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Subverting Sovereignty's Voluntarism: Pluralism and Subsidiarity in Cahoots

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Abstract

Sovereignty's lingering commitment to voluntarism and the limitations of the voluntarist approach are exposed by the crisis of authority represented by contradictory claims to ultimate authority on the part of the Court of Justice and national courts. Whilst it is uncontroversial to assert that both pluralism and subsidiarity pose significant challenges to state sovereignty, this chapter argues that pluralism and subsidiarity not only threaten sovereignty because they allow for the re-allocation of authority to institutions other than those of the nation state but also because they call into question sovereignty's fundamental assumption that authority is dominated by will to the neglect of countervailing considerations. They offer solutions to this crisis of authority which finally tackle the problem of voluntarism, by deflecting focus away from the will and towards the good (higher moral principles), towards reasoned dialogue and towards a spirit of co-operation.

Introduction

Disaffection with institutional sovereignty in the eighteenth century led to the rise of popular and state sovereignty, but this movement has been reversed in the European context: expressions of sovereignty as ultimately abiding in the people or in the state have given way to expressions of sovereignty as finally reposing in institutions. Whereas prior to the eighteenth century those sovereign institutions were parliaments, this time they are courts: the Court of Justice asserts its own sovereignty-based authority to make claims about the status of European law *without* relying on the sovereignty of the European Union, which in turn prompts national constitutional courts to counter that they are the institutional keepers of ultimate legal authority within the nation state. The shift towards institutional sovereignty represented by the battle of the sovereign courts forces law to come to terms with sovereignty's hard edges in a way was not previously necessary when sovereignty was vested abstractly in 'the people' or 'the state'. Now we have conflicting legal answers to the same legal problem being produced by courts which consider themselves to be sovereign, and since law loses much of its credibility, effectiveness and *raison d'être* when it conduces to uncertainty, sovereignty has to give. There is nothing unusual in the suggestion that the concept of sovereignty is undergoing significant challenges in our times;[1] the novelty of this chapter lies in its argument that the reason that these challenges are so devastating is that they threaten sovereignty's fundamental assumption, namely, voluntarism.[2]

Simply stated, voluntarism assumes that the will takes priority over the intellect. If I am faced with choosing between two options, I should be governed by my unreasoned preference or instinctive will rather than allow myself to engage in a rational reflection about which of the two options is the more reasonable or morally defensible or kindly course of action. Voluntarism now has supporters who proclaim the dominance of the will in the disciplines of psychology,[3] philosophy,[4] metaphysics,[5] and so on, but its earliest manifestation, as will be further discussed in Part 1, was in the form of theological voluntarism, from which political voluntarism and theories of sovereignty take their cue. Theories of pluralism, meanwhile, purport to solve the battle of the sovereign European courts by urging that those courts should count other considerations as more weighty than sovereign will, by conceiving of their authority as ordered towards the protection of certain higher moral principles or the promotion of

[1] Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003).
[2] The term was first coined by Ferdinand Tönnies: cf. Ferdinand Tönnies, *Community and Association* (trans. Charles Loomis, Routledge & Kegan Paul, 1995).
[3] William James, *The Principles of Psychology* (Dover Publications, 1950).
[4] Friedrich Nietzsche, *The Will to Power* (ed. Walter Kaufmann and RJ Hollingdale, Vintage Books, 1968).
[5] Arthur Schopenhauer, *The World as Will and Representation* (trans. EFJ Payne, Dover Publications, 1969).

reasoned dialogue or the cultivation of a spirit of co-operation. Since theories of pluralism reconceive of authority by relegating the importance of the will, pluralism thereby jeopardises sovereignty's voluntarism. Theories of subsidiarity double down on this threat by summarily dismissing the notion of static, monolithic sovereign institutions in favour of a problematization of authority in which institutions at various levels must compete for the privilege of decision-making. Where sovereignty understands authority as an entitlement that one claims and thereby assumes for oneself, subsidiarity bestows decision-making authority commensurate with the capacity of the decision-maker to achieve certain goals. Thus, there was a terrible irony in the fact that when the European principle of subsidiarity was initially introduced in the Treaty of Maastricht, it was heralded as the saviour of the sovereignty of the member states,[6] even though the specifics of its design and implementation systematically favour the Union institutions.[7]

Although pluralism and subsidiarity come at the problem of authority from different perspectives and with different aims, and although a whole other chapter could be written on the differences between them, this short contribution makes the point that, notwithstanding their differences, pluralism and subsidiarity act in concert to subvert the voluntarist assumptions that are still deeply imbued in sovereignty. Part 1 opens with a short discussion of voluntarism and its place in theories of sovereignty. Part 2 highlights three strands within theories of constitutional pluralism that seek to escape from sovereignty's voluntarism by elevating the importance of fundamental principles, reasoned dialogue and a spirit of co-operation. Part 3 discusses subsidiarity's more straight-forward rejection of monolithic voluntarist authority.

Part 1: Sovereignty's Lingering Commitment to Voluntarism

Bartelson wrote that the essence of sovereignty is to be found in the 'unthought foundations of our political knowledge'[8] and although there is not much about sovereignty that has not been beneficially thrashed out and reconsidered over recent years, perhaps the 'unthought foundations' of sovereignty itself, namely, its commitment to voluntarism, have somewhat escaped our gaze. Since theories of sovereignty, as manifestations of political voluntarism, take their cue from theological voluntarism, this section reflects on the nature of political sovereignty as shaped by earlier theological debates.[9] Theological voluntarism emerged out of a controversy about the nature of God's power. On one side, the medieval scholastics believed that God's power was grounded both in reason and in love, to such an extent that God could never will something that would violate the laws of reason or the requirements of love.[10] God could not will that 1 + 1 = 6 no more than he could will genocide, because, in a strange way, God's will was 'bound' by reason, 'confined' by his goodness, 'limited' by his love. This position – known as theological rationalism – entails certain corollaries. First, if God's actions are not arbitrary then science can legitimately adopt an epistemic assumption that the universe has intelligibility: that there is meaning to be found in the intricacies of marine eco-systems or the way that the heart pumps blood around the body or the interaction between the parts of the atom. Presuming such intelligible order, the human person can come to know the universe through the exercise of her reason. Secondly, if legal rules are to complement the order of the universe, they need to rise to the same standards of the requirements of reason rather than emerge as dictates of will. Moreover, the laws promulgated by earthly rulers can be judged by reference to those authority-independent standards and, if necessary, critiqued and disobeyed on that basis.

On the other side of the debate were theologians Duns Scotus and William of Ockham who advanced the theory of theological voluntarism which gained sway from the thirteenth century onwards and bequeathed a long-lasting legacy on Western civilisation.[11] Theological voluntarism designated

[6] Paul Marquardt, "Subsidiarity and Sovereignty in the European Union" (1994) 18 Fordham International Law Journal 616.
[7] Gareth Davies, "Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time" (2006) 43 CMLRev 63; Maria Cahill, "Theorizing Subsidiarity: Towards an Ontology-Sensitive Approach" (2017) 15 ICON 201.
[8] Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge University Press, 1995) 4.
[9] Cf. Govert Buijs, 'Que les latins appellant maiestatem: An Exploration into the Theological Background of the Concept of Sovereignty' in Walker (ed.) (n1).
[10] Jean Bethke Elshtain, *Sovereignty: God, State, and Self* (Basic Books, 2008) Chapter 1; Etienne Gilson, *The Unity of Philosophical Existence* (Sheed and Ward Ltd., London, 1938), Chapter 3.
[11] Brad S. Gregory, *The Unintended Reformation* (Belknap Press, 2012).

God's will as 'the ultimate cause of all things';[12] his will was so absolute that it brooked no limitations whatsoever. God could will that 1 + 1 = 6, and it would. He could will that the earth should rotate clockwise on its axis except for Mondays, Wednesdays and Fridays when it should rotate counter-clockwise, and it would. Being completely untethered to reason, God could act irrationally, arbitrarily, capriciously and vindictively, leaving human beings 'stewing in a kind of permanent impotence as their agency is swamped by God's arbitrary power'.[13] That is to say, since God acts without reference to reason, his actions cannot be understood by reference to reason. As a corollary, science cannot operate on the basis that the universe (or marine ecosystems or the human heart or the atom) can be intelligibly understood. More importantly, the second corollary is that as God became 'less frequently represented as the fullness of reason and goodness than as the site of sovereign will', earthly power became 'reframe[d] and refract[ed]' in the same way.[14] After all, if God can exercise his dominion solely by reference to his will and ignoring every other consideration, why should earthly rulers allow their will to be constrained? Inevitably, then, political power was also cast voluntaristically, with priority given to the will while the laws of reason and even the effort to strive after goodness were pushed into the shadows. The seeds of sovereignty are to be found here: the theory of theological voluntarism proposed by Duns Scotus and Ockham in order to explain that God's power is dominated by his will became the foundation for later theories of political voluntarism that describe political power as dominated by the will of the sovereign.

Political voluntarism is exemplified in Jean Bodin's masterpiece, *Six livres de la République*, both in terms of how he describes the purpose of sovereignty and in terms of how he dismisses the idea of a right of resistance. Bodin's sovereign is proposed as the antidote to the civic disintegration of his time: in place of the layers of political authority typical of the medieval ordering of society, there should be one single ultimate source of absolute authority. Such a sovereign prince would not be subject to the commands of non-sovereigns,[15] or to the laws of his predecessors, and or even his own laws.[16] The primacy of will is evidenced in the description of sovereign will as 'absolute and perpetual power'[17] and in the fact that its purpose is self-referential: 'the main point of sovereign majesty and absolute power consists of giving the law to subjects in general without their consent'.[18] Now, in fact, Bodin does not conceive of 'absoluteness' in absolute terms, advocating that the sovereign prince should honour his contracts and keep his oaths, even if he no longer wills to do so, partly as a matter of justice and partly in order to sustain relationships with contractual partners and addressees of the oaths.[19] At the same time, he dispenses with the medieval right of resistance 'no matter how wicked and cruel [the sovereign] may be' on the basis that there is no objective standard of good to which he could be held to account.[20] Thus, Bodin's voluntarism is slightly compromised at the edges: he advises his sovereigns to honour justice and harmony in certain circumstances, albeit that sovereign power is not truly limited by appeals to reason or goodness or mercy because the highest purpose of sovereignty is achieved in the imposition of his will.

Thomas Hobbes introduces his sovereign as the 'power able to over-awe them all',[21] the one who is capable of inducing sufficient fear in the whole population that they will forego the demands of their own wills for the sake of the peace that comes through obedience to the commands of the sovereign. Hobbes's sovereign is forged in the relational dynamic in which they 'confer all their power and strength upon one man, or upon one assembly of men … submit their wills, every one to his will'.[22] The power of this sovereign Leviathan is more absolute than that of Bodin's sovereign, since Hobbes's sovereign is not required or even encouraged to act in accordance with any external standards of justice: 'nothing the sovereign representative can do to a subject, on what pretence soever, can properly be

[12] Gilson (n10), 75.
[13] Elshtain (n10), 26-7.
[14] Elshtain (n10) 27, 25.
[15] Jean Bodin, *On Sovereignty: Four chapters from the Six Books of the Commonwealth* (Julian Franklin ed, Cambridge University Press, 1992), 11.
[16] *ibid* 12.
[17] *ibid* 1.
[18] *ibid* 23.
[19] *ibid* 8.
[20] *ibid* 120.
[21] Thomas Hobbes, *Leviathan* (John Gaskin ed., Oxford University Press, 1998), 83.
[22] *ibid* 114.

called injustice, or injury; because every subject is author of every act the sovereign doth'.[23] The relational dynamic between sovereign and subjects is understood only in terms of a clash of wills (and not, for example, a disagreement about the requirements of the good) the resolution of which is always achieved in only one way as is made clear in the words that Hobbes puts into the mouths of the subjects: '*I authorise and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorise all his actions in like manner.*'[24] Hobbes' embrace of voluntarism is also evident in the fact that he makes no distinction between a sovereign who comes to power by institution (in the manner outlined above when the subjects freely offer their liberty to Leviathan) and the sovereign who comes to power despotically[25] and indeed, that he believes that, in the end, there is no distinction between sovereignty and tyranny: 'the name of tyranny, signifieth nothing more, nor less, than the name of sovereignty'.[26] This is a purer version of political voluntarism because there are no independent standards (be they standards of reason or goodness or order or love) against which to evaluate the commands of the sovereign. He simply rules howsoever he wills.

Scholars who have advanced theories of sovereignty ever since have been keen to put significant distance between themselves and those initial proponents of sovereignty in the sixteenth and seventeenth centuries. As a result, sovereignty has undergone some major reconceptualizations, becoming 'tamed'[27] and 'de-potentized'[28] along the way. These revisions were inspired by the perceived danger of vesting ultimate power in a single pair of hands or a single institution and therefore the solutions similarly focused on increasing the number of persons in whom sovereign power is vested. One solution is to conceive of sovereignty as being vested in all of the people of the nation, emphasizing their role as constituent power, and assuming that when the people delegate power to institutions, the power held by those institutions is not sovereign power, but delegated competence. This solution effectively transfers power from the sovereign prince who wills to the sovereign people who wills but it still underscores the primacy of the 'general will'.[29] Another solution is to allow institutions operate on the basis of delegated competences but vest sovereignty in the state itself. In this case, although power is divided between institutions operating within the state, it presents a united and sovereign front to the outside world.[30] Both solutions re-conceived of the relational dynamic within sovereignty by distinguishing between the site of ultimate authority and the site of ordinary decision-making. Whereas in the Hobbesian version the subjects surrendered both ordinary decision-making authority and ultimate authority to Leviathan, the dynamic interaction at play in popular sovereignty and state sovereignty gave ordinary decision-making authority to the institutions while retaining ultimate authority for the people or the state. As a result, voluntarism could be curtailed at the level of ordinary decision-making through the establishment of constitutional limits on the exercise of power, kerbing the will of parliament for the sake of human rights and controlling the exercise of executive power for the sake of democratic principles.

This shift from personal or institutional sovereignty towards popular or state sovereignty therefore appeared to successfully tackle the dangerous *effects* of voluntarism by requiring that ultimate sovereign power be held more abstractly by non-institutional actors ('the people' or 'the state') while simultaneously ensuring that the ordinary exercise of power at the institutional level be subject to constitutional limits.[31] However, since sovereignty did not vest at this institutional level, limiting the

[23] *ibid* 141.
[24] *ibid* 114. (Emphasis in original.)
[25] *ibid* 135.
[26] *ibid* 470.
[27] Jon Parkin, *Taming the Leviathan: the Reception of the Political and Religious Ideas of Thomas Hobbes in England (1640-1700)* (Cambridge University Press, 2007).
[28] Olaf Asbach, "Sovereignty between Effectiveness and Legitimacy: Dimensions and Actual Relevance of Sovereignty in Bodin, Hobbes and Rousseau" (2006) 2 *Eurostudia* 1, 5.
[29] Cf. Jean-Jacques Rousseau, *On the Social Contract* (tr. GDH Cole, Dover Publications, 2003); Emmanuel Sieyès, "Exposition raisonnée des droits de l'homme" presented to the Constitution Committee on 20th July 1789.
[30] Cf. Alan James, *Sovereignty Statehood: The Basis of International Society* (Allen & Unwin, 1986).
[31] Many jurisdictions go so far as to limit the power of constitutional amendment, such that even when parliament and/or the people amend the constitution their ability to do so is restricted. Cf. Yaniv Roznai, "Unamendability and the Genetic Code of the Constitution" (2015) NYU School of Law, Public Law Research Paper No. 15/13. However, the constituent power of the people is ultimately untouched by these limits and therefore although they, too, help to limit the dangerous effects of voluntarism, they do not finally displace it.

exercise of institutional power did not compromise sovereignty's commitment to voluntarism. Moreover, since the people themselves were legally unlimited in the exercise of their constituent power and the state was legally unlimited in the exercise of its external sovereignty, sovereignty's commitment to voluntarism was actually confirmed, rather than compromised, by these shifts. In short, while the solutions of popular sovereignty and state sovereignty appeal to us because that they put in place safeguards designed to protect individuals and communities from wilful and capricious exercise of political power within the state, they did not in fact rid sovereignty of its voluntarist assumptions. Transferring sovereign will to a more abstract level meant that the problem of voluntarism seemed to disappear, and therefore we paid less attention to it.

Part 2: Pluralism's Escape from Voluntarism

Within the European Union, ironically, the movement from institutional sovereignty to popular or state sovereignty appears to be reversed, in as much as the conflicting claims to sovereignty have been played out in the caselaw of the Court of Justice and the highest courts at national level. The claims to direct effect and supremacy were great acts of will, motivated by a desire to make the rules of the common market count, but, more importantly, in those cases the Court of Justice established itself as the institution with the ultimate authority to determine the status of European law.[32] It arrogated unto itself this kind of institutional sovereignty without declaring the sovereignty of the European Economic Community. Moreover, the attempt to move from institutional sovereignty to polity sovereignty or popular sovereignty, insofar as the project of the European constitution was designed to make those claims, has not yet been successful and the ascription of sovereignty to the European Union or the peoples of Europe as a whole would still be deeply controversial. For this reason, we still refer back to the claims of direct effect and supremacy and the claim to ultimate authority made by the Court of Justice: Europe's sovereignty can only be described in institutional terms. Correspondingly, the responses of the national courts, even when they are based on (loose) interpretations of the national constitutions, still involved a shifting of sovereignty insofar as they entail an acceptance that it is the national courts who will ultimately decide on the characteristics of national sovereignty, as these courts also arrogate to themselves the authority to decide not only that European law should not be applied in the national legal system, but the terms on which they might make such a decision.[33] As a result, the concepts of state sovereignty and popular sovereignty have lost much of their stature: they no longer describe the status of the member states and they do not describe the status of the European Union. Institutional sovereignty is back *en vogue* as the battle of the sovereigns is played out in courts all over Europe, with no sign that the end is in sight: to the contrary, 'the ECJ shows no sign of discovering that the EU Treaties are in fact subject to constitutional law, and supreme courts [276] seem to be becoming only more assertive in their claims that Constitutions determine what applies within the national jurisdiction'.[34]

Undoubtedly, this movement from popular or state sovereignty back to institutional sovereignty has represented a significant challenge for democracy and constitutionalism and has risked alienating popular support for the European project. At the same time, as far as sovereignty theory is concerned, this movement from popular or state sovereignty back to institutional sovereignty may in fact be helpful because it reveals exactly what conceptions of popular and state sovereignty managed to obscure: that is, how much sovereignty is still in thrall to voluntarism. Moreover, the battle of the sovereign courts forces us to come to terms with the reality of the *problem* of voluntarism. Walker captures this best through his acknowledgement of 'incommensurability of the knowledge and authority (or sovereignty) claims' emanating from the courts, which incommensurability is the result of the fact that each has a

[32] Gráinne de Búrca, 'Sovereignty and the Supremacy Doctrine at the European Court of Justice' in Walker (ed.) (n1).

[33] Cf. Maria Cahill, "Ever Closer Remoteness of the Peoples of Europe? Limits on the Power of Amendment and National Constituent Power" (2016) 75 CLJ 245. The decision of the Irish Supreme Court in the case of *Crotty v. an Taoiseach* [1987] IR 713 is exceptional in this regard because it defended popular sovereignty by requiring a referendum prior to treaty ratification, but this position has been weakened by the more recent decision of *Pringle v. Government of Ireland* [2012] IESC 47. Maria Cahill, "*Crotty* after *Pringle*: The Revival of the Doctrine of Implied Amendment" (2014) 17 Irish Journal of European Law 1.

[34] Gareth Davies, 'Constitutional Disagreement in Europe and the Search for Pluralism' in Matej Avbelj and Jan Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, 2012), 275-6.

'different epistemic starting point', and which in turn means that 'there is no neutral perspective from which their distinct representational claims can be reconciled'.[35] Sovereignty, based on voluntarism, conceived of politics as the clash of contradictory wills, and supposed that that clash could be resolved only when one will was subjugated to the other. Such a crude and unsophisticated approach seems to be both an unrealistic and an undesirable solution here. That means, however, that we need to find a way out of voluntarism.

Theories of pluralism have been canvassed for about twenty years in European scholarship[36] and although they may not expressly engage with the theory of political voluntarism, nonetheless they do propose significant changes to the way in which the authority of the highest courts and the Court of Justice should be exercised. In order to give supreme priority to the will, theological and political voluntarism tended to ignore the importance of the rule of reason, the requirements of love or the effort to seek the good. Theories of pluralism, contrariwise, urge courts to yield their will for the sake of a higher prize, by downplaying the importance of will and giving increasing priority to other elements. One strand within pluralism gives increasing priority to the good by means of an emphasis on certain fundamental principles for the sake of which courts should be prepared to sacrifice their claim to ultimate authority. A second strand gives increasing priority to reason by conceiving of the interaction between the courts as a fruitful exchange of ideas rather than a hapless clash of wills. A third strand gives increasing priority to relational aspects, by means of a focus on co-operation and self-restraint. These three strands within pluralism, discussed in some detail below, constitute a novel challenge to sovereignty because they drive a wedge between authority and will, conditioning sovereignty by reference to (1) fundamental principles (2) reasoned dialogue and (3) co-operative spirit.

Sovereignty conditioned by Fundamental Principles

The first strand within pluralism appeals to fundamental principles: the central point is that the question of who gets to exercise authority fades in significance when attention is turned to the principles that are at stake. The self-understanding of the courts should therefore be conditioned by reference to these fundamental principles: they should see themselves as acting in the service of those fundamental principles and gladly recognize and welcome the efforts of other courts who do the same. The good being promoted by those fundamental principles should matter more to them than their own claim to sovereignty. This kind of pluralism finds its home in those decisions of the Bundesverfassungsgericht which championed human rights, democracy and the rule of law, and declared that the Court would be willing to accept the authority of the Court of Justice provided those fundamental principles were upheld by European law.[37] In these decisions, as Weiler noted, 'the German Court presents itself as a guarantor of the universal values of democracy rather than as a guarantor of German particularism'.[38] Mattias Kumm's theory is the best example of this kind of pluralism that conditions sovereignty for the sake of fundamental principles. He recognizes that 'a set of universal principles central to liberal democratic constitutionalism undergird the authority of public law and determine which norms take precedence over others in particular circumstances'.[39] These ideals are recognized by national constitutional traditions as well as European law because they are the 'common heritage of the European constitutional tradition as it has emerged in the second half of the twentieth century'[40] and they have 'universal moral validity'.[41] Thus it is right and just that they should take centre-stage. As a result, the authority claim of

[35] Neil Walker, "The Idea of Constitutional Pluralism" (2002) 65 MLR 317, 338.

[36] This chapter does not specifically address the concept of constitutional pluralism, but remains sceptical about the viability of such a concept. Cf. Neil Walker, 'Constitutionalism and Pluralism in Global Context' in Avbelj and Komárek (n34); Matej Avbelj, 'Can European Integration be Constitutional and Pluralist – Both at the Same Time?' in Avbelj and Komárek (n34).

[37] Case 2 BvL 52/71, *Internationale Handelsgesellschaft mbH. v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540; *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225; Cases 2 BvR 2134/92 & 2159/92, *Brunner v. the European Union Treaty* [1994] 1 CMLR 57.

[38] Joseph Weiler, "Does Europe need a Constitution? Demos, Telos and the German *Maastricht* decision" (1995) 1 ELJ 222.

[39] Mattias Kumm, 'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism' in Avbelj and Komárek (n34), 54.

[40] Mattias Kumm, "Beyond Golf Clubs and the Judicialisation of Politics: Why Europe has a Constitutional Properly So Called" (2006) 54 American Journal of Comparative Law 505, 517.

[41] Kumm, Mattias, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty" (2005) 11 ELJ 262, 286-7.

the national courts can no longer be understood in terms of sovereign will: it is re-cast in terms of how well they 'embody and help realize' those universal principles and ideals principles.[42]

In practical terms, this has two implications. First, if the ultimate purpose of the national courts is to promote adherence to these universal moral principles, then, in their day-to-day operations it is unreasonable to ignore the jurisprudential relevance of non-national decisions informed by those same ideals.[43] There can be no longer be a sharp distinction between state law and international law.[44] Rather, a holistic approach to the question of sources of law is required as each court tries to 'make sense of what the best understanding of the competing principles in play requires them to do'.[45] This means then that conflicts between national courts and the Court of Justice are theoretically unlikely, and any that remain are 'not deep and hard, but shallow and soft' because they rest on the foundation of the shared commitment to these principles that 'serve as a *common framework* to mediate potential disputes'.[46] Nonetheless, disputes may still arise: the second implication is that the motivation for the non-application of European law is now 'justified' by reference to the principle that is at stake.[47] No longer a clash of sovereign wills, the entire dispute is reframed in terms of differing approaches to the achievement of shared moral commitments which the courts recognize as more important than their own claims to authority. Kumm's theory has therefore roundly rejected sovereignty's voluntarism and re-conceived authority as being grounded in propensity to achieve the good.

Although he does not consider himself to be a pluralist, Julio Baquero Cruz's approach resonates strongly with Kumm's insofar as he also conditions sovereignty by reference to fundamental principles and justifies the non-application of European law in these terms. His theory of institutional disobedience understands that national courts opt for non-application of European law ('an extraordinary escape valve'[48]) not in protest against the sovereignty claim of the Court of Justice but as a form of conscientious objection to a particular European law which threatens a higher principle that is enshrined in all the national and European legal orders. Because of its status and self-understanding as a vindicator of these 'higher moral rules', a national court's non-application of European law should not be understood as a trenchant defence of the national court's claim to sovereignty but rather as a plea for reconsideration and reform of the particular law.[49] Therefore, like Kumm, Baquero Cruz is conditioning sovereignty by reference to the good, for the sake of fundamental principles.

Sovereignty conditioned by Reasoned Dialogue

The second strand within pluralism appeals to the power of better arguments and seeks to re-conceive the interaction between the Court of Justice and the national courts as a forum for reasoned dialogue. This strand was introduced by the work of Miguel Poiares Maduro, who seeks to articulate the operational principles that will allow and sustain a productive 'multilogue' between the European Court of Justice and national courts.[50] They are the 'principles of contrapunctual (sic) law' or 'meta-methodological principles'[51] and they comprise (1) pluralism, (2) consistency and coherence, and (3) universalizability.[52] Implementing these principles in their day-to-day operations, courts should arrive at their decisions (1) bearing in mind the existence of plural sites of judicial authority, (2) seeking to achieve coherence among those various courts and (3) drawing on the precedents of other courts who have previously interpreted the laws at issue and also, by using arguments that are not specific to one jurisdiction and by taking into account the effects that a decision might have in other jurisdictions, justifying decisions 'in a manner that could be universalizable'.[53] Will is thereby conditioned by reason,

[42] Kumm, 'Rethinking Constitutional Authority' (n39), 64.
[43] Kumm, 'The Jurisprudence of Constitutional Conflict' (n41), 286-7.
[44] Kumm, 'Rethinking Constitutional Authority' (n39), 64.
[45] *ibid* 56.
[46] *ibid* 64.
[47] *ibid* 55.
[48] Julio Baquero Cruz, 'Legal Pluralism and Institutional Disobedience in the European Union' in Avbelj and Komárek (n34), 256.
[49] *ibid* 265.
[50] Poiares Maduro, Miguel, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Walker (n1), 501, 524.
[51] Matej Avbelj and Jan Komárek, "Four Visions of Constitutional Pluralism" EUI Law Working Paper 2008/21.
[52] Poiares Maduro, 'Contrapunctual Law' (n50), 524-531.
[53] *ibid* 530.

and the requirement of universalizable justification. Jan Komárek develops this reason-oriented strand within pluralism in his efforts to create the conditions of dialogue that allow better arguments can be generated, heard and discussed, and so on. He disputes Poiares Maduro's focus on institutional choice because that in turn emphasizes institutional sovereignty and the 'finality and irreversibility of the decisions taken by particular institutions'.[54] Instead, he endorses the application of theories of constitutional dialogue which reinforce 'circular exchange among various actors.'[55] The advantage of these theories is that they declare that 'no institution has a superior claim to define or protect a particular constitutional value',[56] thus encouraging a dialogue between institutions which ensures that 'a better and more legitimate decision' can be arrived at following the participation of all institutions, each with its unique mandate, competence and expertise.[57] There is plenty of scope to develop and refine this reason-oriented strand within pluralism, in particular, by coming to terms with the implications that it has for legal certainty and the rule of law in respect of its approach to sources of law and hierarchy of laws, and by grappling with the distinction between a popular decision liable to attract institutional support and a controversial decision which is more correct from the point of view of legal reasoning. Nonetheless, this strand of literature already tracks a movement away from a conception of authority that is entrenched in voluntarist sovereignty and towards an understanding of authority as conditioned by capacity to engage in reasoned dialogue.

Sovereignty conditioned by Co-operative Spirit

The third strand within pluralism its is relational sensitivity, which is attractive to many people who welcome it as an antidote to sovereignty's stubborn inflexibility, believing that 'the only acceptable ethic of political responsibility for the new Europe is one that is premised upon mutual recognition and respect between national and supranational authorities'.[58] Neil MacCormick, the 'father of pluralism' emphasized this co-operative aspect very strongly in his work, arguing that the Court of Justice and the national courts should try to avoid flashpoints through the use of circumspection.[59] The former should therefore not make 'interpretive judgments without regard to their potential impact on national constitutions' and the latter 'ought not to interpret their laws or constitutions without regard to the resolution of their compatriots' to participate in the process of European integration.[60] Through these efforts, a spirit of co-operation and mutual deference could come to define their interface, thereby creating the habits that would sustain harmony and co-operation between them and thereby move 'beyond the sovereign state'.[61] While MacCormick's thesis envisaged a mutually co-operative approach, Joseph Weiler's theory of 'constitutional tolerance' seemed to allocate the burden of compromise to the national courts.[62] While he held that the national courts are not 'subordinate to a higher sovereignty and authority attaching to norms validated by the federal people' and therefore not *obliged* to obey European law, nonetheless he maintained that they do obey the requirements of European law, responding to the *invitation* to do so with an 'autonomous voluntary act, endlessly renewed on each occasion'.[63] Within this perspective, the national courts pay a high price for co-operation, however, more recently, both Xavier Groussot and Gareth Davies have transferred the burden of compromise to the Court of Justice, exhorting that the Court should practise 'self-restraint' for the sake of maintaining a successful relationship with the national courts.[64] As far as Groussot is concerned, the Court should adopt a doctrine of deference to national identities, which entails 'a light-touch review [that affords] a wide margin of appreciation/discretion … to the Member states'.[65] For him, deference

[54] Jan Komárek, 'Institutional Dimension of Constitutional Pluralism' in Avbelj and Komárek (n34), 246.
[55] *ibid* 246.
[56] *ibid* 246.
[57] *ibid* 247.
[58] Walker, "The Idea of Constitutional Pluralism" (n35) 337.
[59] Neil MacCormick, "The Maastricht-Urteil: Sovereignty Now" (1995) 1 (3) ELJ 259, at 265.
[60] Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP, 1999), 120.
[61] *ibid* 131; Neil MacCormick "Beyond the Sovereign State" (1993) 56 MLR 1.
[62] Weiler, Joseph, "A Constitution for Europe? Some Hard Choices" (2002) 40 JCMS 563, 567-8.
[63] *ibid* 568.
[64] Xavier Groussot, 'Constitutional Dialogues, Pluralism and Conflicting Identities' in Avbelj and Komárek (n34), 336; Davies (n34), 277.
[65] *ibid* 338.

is particularly warranted whenever member states point to deeply-held national values that reflect their constitutional identity, for example, fundamental rights, social and employment policy and public order, particularly relating to moral, religious and cultural concerns.[66] Davies develops a theory of 'pluralist self-restraint'[67] centred on the principle of proportionality. Since the Court of Justice is 'in the position of supplicant' (it needs the national courts to apply its law), he believes that it should bear the lion's share of the responsibility for 'developing EU law in a way that avoids conflicts in the first place'.[68] It should therefore construct European law in such a way that shows 'respect for and accommodation of the different national – and international – legal orders with which it must interact'.[69] In practice, Davies argues, the principle of proportionality should be tweaked so as to include national autonomy, including policy formulation and implementation, as a value to be taken into account.[70] Thus, the principle of proportionality could justify the non-application of European law in circumstances where member states could demonstrate that 'amending their systems or policies to achieve their goals in a way compatible with EU law would either be unreasonably difficult or disproportionately harmful to other interests'.[71] In terms of the overall architecture of European law, this version of pluralist self-restraint entails a renovation that would subjugate the principle of supremacy of European law to the principle of proportionality.[72] The common aspect of these various approaches is that they all require an institution which might otherwise stand on its own sovereignty claim to put that claim to one side, exercising self-restraint and deference to the other in a spirit of sincere and mature co-operation.

Part 3: Subsidiarity's Rejection of Voluntarism

For all of their effort to escape from voluntarism by introducing another dimension which should take precedence over sovereign will – be it fundamental principles, reasoned dialogue or co-operative spirit – these theories do not always succeed in fully extricating themselves from the grip of sovereignty and its monistic tendencies, and therefore slip back into endorsing the ultimate authority of either the Court of Justice or the national courts.[73] Subsidiarity, too, has seemed at times to be allied to the sovereignty of the nation state. When it was initially embraced by the European project in the Maastricht Treaty, it was deliberately presented as a principle that signalled the political aspiration and legal claim of the nation state to hold onto its remaining authority.[74] Subsidiarity was "pressed … into service as a damage control measure to reassure those suspicious of the growth of EU power",[75] because it was presented as "the great limiting principle that [would] defend national sovereignty against incursion by the ever-expanding Brussels bureaucracy".[76] Promising to resist federalism, it gave a shot in the arm to the member states, because it gave the nationalist cause a European name and status – and therefore a sense of legitimacy, in European terms – that it heretofore did not have. However, the rhetorical power that subsidiarity came to hold was not at all commensurate with the manner in which it was implemented in the treaties. The principle enshrined in the Treaty of Maastricht was designed so as to operate only in areas of shared competences and then merely to guide the decision, made exclusively by European institutions in the light of European objectives, about which decision-making level should exercise authority.[77] Moreover, the Maastricht Treaty established the Committee of the Regions, which facilitated the European legislative institutions in engaging directly with the regional government levels

[66] *ibid* 339.
[67] *ibid* 272.
[68] Davies (n34), 277.
[69] *ibid* 272.
[70] *ibid* 281.
[71] *ibid* 281.
[72] *ibid* 281.
[73] Cf. Avbelj, 'Can European Integration be Constitutional and Pluralist' (n36); Alexander Somek, 'Monism: A Tale of the Undead' in Avbelj and Komárek (n34); Pavlos Eleftheriadis, "Pluralism and Integrity" (2010) 23 Ratio Juris 365.
[74] Ken Endo, "The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors" (1994) 44 Hokkaido Law Review 652.
[75] Marquardt (n6) 626.
[76] *ibid* 617.
[77] Treaty establishing the European Community (consolidated version 1992), Aug. 31, 1992, art. 3b, 1992 O.J. (C 224) as inserted by TEU.

in the member states, bypassing the state level and overlooking state sovereignty. There have been minor adjustments to the principle of subsidiarity in the intervening years, the most noteworthy being the introduction of the Early Warning System in the Treaty of Lisbon, but here also the scope and application of the principle of subsidiarity remains to be finally determined at European level and according to European criteria and by European institutions, with only the possibility of very small, heavily demarcated and non-decisive input by national parliaments.[78] In short, although subsidiarity was portrayed as the saviour of national sovereignty, the principle enshrined in the treaties was certainly not designed to turn that rhetoric into reality.

In fact, that is as it should be. Sovereignty works on the basis that an institution (or a people or a state, in the more abstract versions of the theory) assumes ultimate authority onto itself by making a claim that is monistic, voluntaristic, self-referential, self-authorizing such that, on its own strength, the sovereign will overbears all other wills within a political community. Subsidiarity sharply rejects this approach by assuming multiple sites of decision-making authority within the same polity and calling for a capacity-based division of responsibility between them. No one institution should be allowed to monopolize decision-making and institutions need to demonstrate their capacity in order to be allocated responsibility. Thus, despite the rhetorical confusion, it is a commonplace, at least within academia, that subsidiarity actually undermines the sovereignty of the nation state. Marquardt argued in 1994 that although it would seem 'in the short run' that the principle of subsidiarity would protect the national claim, 'in the longer term', it would 'contribute to the erosion of effective sovereignty and autonomy' at national level because it disputes the idea 'that the authority of existing states is somehow a good in itself'.[79] Gráinne de Búrca similarly pointed out that by problematizing the notion of authority, the principle of subsidiarity displaces sovereignty's assumption that ultimate authority can be claimed by and belong exclusively to the nation state.[80] A corollary, noted by Nick Barber, is that national self-determination which assumes that the nation is the only possible locus and addressee of political power, has also been forced to give way before subsidiarity.[81] Welcoming the loss of monolithic sovereign statehood, Neil MacCormick rejoiced particularly in the opportunities it opened up for multiple levels and kinds of authorities, that is, for pluralism and, through pluralism, for subsidiarity, which 'requires decision-making to be distributed to the most appropriate level'.[82]

For many people, subsidiarity is immediately attractive for this admirably participative dimension: it involves many more institutions, which all have different mandates and operate at different levels, in the decision-making process. It thereby increases political participation, giving people a greater influence in the process by which decisions concerning them are made. As a result, it seems to offer great prospects for democratic flourishing; indeed, it is subsidiarity's democratic credentials that make it so appealing to MacCormick and Barber, the former noting that subsidiarity 'points us to better visions of democracy than all-purpose sovereignty ever did',[83] and the latter arguing that subsidiarity 'speaks to the empowerment of democratic institutions' and allows 'individuals … to be included in decisions relating to the exercise of public power' because it tries to tie decisions more closely 'to those affected by them' using democratic criteria.[84] Yet, before we get carried away with the democratic potential of subsidiarity, our sobering experience with the European principle of subsidiarity must be taken into account.

The text of Art. 5.3 appears, at first blush, to want to hold the scales equally between local institutions, regional institutions, national institutions and European institutions, comparing their capacities under the headings of 'sufficiently achieved' and 'better achieved'. On closer inspection, the provision indirectly discriminates against regional and national institutions because what is to be achieved is invariably an objective of the European Union. Since any single regional government or national parliament cannot typically achieve the objectives of the European Union (protection the

[78] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O. J. (C 306) 1, Protocol on the Application of the Principles of Subsidiarity and Proportionality, art. 5.
[79] *ibid* 653.
[80] Gráinne de Búrca, "Re-appraising Subsidiarity's Significance after Amsterdam" 7/99 Harvard Jean Monnet Working Paper (1999).
[81] Nicholas Barber, "The Limited Modesty of Subsidiarity" (2005) 11 ELJ 308.
[82] MacCormick (n60), 135.
[83] MacCormick (n60) 126.
[84] Barber (n81), 308, 323.

common market, harmonization of standards across the Member States, or so on), legislative measures aimed towards those objectives will – precisely as a result of the application of the European principle of subsidiarity and not in spite of it – necessarily remain the purview of the European institutions.[85] In short, because Art. 5.3 is ordered towards the objectives of the European Union and therefore assesses the capacity of local, regional, state and European institutions based on how well each can achieve a European objective and because the European institutions have the most to gain from the non-implementation of the principle of subsidiarity, we end up in a situation where the so-called principle of subsidiarity has the effect of stubbornly retaining legislative power at European level and systematically excluding local, regional and national authorities from participation in legislative decision-making. Art. 5.3 is in fact a parody of a principle of subsidiarity: a tool of centralization rather than an instrument of decentralization, a mechanism for excluding participation of local, regional and national levels rather than a method of ensuring their inclusion, a principle which exacerbates the democratic deficit rather than alleviating it. One could even go so far as to say that Art. 5.3 has the effect of an anti-subsidiarity principle. However, the reason that Art. 5.3 fails as a principle of subsidiarity is helpfully illuminating. Although it clearly recognizes regional and national institutions as *prima facie* capable of making decisions, the assessment of capacity is scuppered by the fact that capacity is measured in terms of ability to achieve legislative goals, and the European legislator has both the monopoly on legislative goal-setting and the most to gain from the non-implementation of the principle of subsidiarity. Then, because subsidiarity's ambition to increase political participation is thwarted by the European legislative goal setting monopoly, subsidiarity's democratic dividends cannot accrue. The example of Art. 5.3 thus demonstrates that successful implementation of the principle of subsidiarity is predicated on avoiding a situation whereby the legislative goal to be achieved is determined exclusively by the institution which is systemically biased against the principle of subsidiarity.

This example is particularly stark and therefore useful in demonstrating the problem, but the lesson that it teaches will not be surprising for anybody familiar with the philosophical commitments of subsidiarity and, in particular, its 'ethic of assistance'.[86] Its long history demonstrates abundantly that subsidiarity's trademark is its loyalty to the primary units (sometimes known as 'lower levels') rather than the subsidiary units that offer *subsidium* or assistance (sometimes known as 'higher levels').[87] Elsewhere, I have proposed a theory of subsidiarity that stays true to its etymological and philosophical roots and which entails four principles:[88] (1) the primary units[89] must be granted the freedom to develop their own internal authority structures and the opportunity to indicate that assistance is needed from subsidiary units[90] for the achievement of its purposes; (2) the subsidiary units have no right of initiative to intervene, except in the use of the override mechanism, justified in exceptional circumstances (for instance, when the primary unit is so weak or corrupt that it cannot objectively assess whether assistance is needed); (3) any assistance requested, offered and received must be ordered towards the promotion of the goals and objectives of the primary unit and the achievement of the good for which the primary unit was established, rather than the goals and objectives of the subsidiary unit; (4) to prevent the primary unit from becoming dependent on the assistance received, compliance and review structures should examine whether the assistance offered is ordered towards the growing strength and independence of the primary unit and guards against any tendencies of the subsidiary unit to overbear the primary unit. Only when subsidiarity is understood in this way – where the authority of the primary and subsidiary units are ordered towards the good of the primary units, although the primary units do not have exclusive authority to determine how that good is to be achieved – will it allow for genuine participation by multiple decision-makers and create the conditions for democratic flourishing. When

[85] Cf. Davies (n7) 73-75; Gareth Davies, "Subsidiarity as a Method of Policy Centralization" Hebrew University International Law Research Paper 11/06; Neil Walker, "Subsidiarity and the Deracination of Political Community: The EU and Beyond" Edinburgh School of Law Research Paper No. 2015/31, 8-10.
[86] Walker, (n85), 10.
[87] Cahill, (n7) 206-212.
[88] Cahill (n7) 214-216.
[89] For example, families, trade unions, charities, sporting organizations, companies, local government, and so on.
[90] Usually the state will be a subsidiarity unit, offering assistance to the primary units noted above. However, when the subsidiary unit is an international organization, like the European Union, then the state becomes a primary unit vis-à-vis that subsidiary unit.

we understand subsidiarity in this way, however, we decisively reject the voluntarist assumption behind sovereignty, because we marshal the authority of subsidiary units in the service of goals and objectives, and ultimately a good, that it does not define on its own terms.[91] If Art. 5.3 were to be redefined according to this model, it would clearly echo the strands within pluralism by (1) conditioning authority for the sake of the good, although admittedly the good here is defined more concretely and less abstractly as the legislative goals and objectives of national and regional parliaments, rather than Kumm's nebulous 'fundamental principles', (2) conditioning authority through reasoned dialogue, because this model assumes that the institutions at various levels engage in rational argument about whether the use of the override mechanism is warranted and what the outcome of compliance and review procedures should be, and (3) by conditioning authority for the sake of co-operation by fostering self-restraint on the part of the subsidiary units, in this case, the European institutions.

Conclusions

Although it is clear that conceptions of sovereignty have changed much since the pure theories of sovereignty were articulated in the sixteenth and seventeenth centuries, revisions have focussed on increasing the number of people who exercise sovereign will (the shift from the sovereign prince to the sovereign people) and dividing sovereign power so that it is not vested in any one person or institution (separation of powers, internationalisation). Thus, sovereignty became no longer synonymous with the terrible image of Leviathan; it became popular, and in both senses of the word. What did not change, despite these sizeable modifications in sovereignty theory, was the conception of authority proposed by sovereignty: sovereign authority was still governed by will; it still endorsed voluntarism. Ironically, in the European context, the shift from institutional sovereignty to popular or state sovereignty has been reserved, such that the battle of the sovereigns is played out between Court of Justice and national constitutional courts. Theories of pluralism and subsidiarity propose solutions to this crisis of authority in Europe, acting in cahoots not only to deny the sovereignty of the nation state but, at a deeper level, to reject the voluntarist assumptions behind sovereignty, by undermining the importance of the will and conditioning the exercise of authority by reference to the good, reasoned dialogue and self-restraint for the sake of co-operation.

[91] The model laid out here seems to bear some resemblance to the models of communal subsidiarity and comprehensive subsidiarity as proposed by Neil MacCormick: MacCormick (n60) 151-5.