courts say it is, but rather may be recognised by citizens, sometimes with the help of lawyers, confident in the knowledge that the courts would reach the identical conclusion. Second, the realist objection cannot explain those, rare, situations where the court admits that its earlier decisions were contradictory, or where it declares itself incompetent to resolve the inconsistency. Even assuming that the law is what the courts declare it to be, if they confess that before their decision the rules were set in contradiction, it seems odd to be forced to claim that they were mistaken about the relationship of the rules.²⁹ The objection becomes even stronger if the court then declines to resolve the conflict, and sends it for consideration by another body.³⁰ Third, and perhaps most strongly, the realist position prevents us from discussing situations where the conflict involves the competency of the court. Here, even if the court purports to resolve the contradiction it may be relying on the very power that lies in dispute. As Oliver has noted, it is a common but regrettable error for constitutional lawyers to assume all hypothetical questions of law are already governed by a rule.³¹ It would be ironic if our realist, with her emphasis on the political position of the judge, was unable to discuss these interesting jurisdictional struggles.³² It will be these conflicts that form the principal focus of the following section.

C *The Truth in Kelsen's Claim that Legal Rules Cannot be Inconsistent*

The meaning of contradiction in the context of legal rules is far from straightforward. Contradiction is a quality of a pair of propositions: its most obvious application is to

²⁷ Note that where the court is able, in its law-making capacity, to choose between contradictory rules, the citizen is placed in the same position as the Commons and courts in the privilege example. A resolution is possible, but the law is contradictory pending the creative intervention of another body.

²⁸ See discussion of Rhodesia and EU below.

²⁹ The Court of Appeal reserves the right to choose between its own conflicting earlier decisions: *Young v Bristol Aeroplane Co.* [1944] KB 718, 726; R. Cross and J. Harris, *Precedent in English Law* (4th edn, Oxford University Press, 1991), pp. 144–145.

³⁰ Fuller, *op. cit.* note 13 *supra*, at 112.

³¹ Oliver, *op. cit.* note 12 *supra*, at 313.

³² H. L. A. Hart, *The Concept of Law* (2nd edn, Oxford University Press, 1994), p. 153.

statements of fact. When two factual propositions are in contradiction one of them must be false: they could not both be correct in any possible world. A person who believed two contradictory factual statements ought to work towards abandoning her belief in one of them.³³ The phenomenon of contradiction is therefore closely tied to the principle of non-contradiction: the presence of contradiction implies a flaw in our reasoning process, or our understanding of the world. Those who believe that legal rules can contradict consequently face a further challenge to those discussed in the previous section. If the principle of non-contradiction does not apply within legal orders, in what sense is it meaningful to talk of legal rules being set in contradiction? A challenger might claim that the advocate of contradiction within legal orders is hoisted by her own pétard: that ‘contradictions’ between legal rules can exist, persist, and need not be evidence of a mistake of reasoning, shows that these are not really ‘contradictions’ at all. This section of the article will attempt to mollify this challenger. Though ‘contradiction’ does not carry the same implications in law as it does when found in statements of fact, it is still meaningful to talk of contradictory legal rules.

Those who accept the possibility of contradictory moral or legal imperatives face the challenge of explaining what contradiction means in this context.³⁴ If the concept of contradiction is detached from its meaning in logic, what does it mean to say that two norms are contradictory? Williams tackled this problem by shifting normative statements into their descriptive equivalents, which might be termed compliance statements.³⁵ So, the normative statement ‘Albert must not kill Alberta’ is transposed to ‘Albert did not kill Alberta’, which is contrary to the rule ‘Albert must kill Alberta’ transposed to ‘Albert did kill Alberta.’ This device allows us to talk of contradictory rules without assuming these logical concepts can be directly applied to normative statements. The transposition also makes clear that the contradiction between rules lies not in their inherent truth or falsity, but in their subjects’ inability to fully comply with the rules: a claim that both had been fully complied with would necessarily be untrue. Three problems arise from Williams’ shift.

First, whilst the compliance statements may be logically contradictory, it should be emphasised that the norms themselves are not set in this logical relationship. This takes us back to our earlier discussion of deontic logic, and its slippage from the logic of ethics into the logic of ethical propositions. Williams has circumnavigated the question of the possibility of contradictory norms rather than answered the problem.³⁶ However, this article will assume that the connection between the contradictory rules and their compliance statements is sufficient to allow us to talk of contradiction in the context of norms without having to accept the consequences for this relationship that would flow from their existence in propositional logic.

Second, and leading on from this, the relationship between the inconsistent rules and their respective inconsistent compliance statements need not be identical. Logicians distinguish between propositions that are contradictory and those that are contrary. Two

³³ Though as Raz notes, we should not sacrifice truth for consistency: a partially true set of inconsistent propositions is preferable to a consistent set of false propositions. J. Raz, ‘The Relevance of Coherence’, in J. Raz, *Ethics in the Public Domain* (rev. edn, Oxford University Press, 1995), p. 285.

³⁴ A problem noted by Foot, *op. cit.* note 17 *supra*, p. 391.

³⁵ B. Williams, ‘Consistency and Realism’, in B. Williams, *Problems of the Self*, (Cambridge University Press: 1973). Utilised in Hart: H. L. A. Hart, ‘Kelsen’s Doctrine of the Unity of Law’ in H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983), pp. 324–327.

³⁶ As he recognises: Williams, *op. cit.* note 35 *supra*, pp. 193–195.

propositions are contradictory when if one is true the other must be false. So, the proposition 'all lawyers are saints' contradicts the proposition 'this lawyer is not a saint'. Two propositions are contraries where it cannot be the case that both are true, but it could yet be the case that both are false. So, the proposition 'all lawyers are saints' is contrary to the proposition that 'no lawyers are saints' as it could yet be the case that 'some lawyers are saints'. In the example given earlier the inconsistent rules appeared to be contraries. Though 'Albert *must* kill Alberta' appears to run against the obligation 'Albert *must not* kill Alberta', it could yet be the case that 'Albert *has a permission* to kill Alberta'. In contrast, the compliance statements are contradictories. It is either the case that 'Albert *did* kill Alberta', or it is the case that 'Albert *did not* kill Alberta'. If one of these statements is true the other must be false. So, contrary rules do not generate contrary compliance statements. This might cause doubt as to whether it is useful to talk of contrary and contradictory rules: perhaps in the normative sphere all that can be shown is that joint compliance is impossible, the nuances of the difference between the two forms of inconsistency do not hold. Indeed, neither Hart nor Kelsen chose to make this distinction, preferring just to talk of conflict or solely of contradiction.³⁷ However, the relationships between normative propositions appear to parallel the relationships found between descriptive propositions.³⁸

Third, and perhaps as a consequence of the second difficulty, permissions cause particular problems for Williams' move: though it is easy to transpose mandatory rules into their respective compliance statements, permissions are more complicated. This may explain why it has sometimes been claimed, mistakenly, that two permissions can not be inconsistent.³⁹ Hart accepted that a mandatory rule and a permissive rule could be inconsistent. So, 'Derek *must not* eat the sweet' and 'Derek *has permission* to eat the sweet' are contraries. Transposed into their relative compliance statements, we find: 'Derek *did not* eat the sweet' set against 'Derek *either did or did not* eat the sweet', which are in contradiction.⁴⁰ Though the mandatory rule and the permissive rule could be complied with in a compatible fashion, full compliance with each is impossible. If this is accepted, then two permissive rules may be inconsistent in a similar sense. So, 'Derek *has permission* to eat the sweet' and 'George *has permission* to eat the sweet' are contraries. Transformed into compliance statements, we find: 'Derek *either did or did not* eat the sweet' and 'George *either did or did not* eat the sweet'. Again, whilst there are ways in which, if divided, these statements are compatible, if they are taken in their entirety they are set in contradiction.

Following Williams, then, when I assert that two rules are inconsistent, I mean that complete joint compliance with each rule is logically impossible. This can be tested by transposing the rule into its equivalent compliance statement. Whilst it is appropriate to judge assertions of the possibility of joint compliance as being true or false, I do not assume that the norms themselves that generate these compliance statements are susceptible to attributions of truth-value. Consequently, I will describe the relationship

³⁷ Though Foot assumes that there is room for the two sorts of conflict between normative statements: Foot, *op. cit.* note 17 *supra*, p. 390.

³⁸ G. H. Von Wright, 'Deontic Logic: A Personal View', (1999) *Ratio Juris* 26, at 28. Von Wright notes that 'possible', 'impossible', and 'necessary', seem to parallel 'some', 'no', and 'all'—as do, for our purposes, 'permission', 'must' and 'must not'.

³⁹ Hart makes this claim: *op. cit.* note 35 *supra*, p. 327. Munzer, *op. cit.* note 10 *supra*, p. 1146.

⁴⁰ Assuming, of course, that the second compliance statement is indivisible.

between pairs of contrary or contradictory rules as one of inconsistency, which is not intended to imply that one of the imperatives must be invalid or untrue.

D A Note on Fuller's Doubts About the Desirability of Inconsistent Rules

Though these points tackle the particular arguments advanced by Kelsen, they may still leave advocates of the principle of non-contradiction unsatisfied. They may feel that though it is possible for inconsistent rules to arise, their presence is a standing criticism of the system that contains them, a blow against the rule of law.⁴¹ Any pairing of rules that puts the citizen in a position where she cannot help but fall foul of one of their demands seems problematic; running against law's aspiration to guide conduct. Even if the principle of non-contradiction is not a necessary feature of a legal order, the advocate might retaliate, it is such an attractive principle that just about every sane legal system should embrace it. In the remainder of the article two responses will be made to this charge: first, that sometimes it is possible to have inconsistent legal rules without forcing people or institutions to act unlawfully or, necessarily, compelling them to choose between the rules; and second, that there are sometimes political reasons for embracing inconsistent rules. Inconsistent rules may reflect a compromise at the political level, and the institutions of the constitution ought to preserve this ambiguity, and the underlying compromise, rather than attempting to resolve it.

III Multiple Rules of Recognition

Hart's account of legal systems turned, in part, on the existence and operation of a single rule: the rule of recognition.⁴² One of the many tasks of the rule of recognition was to provide an answer to the tricky question of identity: the manner in which the boundaries of legal systems are drawn.⁴³ The identity question can be split into two parts.⁴⁴ First, the drawing of the boundaries of a legal system at a given point in time: how are we to distinguish between the laws of different legal systems? This question asks about the criteria for membership of what has been termed a 'momentary' legal system, criteria that will isolate the rules of the system at a point in time. The second part of the question addresses the continuity of legal systems: how do we know that two momentary legal orders form part of one continuing legal order? The rules of the English legal system in 1960 and in 2000 are profoundly different, and yet both momentary systems are part of the same, continuing, entity. Hart's answer to both of these questions came in the form of the rule of recognition.⁴⁵

The rule of recognition served to unite the rules of a legal system, providing a test by which the other rules could be shown to form part of the legal order.⁴⁶ Each legal

⁴¹ Fuller, *op. cit.* note 13 *supra*, pp. 65–70.

⁴² Austin also provided a much less persuasive non-pluralist account of legal orders. See N. W. Barber, 'Sovereignty Re-Examined: The Courts, Parliament and Statutes', (2000) 20 *Oxford Journal of Legal Studies* 131, 132–133; J. Austin, *The Province of Jurisprudence Determined* (University of London Press, 1954), Lecture vi.

⁴³ J. Raz, *The Concept of a Legal System* (2nd edn, Oxford University Press, 1980), 2–4.

⁴⁴ J. Raz, 'The Identity of Legal Systems', in J. Raz, *The Authority of Law* (Oxford University Press, 1979), Raz, *op. cit.* note 43 *supra*, Chapter 8; J. Finnis, 'Revolutions and Continuity of Law', in A. Simpson (ed.), *Oxford Essays in Jurisprudence (Second Series)* (Oxford University Press, 1973).

⁴⁵ The distinction between these two questions is alluded to by Hart, *op. cit.* note 32 *supra*, p. 116.

⁴⁶ Hart, *op. cit.* note 32 *supra*, pp. 113–115.

system therefore possessed its own unique rule of recognition.⁴⁷ The rule of recognition answered the question of which rules belonged to a given momentary legal system.⁴⁸ All the rules that could be identified through the application of the rule of recognition constituted a single legal system. The rule of recognition also provided an answer to the question raised by the continuity of legal systems.⁴⁹ Two momentary legal systems formed aspects of one continuing legal system when the changes that had occurred between the two sets of rules occurred in conformity to the rules of change identified by the rule of recognition. Obviously, each rule of recognition would, ordinarily, be enormously complicated, with a large number of different criteria identifying the rules of the system.⁵⁰ Supporters of Hart could either present the rule of recognition as a single rule with lots of sub-elements, or as a collection of rules that are set in a relationship with each other.⁵¹ It is possible that some of these sub-rules might be inconsistent, in the sense used in this article, but it is essential for the success of Hart's project that the inconsistency is resolvable within the legal system. So, there might be two courts within a system, both of which claimed supremacy over a particular topic. These claims would be inconsistent, but if both courts recognised Parliament as a higher source of law this agreement would be sufficient to allow the inconsistency to be contained within a single rule, or set of rules.⁵² Whilst these rules are inconsistent, they are set in a relationship: mutual recognition of the legal superiority of statute. However, if the two rules are not set in a hierarchical relationship, if those advancing the rules do not both acknowledge a higher source of law, it is far harder to see how they can be considered parts of a single rule, or part of a distinct group of rules. Here, the rule of recognition would no longer play its part as the unique identifier of legal systems. In such a situation how could we distinguish between two separate legal systems and one legal system with two inconsistent rules of recognition at its core? If it is possible to conceive of inconsistency operating at this level of the legal order, the rule of recognition will not be able to identify and unite the disparate rules of the system by itself.⁵³

Hart was not unaware of the problems that disputes over the rule of recognition caused his theory. In the context of revolutions and invasion he acknowledged the possibility of such a state of affairs: it was conceivable that two rival rules of recognition might operate within a territory, and yet only one legal system was in operation. This was, though, a 'substandard, abnormal case containing within it the threat that the legal system will dissolve'.⁵⁴ Such cases needed to be marginalised because if they were a

⁴⁷ H. L. A. Hart, 'Legal Duty and Obligation', in H. L. A. Hart, *Essays on Bentham* (Oxford University Press, 1982), 155, fn. 77. See also: N. MacCormick, 'The Concept of Law and "The Concept of Law"', (1994) 14 *Oxford Journal of Legal Studies* 1, 13–15; N. MacCormick, 'A Very British Revolution', in N. MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999).

⁴⁸ Raz, *op. cit.* note 43 *supra*, pp. 198–199.

⁴⁹ Though Hart does not make this point explicitly: Finnis, *op. cit.* note 44 *supra*, 54–57.

⁵⁰ On the troublesome task of pinning down the content of the rule of recognition, see: M. Bayles, *Hart's Legal Philosophy* (Kluwer, 1992), 79–81; K. Greenwalt, 'Hart's Rule of Recognition and the United States', (1988) 1 *Ratio Juris* 40; R. Sartorius, 'Hart's Concept of Law', in R. Summers (ed.), *More Essays in Legal Philosophy* (Blackwells, 1971).

⁵¹ T. Honoré, 'How is Law Possible?', in T. Honoré, *Making Law Bind* (Oxford University Press, 1987), 23.

⁵² See the discussion of parliamentary privilege later in this article.

⁵³ See also the discussion of this issue in MacCormick, *op. cit.* note 47 *supra*, esp. pp. 81–86.

⁵⁴ Hart, *op. cit.* note 32 *supra*, p. 123.

common occurrence they would throw doubt on the success of the rule of recognition as the answer to the identity questions posed earlier.

Hart's account of a legal system was non-pluralist. The central case of a legal system contained a single rule of recognition, directing the law-applying institutions to the sources of law. Whilst Hart envisaged the possibility of pluralist systems, where there were inconsistent rules of recognition, he understood these as deviant cases. They constituted legal systems because of their similarity to the central case he presented, and were inherently unstable. If pluralist systems are more common, or more lasting, than Hart believed, the centrality of his non-pluralist account would have to be reconsidered. Reflection on these, and other, problems with the rule of recognition led Hart's students away from the rule of recognition as the answer to the questions of the identity of legal systems. Both Raz and Finnis have advanced more flexible understandings of legal systems, which moved away from Hart's rule-focused account and have made room for the possibility of pluralist legal orders.⁵⁵

IV The Rhodesian Crisis as a Test Case for Legal Pluralism

The task of the first half of the article was to explain what was entailed by inconsistent rules of recognition, and to explain why they were controversial and interesting. It is now time to see whether these abstractions can help us understand the functioning of real legal orders. Is it conceivable that a legal system could exist with a pair of inconsistent rules of recognition at its core? The first test-case for legal pluralism examines the constitutional crisis surrounding the Unilateral Declaration of Independence (UDI) by the government of Rhodesia in 1965.⁵⁶ This will provide a relatively clear example of inconsistent rules of recognition operating within a legal system—though only for a brief period of time. Following this discussion, the article will turn to the more difficult problems presented by the relationships between the legal orders of the European Union. It will be argued that there are important points of similarity between the European and Rhodesian cases.⁵⁷

A The Implications of UDI for the Rhodesian Legal Order

Prior to 1965 the Rhodesian Constitution took the form of an Order in Council,⁵⁸ made under a power conferred by a British statute.⁵⁹ The Rhodesian Parliament was given considerable independence, but was not given the power to alter entrenched provisions of the Constitution.⁶⁰ On 11 November 1965 the Rhodesian Prime Minister announced the independence of Rhodesia, and the introduction of a new constitution, the 'Constitution of Rhodesia, 1965'.⁶¹ This document purported to replace the previous

⁵⁵ Finnis, *op. cit.* note 44 *supra*; Raz *op. cit.* note 44 *supra*.

⁵⁶ T. Mahmud, 'Jurisprudence of Successful Treason', (1994) 27 *Cornell International Law Journal*, 49, 60–65.

⁵⁷ See Oliver, *op. cit.* note 12 *supra*, especially chapters 11 and 12, for a wider discussion of the constitutional foundations of former territories of the British Empire. A number of these might fit our model of a pluralist legal order—at least for a period of their existence.

⁵⁸ Southern Rhodesia (Constitution) Order in Council 1961, S.I. 1961, No. 2314.

⁵⁹ Southern Rhodesia (Constitution) Act 1961.

⁶⁰ G. Marshall, *Constitutional Theory* (Oxford University Press, 1971), pp. 64–72; J. Eekelaar, 'Splitting the Grundnorm', (1967) 30 *Modern Law Review* 156.

⁶¹ Rhodesian Proclamation 53, 1965: R.G. Notice 737N, 1965.

Constitution, and provided that no Act of the United Kingdom Parliament would apply to Rhodesia unless extended to Rhodesia by the Rhodesian Parliament.⁶² It also removed the right of appeal to the Privy Council on matters arising out of the Declaration of Rights. The United Kingdom Parliament responded with the Southern Rhodesian Act 1965, which reasserted Westminster's control over Rhodesia, and, in an Order in Council made under the Act, emphasised that constitutional change could only occur through an Act of the Westminster Parliament.⁶³ In *Madzimbamuto v Lardner-Burke*⁶⁴ the legality of the 1965 Constitution was considered by the Privy Council. The Privy Council held that the usurpation was unlawful and that the purported 1965 Constitution was of no legal effect. In contrast, the Rhodesian courts, after some vacillation,⁶⁵ endorsed the 1965 Constitution⁶⁶ and declined to accept the Privy Council's continued position as final court of appeal for Rhodesia.⁶⁷

Here, there were two separate pairs of inconsistent rules, both of which turned on the inclusion of institutions within the system.⁶⁸

a) *The First Pair: Inconsistent Rules Relating to the Status of Westminster Statutes*

There was a dispute about the role of the Westminster Parliament as a future source of Rhodesian law. According to the Westminster Parliament, and the Privy Council, statutes from Westminster continued to have effect in Rhodesia after UDI, and were the highest source for Rhodesian law. According to the Rhodesian Constitution 1965, and, subsequently, the Rhodesian High Court, Westminster statutes passed after 1965 did not have effect in Rhodesia. There are several dimensions to this inconsistency. First, there was a dispute as to whether the Westminster Parliament had a power to alter the law applying in Rhodesia. One rule stated that the Westminster Parliament may make any changes it wished to Rhodesian law. This rule was presented as a rule of common law, an aspect of sovereignty, and is reflected in the pronouncements of the Westminster Parliament. Set against this was a rule stating that the Westminster Parliament was disabled from making changes to the Rhodesian law. Such a disability is quite unusual: it is rare to see a rule asserting that something *is not* a source of law. This disability is found in the 1965 Constitution. Second, the power entailed a duty. One rule stated that people generally, and the courts in particular, were under a legal obligation to comply with statutes of the Westminster Parliament. Again, this duty constitutes an aspect of sovereignty, and is found in the common law. This rule is countered by that contained in the 1965 Constitution, which stated that individuals and courts were not under a legal duty to comply with statutes of the Westminster Parliament and, indeed, were under a duty not to comply with such statutes where they were inconsistent with Rhodesian law. Both of these pairs of inconsistent rules were found

⁶² Ss. 3–5.

⁶³ S.I. 1965, No.1952.

⁶⁴ [1969] 1 AC 645.

⁶⁵ Eekelaar, *op. cit.* note 60 *supra*; J. Eekelaar, 'Rhodesia: Abdication of Constitutionalism', (1969) 32 *Modern Law Review* 19; Mahmud, *op. cit.* note 56 *supra*, pp. 60–65.

⁶⁶ *R v Ndhlovu* 1968 (4) SA 515. See C. Munro, *Studies in Constitutional Law* (2nd edn, Butterworths, 1999), p. 152.

⁶⁷ *Dhlamini v Carter* (1968) (2) SA 464.

⁶⁸ See more generally, K. Wheare, *The Constitutional Structure of the Commonwealth* (Oxford University Press, 1960), Chapter 4.

dational: neither was created by virtue of a power conferred by some higher rule of law, though both depend for their legal status on their inclusion within a purported source of law. Each sought to define part of the boundaries of Rhodesia's legal system.

b) Second Pair: Inconsistency Relating to the Position of the Privy Council

Second, there was a dispute about the Privy Council's position as the final arbiter of the content of Rhodesian law. One rule, contained in the old Constitution, appointed the Privy Council the final court of appeal. The other rule, contained in the 1965 Constitution, dramatically limited the Privy Council's role in the Rhodesian system. As with the other pair of inconsistent rules, the inconsistency had two aspects. First, there was an inconsistent pair of duties: in some areas both the Privy Council and the Rhodesian High Court were presented as under a duty to make final determinations of the content of Rhodesian law. Second, there were corresponding duties directed to the subjects of the law and the lower courts, directing them to apply the determinations of these bodies.

B Two Interpretations of the Conundrums of the Rhodesian Crisis

There are many different ways in which the legal dilemmas caused by the Rhodesian crisis might be presented. Two accounts at two different points in time will be suggested below: first, the period after the Rhodesian courts accepted the legal validity of the 1965 Constitution; second, the period immediately prior to this when it was unclear whether the Rhodesian courts would follow the 1965 Constitution or the pronouncements of the Privy Council.

a) The Period Following the Acceptance of the 1965 Constitution

After it had become clear that local Rhodesian courts no longer accepted the authority of the Privy Council, a split existed between the local Rhodesian legal system and the Privy Council's version of the Rhodesian legal system. These two accounts differed in some key respects. On the Privy Council's account, it, the Privy Council, was the highest court of appeal in Rhodesia, and competent to produce definitive ruling on the inclusion of rules within the system. In contrast, the Rhodesian High Court asserted that it was the highest court in the system, with the Privy Council treated only as a persuasive source, and that it was competent to produce definitive rulings on the inclusion of rules within the system. On the Privy Council's account of the Rhodesian legal system, the 1965 Emergency Powers Regulation was not legally valid. In contrast, the Rhodesian High Court found that the Emergency Powers Regulation was valid. According to the Privy Council, Madizambuto's detention, based on the ineffective Regulation, was unlawful, and officials were under a legal duty to release him. According to the Rhodesian High Court, Madizambuto's detention was lawful, and the officials were under no duty to release him.

From the perspective of the Privy Council there was only one legal system operating in Rhodesia; a legal system with the Privy Council as final adjudicator, and with Madizambuto entitled to freedom. Similarly, from the perspective of the Rhodesian High Court there was only one legal system operating in Rhodesia, but with it as the final court and with Madizambuto validly detained. The High Court of Rhodesia, in contrast to the Privy Council, recognised that a second, separate, legal system exists: some of the pronouncements of the Privy Council may be incorporated into the Rhodesian system, but only because of an incorporating rule of the local Rhodesian system.

This stage of the Rhodesian crisis is compatible with Hart's account of the rule of recognition. Though there are inconsistent rules of recognition, they lie within different legal systems. The position is identical to the conflict of laws example discussed earlier, in which a dominant legal system recognises the rules of a subservient legal system to a limited extent.

A problem with this interpretation is that, aside from the rule empowering the Privy Council, the Privy Council and the Rhodesian courts might agree on just about every other law within the Rhodesian system. This might appear to make the dual system characterisation of the position artificial: after all, the two purportedly different systems are virtually identical. The attraction of the dual system interpretation in the Rhodesian case is especially strong because of the Rhodesian courts' outright rejection of the Privy Council as a future legal source for Rhodesian law. After the crisis it was irrelevant how close the Privy Council's view of the content of the Rhodesian system was to that of the Rhodesian courts: future pronouncements of the Privy Council were no more part of the law of Rhodesia than, say, pronouncements of the Australian High Court. It would therefore be odd to continue to assert that within the Rhodesian system inconsistent rules of recognition operated after the crisis simply because the Privy Council did not acknowledge the shift in power. Perhaps we should distinguish between the Rhodesian legal system proper, with the Appellate Division of the Rhodesian High Court as the supreme court of the system, and the Privy Council's (ineffective) version of the Rhodesian legal system. Both of these purported legal orders claimed to operate over the same territory.

b) The Period Prior to the Acceptance of the 1965 Constitution by the Rhodesian Courts

In this period prior to the acceptance of the 1965 Constitution, when it was unclear which body was the supreme legislator for Rhodesia, there were inconsistent rules of recognition operating within the system; the split outlined in the previous section had yet to occur. One rule of recognition identified the Westminster Parliament as the highest source of law in the system, and the Privy Council as the highest adjudicative body. The second identified the Rhodesian Parliament as the highest source of law, and the Rhodesian High Court as the supreme adjudicative body. This period of the Rhodesian crisis poses problems for Hart's understanding of the rule of recognition, and may give us a glimpse of what a 'pluralist' model of a legal system might look like. Supporters of Hart's account of the rule of recognition might make one of two replies.

First, though Hart insisted that there was a single rule of recognition in each system, it is quite possible that within the rule there are areas of ambiguity or conflict. A brief reflection on parliamentary privilege provides an example of a conflict within a rule of recognition that does not challenge Hart's account.

Both the House of Commons and the courts assert that they are under a duty to determine whether a matter falls within the scope of parliamentary privilege. The judges have consistently asserted that it is only once they have concluded that a matter is subject to privilege that the issue falls within the exclusive jurisdiction of the Commons.⁶⁹ In contrast, the Commons asserts that the breadth of privilege is a matter

⁶⁹ *Stockdale v Hansard* (1839) 9 Ad. And E. 1, esp. 165; *Bradlaugh v Gosset* (1884) 12 QBD 271, esp. 278–280; S. A. de Smith, 'Parliamentary Privilege and the Bill of Rights', (1958) 21 *Modern Law Review* 465; A. Denning, 'Memorandum on The Strauss Case', (1985) *Public Law* 80.

for it to determine.⁷⁰ These two rules are duty-imposing: neither institution regards itself as having a choice about the resolution of the jurisdictional question. They are compelled to reach a decision on the issue, even if that decision amounts to an endorsement of the other body's interpretations. These jurisdictional rules also embody a power: once the institution has reached a decision, officials within the system are obliged to accept and act upon that judgment. The two rules have different sources.⁷¹ The source of the Commons' jurisdictional rule lies in the law of the Commons: both Houses of Parliament are bodies of inherent jurisdiction, and their customary practices, as expressed principally in the rulings of Speakers and resolutions, have the status of law.⁷² The source of the courts' jurisdictional rule, in contrast, is the common law. The Commons and the courts agree that Parliament is entitled to resolve disputes about the scope of privilege. So, when these inconsistent jurisdictional rules generated an actual dispute in *Stockdale v Hansard* the Parliamentary Papers Act 1840 succeeded in ending the conflict.⁷³

The mutual acceptance of Parliament as a higher legal source allows this conflict to be contained within a single rule of recognition: it is one rule, or one set of rules, with conflicting elements. In contrast, in the Rhodesian example there was no agreed higher source; the question of competence turned on the issue of supremacy. It was unclear whether the 1965 Constitution was the highest legal instrument, or whether statutes of the Westminster Parliament took precedence. It was unclear whether the Rhodesian High Court or the Privy Council had legal authority to resolve the dispute.

Second, supporters of Hart could argue that though there appeared to be two inconsistent rules of recognition operating in this period, in fact only one was the 'true' rule of recognition; the other was an impostor, a legal mistake. The conduct of the Rhodesian courts following *Madizambuto* revealed a split that already existed. The difficulty with adopting this argument is that the rule of recognition is deduced from the conduct and understanding of officials—in particular, from that of the judges.⁷⁴ If the conduct of the judges, as shown in their decisions and reasoning, at a given point in time is divided between inconsistent rules of recognition, then there is no single 'true' rule of recognition to be found.⁷⁵ The judges agree that there is a single legal system, but disagree about the content of the rule of recognition.⁷⁶ As the Rhodesian example shows, the inconsistency may be resolved, but this does not mean that the inconsistency was not present in the system for a period of time.

⁷⁰ E. May, *Parliamentary Practice* (22nd edn, Sweet & Maxwell, 1997), Chapter 10; CJ (1702–04) 308; CJ (1837) 418–420; M. L. Gwyer, *Anson's Law and Custom of the Constitution* (5th edn, Oxford University Press, 1922), at 192–193; C. R. Munro, *Studies in Constitutional Law* (Butterworths, 1987), pp. 148–150.

⁷¹ This distinction has traditionally been presented as a contrast between *lex parliamenti* and *lex terrae*. See C. Wittke, *The History of English Parliamentary Privilege* (Ohio University Press, 1921) and J. Chafetz, *Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions*, 2004, D.Phil submitted to Oxford University, chapter 1.

⁷² Munro, *op. cit.* note 66 *supra*, pp. 216–218.

⁷³ On which, see Wittke, *op. cit.* note 71 *supra*, and Chafetz, *op. cit.* note 71 *supra*, chapter 3. A more colourful description of the crisis can be found in J. Dean, *Hatred, Ridicule or Contempt* (Constable, 1953), chapter 19.

⁷⁴ Hart, *op. cit.* note 32 *supra*, pp. 101–102.

⁷⁵ J. Raz, 'The Identity of Legal Systems', in J. Raz, *The Authority of Law* (Oxford University Press, 1979), pp. 95–96.

⁷⁶ As Coleman notes, the rule of recognition is defined not merely by the practice of officials, but also by their shared grasp of what the rule entails: J. Coleman, *The Practice of Principle* (Oxford University Press, 2001), pp. 80–81.

The Rhodesian crisis is sufficient to show that a pluralist legal system could exist for a brief period of time. Hart could reply that this was just the sort of substandard abnormal case he had in mind when he spoke of unstable systems containing multiple rules of recognition. The inconsistency was swiftly resolved. However, the ambiguities raised by the legal systems of the European Union may provide a more durable collection of examples of pluralism. With the Rhodesian crisis as our model, it is time to approach Europe's troubled legal orders.

V Legal Pluralism and the European Union

The European Court of Justice makes three, interconnected, claims of supremacy:⁷⁷ that the Court of Justice is entitled to definitively answer all questions of European law;⁷⁸ that the Court of Justice is entitled to determine what constitutes an issue of European law;⁷⁹ and that European law has supremacy over all conflicting rules of national law.⁸⁰ These claims are distinct: making any one of the claims does not entail making the other two. National supreme courts have sometimes proved unwilling to accept these assertions. Most famously, the German courts have refused to cede their role as guardians of the German constitution.⁸¹ As the pronouncements of the German Constitutional Court provide the clearest, and most widely discussed, challenge to Europe's supremacy claims, it is the German example that will be used in what follows.

At various times the German courts have adopted a different view of the impact of European law to that articulated by the Court of Justice. In *Solange I*⁸² the German Constitutional Court rejected the supremacy of European law: rules of Community Law that conflicted with fundamental constitutional rights would not be applied in the German system. This was a challenge to the third of the three assertions of supremacy. More recently, in the *Maastricht*⁸³ decision, the German Constitutional Court rejected the Court of Justice's claim to have the final say as to the meaning and scope of European law. The German Constitutional Court stated that it would not accept surprising readings of the Treaty that had the effect of extending the Union's powers.⁸⁴ This challenges both the first and the third of the Court of Justice's supremacy claims. As with the Rhodesian example, two groups of inconsistent rules can be determined. These two groups, a rich mixture of duties and powers, together constitute a pair of inconsistent rules of recognition.

⁷⁷ K. Alter, *Establishing the Supremacy of European Law* (Oxford University Press, 2001), Chapter 1; J. Weiler, 'The Autonomy of the Community Legal Order', in J. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999).

⁷⁸ Art 234 (ex Art 177) EC.

⁷⁹ J. Weiler, 'The Transformation of Europe', in J. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999), p. 21. Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

⁸⁰ Case 6/64 *Costa v ENEL* [1964] ECR 585.

⁸¹ For discussion, see Alter, *op. cit.* note 77 *supra*, chapter 3. Other national courts have expressed similar doubts. France: *Nicolo* [1990] 1 CMLR 173; Italy: *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372; Denmark: *Carlsen v Prime Minister* [1999] 3 CMLR 854.

⁸² *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1974] CMLR 540.

⁸³ *Brunner v The European Treaty* [1994] CMLR 57. See M. Zuleeg, 'The European Constitution Under Constitutional Constraints: The German Scenario', (1997) 22 *European Law Review* 19, for energetic criticism of the decision, and M. Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?', (1999) 36 *Common Market Law Review* 351.

⁸⁴ *Brunner*, *op. cit.* note 83 *supra*, paras 33, 48–49.

a) *Inconsistent Rules Giving Supremacy to Different Sets of Legal Rules*

According to the German Constitutional Court the German constitution is the highest source of law within Germany. European law takes effect through the German constitution, and, consequently, can be constrained by constitutional rules. This supremacy doctrine is presented as implicit within the framework of the German constitution. In contrast, the European Court of Justice regards European law as the highest source of law within the European Union, which, of course, encompasses Germany. This supremacy doctrine is presented as a consequence of the signing of the Treaties establishing the Union, and does not depend on the validation of the German constitution. Each supremacy claim contains an implicit negation of the other. In both cases these rules are presented as duties resting on the courts: each court claims that it is compelled to give precedence to the different sources of law.

b) *Inconsistent Rules Giving Adjudicative Supremacy to Different Courts*

The dispute over the priority of sets of rules is coupled with a dispute about the hierarchy of courts within Germany. Again, this inconsistency takes the form of a combination of duties and powers. In some situations both courts regard themselves as under a duty to make the final determination about the content of law in Germany. The rules are asymmetrical: whilst the German Constitutional Court regards itself as under a duty to have the final say about the content of all the laws operative in Germany, the Court of Justice only claims to be obliged to have the final say about those laws with a European element that are operative in Germany. As with the example drawn from parliamentary privilege, these duties could be acquitted by merely endorsing the decision of the other body—but the duties prohibit the acceptance of the other body's claim to authority. A simple pair of duties to express a view about the law within a territory would not be inconsistent. What makes these rival claims to adjudicative supremacy inconsistent is their assertion of finality: a duty to state authoritatively for those affected by the law what the law requires of them. Adjudicative supremacy is a duty coupled with a power to bind people, courts, and other institutions. It is these powers, inextricably mixed with the duties, which create the potential for inconsistency. This inconsistency need not be realised—perhaps the rival bodies will agree—but there is the unavoidable potential for actual inconsistency; that individuals will be placed in a position where they cannot fully comply with the directives produced by each court.

Two further aspects of European law combine to make these inconsistencies even more piquant.

First, and most obviously, people and institutions are sometimes under a duty to comply with European law even when its demands run contrary to the apparent requirements of national law. Such a duty is imposed on all parties, public and private, when rules of European law are directly effective, and, in addition, applies to public bodies when the conditions for vertical direct effect are satisfied. The supremacy of European law does not, therefore, entirely depend on the support of the national courts: in some situations people and institutions are required to set aside conflicting national law.

Second, in the recent case of *Köbler*⁸⁵ the Court of Justice extended *Francovich*⁸⁶ liability to decisions of national courts. An action in damages lies when a final court of

⁸⁵ C-224/01 *Köbler v Austria* [2003] ECR I-10239; H. Scott and N. W. Barber, 'State Liability Under *Francovich* for Decisions of National Courts', (2004) 120 *Law Quarterly Review* 403.

⁸⁶ Cases 6/90 & 9/90 *Francovich v Italy* [1991] ECR I-5357.

appeal makes a sufficiently serious error in its application of European law. *Francovich* required domestic courts to create a national remedy: the obligation to have such liability comes from Europe, but the right itself must be grounded in the law of each of the Member States. Consequently, after *Köbler*, national courts of first instance will occasionally be compelled to pass judgment on decisions of higher courts in their system.

If a national constitutional court were to reject a judgment of the Court of Justice a number of interesting legal problems within the domestic system would arise. First, there would be the position of people and institutions within the Member State. Should they follow the Court of Justice's assertion of their legal duties, or the demands of their national constitutional court? Second, compounding this, what of the lower courts in the national legal hierarchy? The Court of Justice does not regard lower courts' obligation to apply European law as mediated through the national legal system; lower courts should not follow incorrect decisions of higher courts.⁸⁷ Each judge of first instance must therefore decide whether to accept the supremacy claims of the Court of Justice, or the rival supremacy claims of her national court. Third, after *Köbler* the dissenting decision can be challenged immediately and directly. The first instance judge will be in a very difficult situation: what is to be done about the plaintiff's claim for damages, a claim certain to be supported by the Court of Justice if a reference is made? This scenario begins to look very like the Rhodesian case examined earlier; the devices used to protect the supremacy claims of the Court of Justice have the potential to fragment the national legal system in the event of a dispute, subverting existing judicial hierarchies.

There are lots of ways of interpreting the relationship of the German legal order and the European Union,⁸⁸ but only two will be considered here: a non-pluralist and a pluralist reading.

It is possible to hold rigidly to the view that there is one European legal system, which has a separate relationship with each legal order of each Member State. Each Member State has a legal device, contained within a constitution or statute, which allows national courts to recognise and apply rules of European law—even to the extent of setting aside some contrary rules of national law. This is very like the conflict of laws example considered right at the start of the article. The European legal order is the subservient legal order, dependant for its force on recognition by the national, dominant, legal orders. This interpretation fits with the account given in the *Maastricht* decision by the German Constitutional Court. On this reading, some of the European supremacy claims are ineffective: they are legally correct within the European legal system, but cannot be recognised and incorporated within national systems. Broadly, this is the 'pluralist' account advanced by MacCormick in his valuable book, *Questioning Sovereignty*.⁸⁹

MacCormick provides two versions of this interpretation: radical pluralism, and pluralism under international law. Both of these forms of pluralism begin by identifying a variety of distinct, but connected, legal systems within Europe. Radical pluralism

⁸⁷ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

⁸⁸ See C. Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law', (1997) 16 *Law and Philosophy* 377.

⁸⁹ See especially, 'Juridical Pluralism and the Risk of Constitutional Conflict', in N. MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999). See also the discussion in P. Oliver, 'Sovereignty in the Twenty-First Century', (2003) 14 *King's College Law Journal* 137, 157–178.

then asserts that this is the end of the matter: there are multiple systems, and the answer given to particular legal question will depend on which system the lawyer chooses to reason within.⁹⁰ Pluralism under international law, in contrast, claims that international law may provide rules which can help resolve conflicts between these different systems. This reduces the chances of a legally irresolvable conflict arising between the systems. MacCormick's interpretation is sophisticated, but it may not be sufficiently controversial to be described as 'pluralist'. Once again, Hart and Kelsen could, without too great a stretch, endorse either of these two interpretations. Radical pluralism posits a number of distinct legal systems, each with its own rule of recognition or *Grundnorm*. Pluralism under international law posits, effectively, a single legal system (international law) with domestic legal orders as subsets contained within it. These models bring to mind Kelsen's famous claim that international law and domestic law were parts of a single entity.⁹¹ As with MacCormick's 'pluralisms', Kelsen's unified model turned on the point of view adopted.⁹² From the view point of a national system, there was only one legal order, with elements of international law identified by rules of domestic law. From the view point of international law, there was only one legal order, with elements of domestic law identified by rules of international law.

The danger of sticking with these readings is that they may over-simplify the split between the German and European systems. They assume that the judges within Germany would unquestioningly follow the ruling of the Constitutional Court, regardless of their apparent European obligations. If the judiciary were divided, or undecided, it might be more accurate to say that both of these inconsistent rules of recognition exist in the German legal system at the present time. The situation might resemble the Rhodesian crisis in reverse. To begin with, there were two, clearly distinct, legal systems: the German and the European. Over time they have moved together, the boundaries of each becoming blurred. It would be a mistake to say that they have become, or will become, a single legal system. The German system differs from the European in a number of important respects, none of which are challenged by the inconsistency between the rules of recognition. An enormous number of rules are untouched by Europe, operating only within the German system. The institutions—courts and legislatures—in Germany are created by, and largely defined by, domestic rules. On the other hand, the Court of Justice claims a jurisdiction that reaches beyond Germany; it applies to the territories of other Member States, too. The Court of Justice has never claimed that national legal systems are mere subsets of the European. Rather than moving towards a single system, it might be better to say that the two systems overlapped, with the duties and loyalties of those within the German system becoming increasingly ambiguous.⁹³ It is likely that this ambiguity will increase if and when citizens and judges come to see the European Union as a permanent feature of their constitutional framework. Both the European and the German legal systems are, and will remain, distinct,

⁹⁰ Intriguingly, MacCormick talks of legal systems 'overlapping' in these pluralist models. (MacCormick, *op. cit.* note 89 *supra*, p. 119) It is unclear what he means by this. Mere recognition of the rules of one legal order by another is not an 'overlap'. In what follows below, I try to develop an account of overlapping legal orders that goes beyond mutual recognition.

⁹¹ Kelsen, *op. cit.* note 11 *supra*, at 328–344.

⁹² See further, Richmond *op. cit.* note 88 *supra*, who presents a collection of internally coherent models in Kelsenian terms, asserting that these provide a plurality of viewpoints from which to look on the European legal order.

⁹³ N. Walker, 'The Idea of Constitutional Pluralism', (2002) 65 *Modern Law Review* 317, 337–338.

and yet overlap in significant ways. This overlap means that both systems might be termed 'pluralist' in that the judges, officials, and citizens within them may be faced with inconsistent rules of recognition.⁹⁴

If it is accepted that there are inconsistent rules of recognition within the German system, the result may be a combination of elements from the examples set out earlier. Like Rhodesia, there are inconsistent rules of recognition operating within a given territory. Like Rhodesia, the inconsistency cannot be resolved by an appeal to a higher body, because the dispute turns on the question of supremacy. Like Rhodesia, the ultimate resolution of the debate would depend on the loyalty of officials—in particular, but not exclusively, the loyalty of the judges. Like the parliamentary privilege example, though, and unlike Rhodesia, this inconsistency is sustainable if each side shows institutional restraint. Though the German Constitution Court and the European Court of Justice make inconsistent claims these need not produce actual constitutional dilemmas. Much as the courts and Commons have accommodated each others' rival claim to precedence by carefully avoiding pushing the issue to a crisis such as that seen in *Stockdale*, the Court of Justice and German Constitutional Court could avoid a crisis by adopting compatible decisions about the impact of European law.

I have used the *Maastricht* decision to conjure an image of what a pluralist system might look like, but a pluralist model might also be applied to the legal systems of other Member States. In the United Kingdom, for example, the simple certainties of sovereignty appear increasingly implausible.⁹⁵ In *Factortame (No. 2)*⁹⁶ Lord Bridge claimed that after the European Communities Act 1972 the English courts would 'accord . . . supremacy to rules of Community law in areas to which they apply . . .'⁹⁷ Even this apparently wide acceptance of the claims to supremacy made by the Court of Justice is not without its ambiguities. First, it is not clear how the courts would respond to a ruling of the Court of Justice that was perceived as falling outside of the sphere of European law—would they give effect to such jurisdictional mistakes? Second, Lord Bridge may be wrong in asserting that supremacy will *always* be accorded to directly effective European law: if Parliament were to pass a statute purporting to withdraw from the European Union the courts would probably follow the statute, even though it would conflict with the United Kingdom's treaty obligations.⁹⁸ The English legal system may therefore also contain inconsistent rules of recognition.

VI Conclusion

The question remains: even if a pluralist model of a legal system is plausible, is it attractive? It may be that whilst a pluralist model provides a good basis for a description of the relationship between the European legal order and the national legal orders, this

⁹⁴ The European Union legal system includes the judges and courts of the national legal orders, as well as the judges of the Court of Justice and Court of First Instance. Whilst there is disagreement between the judges of the European Union legal system about the supremacy of EU law, the European legal order will be a pluralist legal order—though still distinct from the pluralist legal orders at the level of the Member States.

⁹⁵ N. W. Barber, 'Sovereignty Re-examined: The Courts, Parliament and Statutes', (2000) 21 *Oxford Journal of Legal Studies* 130; see Oliver, *op. cit.* note 89 *supra*.

⁹⁶ *R. v Secretary of State for Transport ex. p. Factortame Ltd. (No.2)* [1991] 1 AC 603.

⁹⁷ *Ibid.*, at 659.

⁹⁸ *Macarthy's Ltd. v Smith* [1979] 3 All ER 325, 329; *Thoburn v Sunderland District Council* [2003] QB 151, 184–185.

description is regrettable; the inconsistencies within the model are unattractive. Perhaps we should push towards a legal system in which these disputes are resolved, one in which the hierarchy of legal sources is more clearly defined. There are at least two reasons why we should welcome, rather than regret, inconsistency.

First, as Maduro has argued, the sort of inconsistency described here may amount to a political compromise; a tacit agreement to disagree.⁹⁹ It allows supporters of European Court of Justice supremacy and supporters of national supremacy to both claim victory; conversely, and perhaps even more importantly, it avoids either constituency having to admit defeat. As we have seen, inconsistent laws need not demand inconsistent action; the constitutional dilemma can remain unresolved, provided that each side exercises restraint. *Stockdale* and *Madizambuto* are examples of where these disagreements did generate constitutional crisis—but as the peaceful history of privilege since *Stockdale* shows, these crisis could have been avoided. The emergence of pluralist legal systems with the European Union may provide a desirable compromise between the old models of sovereignty and constitutional supremacy, and the new claims to supremacy made by Europe. Whilst these positions cannot reach a compromise through the adoption of an agreed middle course, the pluralist model provides a compromise framework within which these inconsistent claims can coexist. Provided that the practical conflict within this model remains potential, and actual disputes are avoided, this can provide a stable, even a long-lasting, form of settlement. The advantage of such a settlement is that it avoids unnecessary and potentially destructive conflict, and allows the protagonists to work together on beneficial projects where agreement exists.

Second, these competing supremacy claims could provide a form of what Young and I have elsewhere described as ‘constitutional self-defence’.¹⁰⁰ A rule of constitutional self-defence empowers an institution to protect itself against other constitutional bodies. For instance, legislatures are given judicial powers in the area of privilege to stop the encroachment of the courts, judges often run the administrative side of the court process. Sometimes these measures are more aggressive, giving one institution a weapon it can use against another: for instance, giving one legislature the power to strike down the acts of another legislative body. Competing claims to supremacy arm national and European courts with weapons that may help to ensure mutual respect and restraint. If the potential conflicts caused by inconsistent rules of recognition were realised, with inconsistent rules addressed to individuals, all sides in the dispute would pay a price. As Fuller commented, non-contradiction is one of the requirements of the rule of law: if the courts face the citizen with irreconcilably inconsistent rules they have failed to live up to its aspirations. Furthermore, in the event of actual conflict, one side will, probably, emerge from the crisis as a victor: whilst it is unclear who will win, each side has an interest in avoiding the contest. The risks of actual conflict provide incentives on each party to strive towards harmonious interpretation of the law. It encourages the Court of Justice to interpret European law in a manner that will be palatable

⁹⁹ Richmond, *op. cit.* note 88 *supra*. M. Maduro, ‘Europe and the Constitution: What If This Is As Good As It Gets?’, in J. Weiler and M. Wind (eds), *European Constitutionalism Beyond The State* (Cambridge University Press, 2003).

¹⁰⁰ N. W. Barber and A. L. Young, ‘Prospective Henry VIII Clauses and their Implications for Sovereignty’, (2003) *Public Law* 112. Similar points are discussed by Weiler and by Walker: see J. Weiler, ‘The Reformation of European Constitutionalism’, (1997) 35 *Journal of Common Market Studies* 97 and N. Walker, ‘Sovereignty and Differentiated Integration in the European Union’, (1998) 4 *European Law Journal* 355, 375–379.

to national courts,¹⁰¹ and, at the same time, discourages national courts from blindly insisting on the primacy of national rules. In short, the competing supremacy claims may serve to create an atmosphere of cooperation between the courts, where each side has an incentive to strive to respect the position and tradition of the other.

We have travelled such a long way from the origins of legal pluralism that some might argue the label should be abandoned: does an account of the relationship between the various legal systems of Europe really have anything in common with the work of the legal anthropologists of the 1970s and 1980s? There are two threads that bind these very different approaches together. First, there is an insistence on the multiplicity of different legal systems, coupled with a claim that these systems can interact in interesting and important ways. Second, to be interesting, this interaction must present the risk of contradiction: inconsistent rules of recognition are at the heart of the pluralist model.

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¹⁰¹ As evidence of this see, perhaps, J. Coppel and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', (1992) 12 *Legal Studies* 227, though their claims are challenged in J. Weiler and N. Lockhart, '“Taking Rights Seriously” Seriously: The European Court and its Fundamental Rights Jurisprudence', (1995) 32 *Common Market Law Review* 51 and 579.

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