

# Three Claims of Constitutional Pluralism

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The constitution of Europe has developed without a constitutional theory.<sup>3</sup> Following the work of Joseph Weiler, there has been increased discussion, focused on two old questions: Does Europe have a constitution? Does Europe need a constitution? Rarely do we see any work on the constitutional consequences of different constitutional conceptions of the European Union: what theories of fundamental rights, separation of powers or judicial review ought to dominate EU constitutional law? If European constitutionalism changes constitutionalism itself how does that impact on those aspects of a theory of constitutional law?

Constitutional pluralism<sup>5</sup> has been, perhaps, the most successful attempt at theorizing the nature of European constitutionalism. However, it has not yet provided a constitutional theory of EU law. Some understand it, in fact, simply as theory regulating conflicts of constitutional authority. In other words, constitutional pluralism would not define the identity of European

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<sup>3</sup> M Poiares Maduro, 'Europe and the Constitution: What If This Is As Good As It Gets?' in M Wind and J Weiler (eds) *European Constitutionalism Beyond the State* (Cambridge, Cambridge University Press, 2003) pp. 74, 76 and *idem.*, *We the Court: The European Court of Justice and the European Economic Constitution* (Oxford, Hart Publishing, 1998) 7 *et Seq.*

<sup>5</sup> Including, in here, its German variant of multi-level constitutionalism. See I Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited' (1999) 36 *Common Market Law Review* 703-750; *idem.*, 'Multilevel Constitutionalism in the European Union' (2002) *European Law Review* 511-529; *idem.*, 'The Treaty of Lisbon. Multilevel Constitutionalism at Work' (2009) 15 *Columbia Journal of European Law* 349-407; F Scharpf, 'Legitimacy in the Multi-level European Polity' in P Dobner and M Loughlin (eds.) *The Twilight of Constitutionalism?* (Oxford, Oxford University Press, 2010) 89-119; N Walker, 'Multilevel Constitutionalism: Looking Beyond the German Debate' in K Tuori and S Sankari (eds.), *The many Constitutions of Europe* (Farnham, Ashgate, 2010) 143-168.

constitutionalism itself but the nature of its relationship with other constitutional orders (national and, possibly, international). In this piece, I want to discuss the real potential of constitutional pluralism as a constitutional theory. I conceive constitutional pluralism not only as remedy for constitutional conflicts of authority but as the theory that can best embrace and regulate the nature of the European Union polity.

I will put forward three different claims that can be made by constitutional pluralism. I will start by highlighting how those claims entail a more ambitious conception of constitutional pluralism when compared with the more modest claim usually attributed to constitutional pluralism. As a consequence, I will discuss the relationship between constitutional pluralism and EU constitutional law and constitutionalism in general. The broadest claim will present constitutional pluralism as the basis for an upgrading of the theory of constitutionalism in general but will also highlight the challenges still to be faced by constitutional pluralism to perform that role.

### **The Claims of Constitutional Pluralism**

It has been stated that constitutional pluralism has emerged as a response to the Maastricht Judgment of the German Constitutional Court.<sup>6</sup> This judgment brought to the fore the risks of constitutional conflicts between EU law and national constitutions emerging from the claims of final authority embodied in the case law of the European Court of Justice and national constitutional courts. Constitutional pluralism is often presented as a

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<sup>6</sup> J Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) *European Law Journal* 389-422, at 412 *et Seq.*, Mayer and Wendel, 'Multilevel Constitutionalism and Constitutional Pluralism' and A Somek, 'Monism: A Tale of the Undead' chapter XXX in this volume.

reaction to this judgment, attempting simultaneously to describe that reality and accommodate those competing constitutional claims.

But it is also possible to construct a narrative that sees the in the seminal article by Neil MacCormick “Beyond the Sovereign State”<sup>7</sup> (that preceded the judgment) the driving force behind the constitutional pluralism movement. The latter was certainly more important in my own path towards constitutional pluralism. My initial interest was not so much determined by the risks of constitutional conflicts but more by an inquiry into the character of the European Constitution itself.<sup>8</sup> In this respect, also the analysis of European constitutionalism undertaken in the works of Joseph Weiler already hinted at other aspects of constitutional pluralism, particularly when he later articulated the principle of constitutional tolerance.<sup>9</sup> In this second narrative, constitutional pluralism emerges as a theory of European constitutionalism and not simply as a theory of constitutional conflicts. The former focuses on the legitimacy of European constitutionalism and its model of organizing power while the later focuses in its relationship with other constitutional orders.

It must be recognized, however, that it have been the risks of constitutional conflicts highlighted by the Maastricht judgment that have fed the interest in constitutional pluralism. This shaped its agenda. Most works on constitutional pluralism have focused on courts and the risks of constitutional conflicts of authority embedded in their respective case laws. But one does not need to limit constitutional pluralism to this. In my view,

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<sup>7</sup> N MacCormick, ‘Beyond the Sovereign State’ (1993) 56 *The Modern Law Review* 1-18.

<sup>8</sup> This is visible in, *We the Court* and ‘Europe and the Constitution’.

<sup>9</sup> See, J Weiler: Federalism and Constitutionalism: Europe's Sonderweg, Harvard Jean Monnet Working Paper No. 10/00 (2001) and ‘Why should Europe be a Democracy: The Corruption of Political Culture and the Principle of Toleration’, in F Snyder (ed.) *The Europeanisation of Law: The Legal Effects of European Integration* (Oxford, Hart Publishing, 2000) 213, 217.

constitutional pluralism is both better understood and more useful if not limited to that. Furthermore any debate on how to solve or regulate constitutional conflicts of authority inherently involves a debate on the nature and legitimacy of the competing constitutional claims of final authority. As such, it always requires a broader understanding of the nature of the European and national constitutions and their relationship with constitutionalism in general.

It is with this in mind that I will present three different claims of constitutional pluralism in order to clarify what constitutional pluralism is and the extent to which it can help us develop a constitutional theory of EU law and of constitutionalism in general.

### **The Empirical Claim**

The starting point of constitutional pluralism is empirical. Constitutional pluralism identifies the phenomenon of a plurality of constitutional sources and claims of final authority which create a context for potential constitutional conflicts that are not hierarchically regulated. More broadly, it refers to the expansion of relevant legal sources, the multiplication of competing legal sites and jurisdictional orders, and the existence of competing claims of final authority. In EU law, where the current movement started, constitutional pluralism also mapped what is usually described as a discursive practice between the European Court of Justice and national constitutional courts, aimed at reducing the risks of constitutional conflicts and accommodating their respective claims of final authority.

If I had to summarize the core empirical claim of constitutional pluralism, it would be the following: constitutional pluralism is what best describes the current legal reality of competing constitutional claims of final authority among different legal orders (belonging to the same legal system) and the judicial attempts at accommodating them. This leaves open the question of whether it is more appropriate to conceive of constitutional pluralism in the EU as a pluralism of legal orders (EU and national) or as a pluralism of constitutional claims of authority within the same legal order (with national legal orders being part of the broader European legal order in its respective field of application). In my previous work I have conceived of a European legal order composed of national and EU legal orders. However, the best way to present the current legal reality in the practice of courts may be by making use of Tuori's distinction between legal order and legal system.<sup>10</sup> While the legal order refers to law as a symbolic-normative phenomenon, the legal system refers to the legal practices where the legal order is produced and reproduced (lawmaking, adjudication and legal scholarship).<sup>11</sup> Making use of this distinction, we can conceive of the EU and national legal orders as autonomous but part of the same European legal system. For those practising law in Europe, this European legal system implies a commitment to both legal orders and imposes an obligation to accommodate and integrate their respective claims. The importance of this resides, among other things, on the hermeneutic requirements imposed on national and European courts when acting within the EU legal system.<sup>12</sup>

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<sup>10</sup>. See K Tuori, 'The Many Constitutions of Europe', in K Tuori and S Sankari (eds.), *The many Constitutions of Europe* (Farnham, Ashgate, 2010) 3-30...

<sup>11</sup> K Tuori, *Towards a Theory of Transnational Law*, manuscript, not yet published.

<sup>12</sup> In this respect, see the principles of contrapunctual law that I develop in *Contrapunctual Law – Europe's Constitutional Pluralism in Action...*

The empirical thesis asserts that both the European Court of Justice and national constitutional courts are aware of their competing constitutional claims and act accordingly, by accommodating their respective claims so as to minimize the risks of constitutional conflicts.<sup>13</sup> The most well known example of this regards the fundamental rights jurisprudence of the national constitutional courts and the European Court of Justice<sup>14</sup>.

This empirical claim is challenged by some. Alexander Somek makes the most developed challenge to the empirical thesis of constitutional pluralism to date. He claims that pluralism does not fit the existing legal practice.<sup>15</sup> For him, at best, there is nothing really new in constitutional pluralism. Constitutional pluralism would be a form of monism under national law. In this light, the question of final authority is not open. There is a legal answer. He starts by noting that:

“If national courts were to let Union law trump constitutional law, they would clearly act as agents of the supranational system and thereby sever their ties with the national system. Viewed from the national perspective, again, they would not act as courts and produce legally irrelevant statements”.<sup>16</sup>

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<sup>13</sup> Note, however, that this not imply that courts are aware of constitutional pluralism and see themselves as practicing it. Constitutional pluralism only requires for courts to act so as to accommodate their conflicting constitutional claims. It does not require them to actually acknowledge those competing constitutional claims.

<sup>14</sup> For a classical account B de Witte, ‘The Past and Future Role of the European Court of Justice in the Protection of Human Rights’, in P Alston (ed.) *The EU and Human Rights* (Oxford, OUP, 1999) 859-897; A von Bogdandy, ‘The European Union as a Human Rights Organization? Human Rights and the Core of the European Union’, (2000) *37 Common Market Law Review* 1307-1338; J Lockhart and J Weiler, ‘“Taking Rights Seriously” Seriously: The European Court and its Fundamental Rights Jurisprudence’ (1995) *32 Common Market Law Review* 51-94 and 579-627. For a reassessment of this account see BO Bryde, ‘The ECJ’s Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism’ in M Poiars Maduro and L Azoulai (eds.) *The Past and Future of EU Law* (Oxford, Hart Publishing, 2010) 119-129.

<sup>15</sup> Somek, ‘Monism: A Tale of the Undead’ 50.

<sup>16</sup> Somek, ‘Monism: A Tale of the Undead’ 16

Instead, he argues that EU law itself does not prevent national judges from adopting decisions disrespecting EU law (what he calls “false decisions”) since ultimately their decisions will not be void and the only consequence may be tort liability. In his own words: “it makes sense to say that Member States retain the power to have their judges adopt false decisions, at any rate, as long as States are willing to pay for it.<sup>17</sup> To this, he adds the lack of effective EU powers to protect EU law against recalcitrant Member States.<sup>18</sup> The conclusion is that “the overarching legal system vests the power to adjudicate supremacy conflicts in the national system”.<sup>19</sup>

What constitutional pluralism presents as conflicting claims of final authority is reconstructed by Somek as an actual recognition of the supremacy of national constitutionalism. I disagree. First, the existence of false decisions is, as Somek himself recognizes, a usual feature of any legal system.<sup>20</sup> it is quite common for courts to wrongly interpret and apply the law. Under EU law, as under national law, those “false decisions” are not void, because the national courts that take them have been empowered to interpret and apply EU rules by EU law itself. It is because national courts are part of the judicial system set forth by EU law that their decisions (even when “false” in the sense mentioned by Somek) are valid and become final when all appeals have been exhausted. This is, therefore, a consequence of EU law and not national law. Second, the argument that the existence of liability for judicial acts violating EU law amounts to permit States to violate EU law so long as they are willing to pay for it is equally unconvincing. A similar argument can be made in respect of national law itself. Consider, for

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<sup>17</sup> Somek, ‘Monism: A Tale of the Undead’ 17.

<sup>18</sup> Somek, ‘Monism: A Tale of the Undead’ 18

<sup>19</sup> Somek, ‘Monism: A Tale of the Undead’ 19.

<sup>20</sup> Somek, ‘Monism: A Tale of the Undead’ 17.

example, national laws imposing the liability of the state (including, in some cases, by virtue of judicial acts) for violations of the law, in particular the Constitution. Do we put into question the supremacy of the law and the constitution in the national legal order whenever there is liability for state acts violating it? Liability is an additional instrument of enforcement and supremacy, not a price to be paid in order to be exempted from enforcement and supremacy.

For Somek, the decisive element appears to be the lack of an effective enforcement instrument against recalcitrant Member States. But he measures the enforcement power of EU law in light of an “ideal” that does not correspond to the reality existing in many States. Usually courts do not have any material force to impose on the political process compliance with their decisions.<sup>21</sup> That does not lead us to put into question their legal authority. Even if it can be stated that the European Union lacks the army at the disposal of federal governments, it has other alternative and perhaps more effective instruments in the day-to-day effectiveness of the law. It now has the power to impose fines on States not complying with EU law. This does not exist, for example, in the United States. If there may be greater compliance with the supremacy clause in the United States<sup>22</sup> I don’t think it is due to the enforcement mechanisms at the disposal of the federal government.<sup>23</sup>

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<sup>21</sup> There are even examples, at national level, of constitutional decisions that have not been complied with by the political process or only complied after extensive delays. Italian Corte Costituzionale, Decisions No. 826/1988 of 13 July 1988 and No. 420/1994 of 5 December 1994 and No. 466/2002 of 20 November 2002 (all on Mediapluralism). To some extent also German Constitutional Court, Order of 16 May 1995 1 BvR 1087/91 (Crucifixes in Bavarian Classrooms).

<sup>22</sup> Which has not always been the case. See R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford, Oxford University Press, 2009) ???.

<sup>23</sup> See below the discussion on the degrees of constitutional pluralism.



The core of Somek's criticism must and does lay somewhere else. First, he does not consider it possible for national courts to accommodate the claims of EU law without severing their ties with the national legal order. But, in fact, national courts are now tied to both the national and EU legal orders. They are part of a European legal system composed of both the EU and national legal orders.<sup>24</sup> What we see in the practice of courts is an attempt to accommodate the claims of those legal orders without severing ties with either of them. When conflicting claims may exist they make use both of principles of EU law, such as supremacy and direct effect, and of principles developed under national law, such as the *so lange* doctrine of the German Constitutional Court or the counter-limits of the Italian Constitutional Court, to reconcile those claims.

More importantly, , Somek argues that constitutional pluralists give up precisely where an answer is most needed: what happens when the constitutional conflict cannot be prevented or solved?<sup>25</sup> There are different possible replies to this critique. They depend on different normative standpoints on constitutional pluralism to be discussed below. At this point, it is enough to state that one of the purposes of constitutional pluralism is precisely to legitimate leaving that question open and that, at an empirical level, the fact that the question remains open is a simple description of the constitutional status quo in Europe and only serves to reinforce the value of constitutional pluralism since its articulation of techniques of

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<sup>24</sup> See above.

<sup>25</sup> Somek, 'Monism: A Tale of the Undead' 18. Nico Krisch, a pluralist himself, puts forward a different, but related, open question. For him, the parallelism often made between pluralism and checks and balances "leaves open a crucial question: who should be entitled to check whom and why?". See: *Beyond Constitutionalism: The Pluralist Structure of Postnational Constitutional Law*, Oxford, Oxford University Press, 2010, p. 89.

accommodation of the competing constitutional claims helps decreasing the number of times that the question will pose itself.

Another usual empirical challenge departs from the example of the amendments to national constitutions whenever a new Treaty of the EU (or any EU act for that purpose<sup>26</sup>) collides with a national constitution. Those amendments of national constitutions are presented as evidence of national constitutional supremacy that would, otherwise, prevent the entry into force of the new Treaty.<sup>27</sup> This would be particularly the case when such collision has been ascertained by a national constitutional court and the latter imposes amending the Constitution in order to eliminate such incompatibility.<sup>28</sup> In national systems that allow ex-ante constitutional review of a treaty subject to national ratification (including EU treaty amendments), this requirement of constitutional conformity before the Treaty can be ratified would be evidence that the final authority ultimately rests with national constitutions. However, such constitutional control takes place as part of the ratification process of the treaty and, as such, is better conceived as part of the treaty amendment process itself. In other words, it is more appropriated to talk about such national constitutional ex-ante control as part of the EU law or constitution making process and not as a limit to the supremacy of a EU law that does not yet exist. Moreover, one can question if constitutional amendments generated by EU treaty amendments are, in fact, evidence of EU law subordination to national constitutions. Instead, can they not be

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<sup>26</sup> Polish Constitutional Court, Decision of 27 April 2005, P 1/05 (European Arrest Warrant).

<sup>27</sup> French Constitutional Council, Decision of 9 April 1992 No. 92-308 DC (Maastricht I); German Constitutional Court, Judgement of of 30 June 2009 2 BvE 2/08, para. 113 (Lisbon); Spanish Constitutional Court, Decision of 1 July 1992 Case No. 1263/92 (Maastricht).

<sup>28</sup> Polish Constitutional Court, Decision P 1/05 (European Arrest Warrant).

presented as a requirement imposed by EU law on national constitutions?<sup>29</sup> In fact, whenever a possible conflict was detected between a national constitution and an EU Treaty it was the national constitution that was amended and not the EU Treaty.<sup>30</sup> The same happened when the Polish Constitutional Court declared, in ex-post review, that the EU arrest warrant was contrary to its national constitution. The Polish Court did not declare the EU act inapplicable. Instead, it preserved its application while granting the Polish political process some time to amend the Constitution in order to eliminate such incompatibility.<sup>31</sup>

It is for these reasons that some challenge the empirical claim of constitutional pluralism from the opposite direction: the supremacy of EU law would now be the rule and an established fact and that would be so even with respect to national constitutions.<sup>32</sup> This would amount to a monism of EU law, with national courts having changed their primary allegiance towards EU law. The later would provide their rules of recognition or the grundnorm. However, both the statements of national courts (including the usual reconstruction of EU law supremacy as derived from national constitutional law) and their practice defy this narrative.<sup>33</sup> Moreover, if it is

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<sup>29</sup> In this sense, FL Pires, 'Competência das Competências»: Competente mas sem competências?', (1998 ) nº3885 *Revista de Legislação e Jurisprudência* 356.

<sup>30</sup> Spanish Constitutional Court, Case No. 1236/92 (Maastricht); French Constitutional Council, Decisions No. 92-308 DC (Maastricht I) and of 2 September 1992 No. 92-312 DC (Maastricht II); Portuguese Constitutional Court, Decision of 1 February 1989 Case No. 184/89 (ERDF); Cyprian Supreme Court, Decision of 7 November 2005 (European Arrest Warrant). See also the references in J Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' 397 *et Seq.*

<sup>31</sup> Polish Constitutional Court, Decision P 1/05 (European Arrest Warrant). J Komarek, 'European Constitutionalism and the European Arrest Warrant: In Search of Limits of "Contrapunctual Principles"', (2007) 44 *Common Market Law Review* 9-40, at 19 and also Z Kühn, 'The European Arrest Warrant, Third Pillar Law and National Constitutional Resistance/Acceptance: The EAW Saga as narrated by the Constitutional Judiciary in Poland, Germany and the Czech Republic', (2007) 3 *Croatian Yearbook of European Law & Policy* 99-133.

<sup>32</sup> See Barents, chapter XXX in this volume; Baquero (rather not)? Check better. See also

<sup>33</sup> For a general overview and more detailed presentation of this argument see M Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N Walker (ed) *Sovereignty in*

true that the EU claim of supremacy forces national courts to reconstruct even their national constitutional law, it is equally true that national constitutional claims also shape how EU law is developed and sensitive to national constitutional traditions.

The current reality is better understood as one where EU and national legal orders can be construed as normatively autonomous but also institutionally bound by the adherence of their respective actors to both legal orders. The later bond is institutionally operated but founded on a normative commitment to European constitutionalism that has important consequences. In particular, it requires a coherent and integrated construction of the European legal system by all those different actors.

Empirically, the open question remains open. The examples of a discursive practice among courts acknowledging this situation abound.<sup>34</sup> This does not involve courts using the language of constitutional pluralism. Constitutional pluralism does not require courts to talk about constitutional pluralism in their decisions. It does not even require for courts to engage expressly with other courts. Those that say that courts do not endorse constitutional pluralism, because they neither talk about constitutional pluralism nor cite

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*Transition* (Oxford, Hart Publishing, 2003), 501. See also D Chalmers, 'Judicial Preferences and the Community Legal Order' (1997) 60 *The Modern Law Review* 164-199 and 'The Autonomy of EU Law and the supply of Legal Goods' (on file with the author); M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', (2005) 11 *European Law Journal* 262-307 and the contributions in AM Slaughter, A Stone Sweet and J Weiler (eds.), *The European Courts and National Courts – Doctrine and Jurisprudence*, (Oxford, Hart Publishing, 1998). For recent decisions of national constitutional courts which only accept a conditional form of supremacy see: German Constitutional Court, Decisions 2 BvE 2/08 *et al.* (Lisbon) and of 6 July 2010 2 BvR 2661/06 (Honeywell); Czech Constitutional Court, Decisions of 28 November 2008 No. Pl. US. 19/08 and of 3 November 2009 Pl. US. 29/09 (Lisbon); French Conseil d'Etat, Decision of 7 February 2007 No. 287110 (Arcelor). The approaches of the national courts to such conditionality vary however. For a case study of patterns of national judicial decisions openly disregarding EU law see F Pereira Coutinho, *Os Tribunais Nacionais na Ordem Jurídica Comunitária: O Caso Português* (2004) PhD Thesis Universidade Nova de Lisboa.

<sup>34</sup> See cases cited in the previous note and Maduro, 'Contrapunctual Law'. See also several examples in Sarmiento, ' ' chapter XXX in this volume and Komarek, ' ' chapter XXX in this volume. Some, however, deny this discursive practice actually exists. See, for example, Somek, 'Monism: A Tale of the Undead' 35.

decisions of other courts, miss the point. The fact that courts continue to narrate the law according to the internal viewpoint of their legal order does not mean that such viewpoint has not been altered by reason of constitutional pluralism. The primary example is how many national courts have interpreted their constitutions so as to incorporate the demands arising from the supremacy claim of EU law without formally accepting, in most cases, such supremacy. The narrator is still the national constitution but the script has changed. What constitutional pluralism claims, in this respect, is that judicial actors have changed the internal perspective of their legal order in order to accommodate the claims of the other legal order. As such, the new internal perspective is informed by constitutional pluralism. Courts are not institutionally blind. Courts are aware of the context of constitutional pluralism and react to it. A different issue is if they react in the best way. The later is a normative question, not an empirical one.

### **The Normative Claim**

While the empirical thesis of constitutional pluralism limits itself to state that the question of final authority remains open, the normative claim is that the question of final authority ought to be left open. Heterarchy<sup>35</sup> is superior to hierarchy as a normative ideal in circumstances of competing constitutional claims of final authority. This normative thesis implies, in practice, another: that those competing constitutional claims are of equal legitimacy or, at least, cannot be balanced against each other in general

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<sup>35</sup> To use the expression of D Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in J Dunoff and J Trachtman (eds.) *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge: Cambridge Univ. Press. 2009) 326-55.

terms. Therein lays another of the usual challenges to constitutional pluralism: that it recognizes a constitutional order where there is none. Such an unjustified extension of constitutionalism might even end up undermining constitutionalism itself. I will address this particular risk below when discussing the relationship between constitutionalism and constitutional pluralism. For now, I will limit myself to the other issues.

As stated, constitutional pluralism recognizes that there is a constitutional claim of final authority on the part of the European Union. As a normative thesis it assumes, furthermore, that such claim is legitimate. That the claim exists is now largely undisputed.<sup>36</sup> But is it legitimate? Questioning this legitimacy would solve the risk of constitutional conflicts by recognizing the supremacy of national constitutionalism (considered the only or higher legitimate form of constitutionalism). Constitutional pluralism implies, therefore, recognizing the legitimacy of the EU constitutional claim. This is the real starting point of constitutional pluralism in the European Union.<sup>37</sup>

Constitutionalism is both possible and necessary in the European Union. But its constitutional claim of authority is not a consequence of the powers the Union has acquired. I am stating this because rather often the constitutional argument for the European Union is based on the need to have constitutionalism as a form of governing and controlling EU power.

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<sup>36</sup> I describe how this claim emerged in Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action'. For other narratives see J Weiler and U Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz', in: AM Slaughter, A Stone Sweet and J Weiler (eds.), *The European Courts and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context*, (Oxford, Hart Publishing, 1998) 331-364, A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford, Oxford University Press, 2000) 166 *et Seq.* and

<sup>37</sup> As explained by Mayer and Wendel behind the emergence of the similar concept of multilevel constitutionalism was precisely the attempt to argue that the concept of constitutionalism should not be limited to the State and could be applied to the European Union. F Mayer and M Wendel, 'Multilevel-Constitutionalism and Constitutional Pluralism', chapter XXX in this volume.

Wherever there is power there ought to be constitutional limits. As a consequence: since the Union has developed autonomous forms of power it ought to be subject to constitutionalism. This might be true but it is not enough to support a constitutional claim to be opposed to national constitutionalism. It would make such claim a product of a circular reasoning that would require the power claimed by the Union to be subject to constitutional control and then use the latter to justify the power being claimed. A deeper justification and legitimacy of European constitutionalism must be derived from its constitutional added value with respect to national constitutionalism. It is this that authorises the former to be opposed to the latter and explains constitutional pluralism. There is an important difference in recognizing that the European Union needs constitutional instruments to limit and govern its power and arguing that the Union has a constitutional claim of authority that can be opposed to that of national constitutions. The latter requires demonstrating that the constitutional claim of the European Union has a legitimacy that can be opposed to that of the States. This does not imply that its constitutionalism is the same as that of the States or even has the same comprehensive social ambition. But it does require for EU constitutionalism to have, in certain respects, a constitutional added value with respect to State constitutionalism that may be opposed to it.

In other works I have articulated where that added constitutional value may be.<sup>38</sup> In short, we can identify three main sources of constitutional and democratic added value that the process of European integration and EU Law can bring with respect to national political communities and their constitutional democracies. First, European constitutionalism promotes

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<sup>38</sup> Maduro, *We The Court*; *idem*, 'Europe and the Constitution' and *idem*, 'Passion and Reason in European Integration'.

inclusiveness in national democracies by requiring national political processes to take into account out-of-state interests that may be affected by the deliberations of those political processes. By committing to European integration, EU states accept to mutually open their democracies to the citizens and interests of other Member States. This amounts to an extension of the logic of inclusion inherent in constitutionalism. Second, European constitutionalism allows national democracies to collectively regain control over transnational processes that evade their individual control. While in the former case we can talk of outbounded democratic externalities (States impacting on out-of-state interests), the latter refers to inbound democratic externalities (out-of-state decisions and processes that affect domestic interests). Third, European constitutionalism can also constitute a form of self-imposed external constitutional discipline on national democracies. There are many instances where domestic political malfunctions can be better corrected by external constraints. These may force national political processes to rationalise national policies that have, for example, become path-dependent or captured by certain interests. In many such instances, EU law's imposed discipline rationalises and, often, reignites a more informed and genuinely open deliberation in the national political process.

This does not ignore that national political communities are still, in many respects, the best forum for pursuing the values of constitutionalism. National constitutionalism is still, in many instances, the best proxy for constitutional values and also serves as a guarantee against possible concentrations and abuses of power from European constitutionalism. The highlighted forms of constitutional added value of European constitutionalism do not provide it with a general claim of supremacy over



national constitutionalism. However, they do provide it with a claim. It is the constitutional added value arising from the mutual correction of each other's constitutional shortcomings that requires pluralism to be maintained between the national and European constitutional orders. As long as the possible conflicts of authority do not lead to a disintegration of the European legal order, the pluralist character of European constitutionalism should be met as a welcomed discovery and not as a problem in need of a solution.

It is this that also explains why European constitutionalism brings us closer to the ideals of constitutionalism. It is not, in itself, a closer representation of constitutionalism than national constitutionalism but their interplay is. This is what constitutional pluralism argues and therein lays its thicker normative claim, one that relates constitutional pluralism and constitutionalism in general.

### **The Thick Normative Claim**

The thicker normative claim of constitutional pluralism is that, in the current state of affairs, it provides a closer approximation to the ideals of constitutionalism than either national constitutionalism or a form of EU constitutionalism modeled after state constitutionalism.<sup>39</sup> In this way, the pragmatic concern that has dominated earlier writings on constitutional pluralism is turned upside down. Constitutional pluralism is not simply a remedy for the risks of constitutional conflicts of authority; it's the best representation of the ideals of constitutionalism for the current context of increased pluralism and deterritorialisation of power.<sup>40</sup>

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<sup>39</sup> It is unclear the extent to which most constitutional pluralists will support the thick normative claim. I am one who does it. Mattias Kumm and likely Daniel Halberstam will likely share this view. Others, such as Neil Walker, appear to keep a more external and agnostic view on this question.

<sup>40</sup> This notion is developed by Gustavo Zagrebelski in *Il Diritto Mite*, Torino, Einaudi, 1992.

To understand this we need to start by recognising that pluralism is inherent in constitutionalism.<sup>41</sup> In fact, constitutionalism aims to simultaneously guarantee and regulate such pluralism: a pluralism of interests, ideas and visions of the common good that is reflected in the paradoxes of constitutionalism and the balance between democratic deliberation and constitutional rights that its modern liberal form embraced.

In a previous work I have argued that constitutionalism is related to three paradoxes: the paradox of the polity; the fear of the few and the fear of the many;<sup>42</sup> and the **question of who decides who decides**. They are paradoxical because they simultaneously embrace conflicting values in an attempt to reconcile them that is at the core of constitutionalism. With respect to all of them, national constitutionalism could be seen as both a promoter of and a limit to constitutionalism.

The polity is the basic assumption of a Constitution. Constitutional questions have always been addressed within a pre-existing polity (normally the Nation State). It is that polity that has served as the yardstick of constitutionalism. Relations within the polity are regulated by constitutional law. Relations among polities, instead, have been dominated by a different set of actors (the States) and a different set of rules (international law). The Constitution both defines and presupposes a polity or political community whose members are bound by such constitution. It is from this political community and its people that the democratic process draws its legitimacy and that of the majority decisions reached in the democratic representative process. The basis of the polity is normally referred to as “the people”.

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<sup>41</sup> I am referring in here to the holistic notion of constitutionalism described and discussed by Matej Avbelj in his contribution to this book

<sup>42</sup> An expression originally crafted by N Komesar, *Law's Limits: The Rule of Law and the Supply of Demand Rights* (Cambridge, Cambridge University Press, 2001) 60.

Constitutional and democratic theory scholars normally presuppose that “a people” already exists.<sup>43</sup> But what makes a people? And who has the right to be considered as part of the people? And why should participation and representation be limited by the requirement of belongingness to such a polity? It is the paradox of the concept of polity in its relation with constitutionalism and democracy. Isn’t a national demos a limit to democracy and constitutionalism? In fact, as discussed above, participation in national democracies is not granted to all those affected by the decisions of the national political process but only to those affected which are considered as citizens of the national polity. It is not the existence of democracy at national level that is contested but the extent of that democracy.<sup>44</sup> There is a problem of inclusion faced by national polities.<sup>45</sup> Such problem of inclusion does not exist simply by not taking the others into account in decisions that affect them. National polities are often closed to many which would accept their political contract. National polities tend to exclude many which would accept their political contract and are affected by their policies simply because they are not part of the *demos* as understood in a certain ethno, cultural or historical sense. In this way, if national polities can be seen as an instrument of constitutionalism, they also limit its ambitions of full representation and participation.

The same occurs with the paradox of the fear of the few and the fear of the many. All major constitutional arguments and doctrines gravitate around a complex system of countervailing forces set up by constitutional law to

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<sup>43</sup> R Dahl, *Democracy and Its Critics* (New Haven, Yale University Press, 1989) 3.

<sup>44</sup> The difference between the existence of democracy and the extent of democracy is highlighted by J Elster, *Deliberative Democracy* (Cambridge, Cambridge University Press, 1988) 99.

<sup>45</sup> Dahl points out that polities have a twofold problem: ‘1 - The problem of inclusion: What persons have a rightful claim to be included in the demos; 2 - The scope of its authority: What rightful limits are there on the control of a demos’, *supra* 119. See also David Held, *Democracy and the Global Order* (Cambridge and Oxford, Polity Press, 1995) mainly chapters 1 and 10.

promote the democratic exercise of power (assure that the few do not rule over the many) but, at the same time, to limit that power (assuring that the many will not abuse of their power over the few). There are two basic fears underlying constitutional discourse and organisation: the fear of the many and fear of the few. The core of constitutional law is the balance between the fear of the many and the fear of the few. Constitutional law sets up the mechanisms through which the many can rule but, at the same time, creates rights and processes for the protection of the few.<sup>46</sup>

The final paradox is that of who decides who decides? In reality, the question of “who decides who decides”, that appears to dominate debates about the relationship between national and EU constitutionalism, has long been around in constitutionalism. It is a normal consequence of the divided powers system inherent in constitutionalism. In fact, it can be considered as an expected result of the Madisonian view of separation of powers as creating a mechanism of checks and balances. Though national constitutions may have developed historically answers to that question they are a contextual product of certain constitutional practices and not a systemic feature of constitutionalism. On the contrary, the nature of the organisation of power inherent in constitutionalism requires the question to be open and periodically reassessed.

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<sup>46</sup> Bellamy highlights three principles who have defined constitutionalism: rights, separation of powers and representative government. However, in his view, the first has come to predominate in recent years: ‘Rights, upheld by judicial review, are said to comprise the prime component of constitutionalism, providing a normative legal framework within which politics operate’, Bellamy, ‘The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy’, in R Bellamy and D Castiglione (eds.) *Constitutionalism in Transformation: European and Theoretical Perspectives* (Oxford, Blackwell Publishers, 1996) 24-44. Note that Bellamy is, himself, a critical of that dominant view of constitutionalism. See Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Cambridge University Press, 2007.

These paradoxes are a consequence of the constitutional goal of both preserving and regulating political pluralism. At the same time, constitutions provide a, substantively partly fictional but rationally useful, common platform on the basis of which political conflicts assume the nature of competing rational arguments on the interpretation of shared values and not the character of power conflicts.<sup>47</sup> These conflicts are replaced by competing interpretations of the constitution. But in order for constitutionalism to perform this role such pluralism of interpretations is supported by institutional pluralism: different institutions that guarantee that no set of interests acquires a dominant role and that any definition of the common good can be, at any moment, reassessed and contested. Such pluralism of interpretations and institutions ensures the simultaneous expression and accommodation of political pluralism in a particular political community.<sup>48</sup> What constitutional pluralism notes is that such pluralism of interpretations and institutions embraced by constitutionalism has now extended itself to different legal orders.

To understand, however, both the promise and challenges of constitutional pluralism it is important to note that the paradoxes of constitutionalism embody two opposing pulls of modern constitutionalism. One, towards pluralism, linked to the values of freedom and private autonomy. The other, towards unity or hierarchy, linked with the ideals of equality, the rule of law

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<sup>47</sup> Rational discourse through the constitution is the guarantee of a common identity and the stabiliser of the political community in a context of pluralism.

<sup>48</sup> It is the fact that this point is often missed that explains many misunderstandings in the never-ending debate about the role and legitimacy of judicial review. Also there lawyers appear to be looking for the ultimate authority in determining the meaning of the constitution when what is taking place can better be described as a form of institutional competition expressly intended by the embedded pluralism of the Constitution. I develop this point in Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in the Context of Constitutional Pluralism', (2007) 2 *European Journal of Legal Studies* 1-21.

and universality. Modern constitutionalism success has been founded on its capacity to reconcile both at the level of the State.

These opposing pulls are reflected in a tension between the political project of pluralism endorsed by constitutionalism and its legal emphasis on hierarchy and primacy.<sup>49</sup> They are however mutually dependent. Pluralism is ordered through democracy and in order to fulfil the idea of self-government requires a unified and closed political space. This entails, in turn, an ultimate source of political authority. State constitutionalism in its modern form made that political authority reside in the people. The people is both the site and source of pluralism and the unified entity upon which rests ultimate political authority. This is also linked to a conception of constitutionalism as providing a comprehensive social ordering. Nico Krisch as recently labelled of foundational constitutionalism, **the dominant form of constitutionalism to emerge of political modernity**. One, where a comprehensive and foundational constitutional settlement constitutes the basis for the realisation of both public and private autonomy.<sup>50</sup>

The most powerful challenge to constitutional pluralism departs therefore from the association made between the values of constitutionalism and the existence of an ultimate source of political authority expressed, in legal terms, in the absolute primacy of the constitution. These links are considered essential to protecting the constitutional values of the rule of law, equality and universalism.

This challenge comes in to two very different forms however. A set of authors argues that the incompatibility between certain constitutional values

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<sup>49</sup> See, in this book, the chapter by Matej Avbelj and his discussion of the work of Dieter Grimm.

<sup>50</sup> N. Krisch, *Beyond Constitutionalism, The Pluralist Structure of Postnational Law*, Oxford, Oxford University Press, 2010, pp. 47 ff., in particular p. 52.

and pluralism requires abandoning pluralism altogether and returning to either monism or dualism. Another set of authors argues that the solution is to be found, instead, in radically departing for constitutionalism as we know it.

The first form of criticism was perhaps initiated by Baquero in a well known piece where he accused constitutional pluralism of undermining the rule of law.<sup>51</sup> It is also what largely underlies the empirical criticism made by Alexander Somek discussed above. In practice, Somek does not conceive as possible for courts to both adhere to the conception of the law internal to their legal order and recognise an external account that challenges that internal conception because that would undermine the authority of the law. The same legal order cannot claim to have authority to universally address all issues within its jurisdictional boundaries and, simultaneously, accept to negotiate that authority with others. As Alexander Somek puts it: “law is intrinsically monistic”.<sup>52</sup>

In a recent article Pavlos Eleftheriadis makes a comprehensive critique of pluralism focusing on the same perceived incompatibility with core values of constitutionalism. Adopting Dworkin’s concept of integrity as an essential value of the legal order,<sup>53</sup> Eleftheriadis argues that constitutional pluralism does not respect that value and, in fact, leads to a legal order of unpredictable results where courts and officials can freely choose between rival constitutional schemes.<sup>54</sup> In his own words:

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<sup>51</sup> Baquero Cruz, ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’. I debated some of those criticisms with Baquero in Avbelj, Matej and Komárek, Jan (eds.), **Four Visions of Constitutional Pluralism** ( October 28, 2008). **EUI Working Paper Law No. 2008/21**.

<sup>52</sup> Somek, ‘Monism: A Tale of the Undead’, 42.

<sup>53</sup> R. Dworkin, *Law’s Empire*, Cambridge, MA: Harvard University Press, 1986.

<sup>54</sup> P. Eleftheriadis, *Pluralism and Integrity*, *Ratio Juris*, v. 23, No. 3, 2010 (365-89), at 377-378.

“The role of the constitutional doctrine is to impose some order on the way in which the various doctrines of law hang together. It is the nervous system of the law. If we say that our constitutional doctrine is relaxed about the coherence of its various frameworks, then we abandon coherence everywhere else in the system.”<sup>55</sup>

Curiously, however, Eleftheriadis endorses a form of dualism. The reason is that integrity is always to be assessed from the point of view of an individual legal order.<sup>56</sup> This may sound formalistic, particularly when he adds that any such legal order must be able to accommodate in law its relations with other states and international law.<sup>57</sup> For him, in practice, such accommodation is achieved by recognizing the other legal order under a doctrine of dualism. One may wonder then what exactly is the distinction from pluralism or how is political integrity really protected when conflicts occur between these legal orders. I think the difference from pluralism, for Eleftheriadis, is to be found in the fact that dualism does not impose an obligation of mutual accommodation on both legal orders. They co-exist and prevalence of one or the other is a simple function of jurisdictional power. Constitutional pluralism, on the other hand, requires mutual recognition but also communication and accommodation. As to political integrity, the reason why Eleftheriadis assesses it by reference only to each individual order must be found in the connection between the Dworkian value of political integrity and the constitutional assumption of a unified and closed political space subject to an ultimate source of political authority. The obligation of

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<sup>55</sup> *Ibidem*, 378.

<sup>56</sup> *Ibidem*, 381.

<sup>57</sup> *Ibidem* 381 and 388.



political integrity is naturally linked to that conception of political authority and stems from the unique position of the later in a State.

The problem occurs when, as in the postnational context we currently live in, it is difficult to continue to talk about unified and closed political spaces subject to an ultimate source of political authority. We can still do it in conceptual terms by artificially closing and insulating national polities under a self-referential notion of political authority that extends so far as the legal hierarchy and claim of supremacy of the constitutional order itself claims to extend. But this is a purely circular reasoning. More importantly, trust in political integrity will gradually erode as the purported coherence and universality of any particular legal order is increasingly challenged, in practice, by its interaction with other legal orders.

In this respect, constitutional pluralism does nothing more than adapt constitutionalism to the changing nature of the political authority and the political space.<sup>58</sup> The challenge is to adapt it while protecting political integrity and the correspondent ideals of coherence and universality of the legal order. This is what I have attempted to do in a previous work. I have developed a set of criteria to be adopted by all actors of the European legal system so as to preserve coherence and universality in a context of pluralism.<sup>59</sup> I called them the principles of contrapuntual law so as to highlight that, as in musical counterpoint harmonization of different melodies, so to in Europe's constitutional pluralism it would be possible to preserve coherence and integrity if all actors, while preserving the internal viewpoint of their legal order, will commit to some common meta-

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<sup>58</sup> Perhaps it will be even more appropriate to talk, as Nico Krisch does, of a change in the forms of public and private autonomy.

<sup>59</sup> See mine Contrapuntual law.

methodological principles of substantive character in the protection of coherence and universality and broadly the promotion of political integrity beyond the State.

Eleftheriadis recognizes my effort but considers that my principles require a unifying institutional basis. For that reason, my theory would be a form of implicit monism.<sup>60</sup> To prevent the risk of entering into a discussion about the monist label I will limit myself in here to two brief notes. I have no problem in recognizing that my theory of constitutional pluralism is different from radical forms of pluralism<sup>61</sup> or even from politically or international law arbitrated forms of pluralism.<sup>62</sup> But it does not impose a unifying institutional basis. Moreover, the meta-principles of contrapunctual law do not put into question pluralism because they are themselves a product of pluralism: the rules of the game are entered into by playing the game according to the rules. The meta-principles or **rules of discourse are not hierarchically imposed by an external authority**. In fact, any of the participant courts can “propose a rule” by acting or narrating the law in a certain way and that becomes a rule of the discourse to the extent that it becomes part of the discourse itself. Each judicial decision is an illocutionary act but, in this respect, their performative value is dependent on their discursive value. What I argue is that once courts are in a context of constitutional pluralism they ought to manage the risk of constitutional conflicts, in the context of the European Union, by embracing those principles. This is so, because these principles provide the best way for all

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<sup>60</sup> P. Eleftheriadis, *Pluralism and Integrity*, 387.

<sup>61</sup> See, notably, Jan Komarek (**JAN CAN YOU DECIDE WHAT BEST TO CITE FROM YOU IN HERE?**)

<sup>62</sup> I am thinking of the different versions of pluralism that can be found in Neil MacCormick’s work: *Beyond the Sovereign State*, *Modern Law Review*, 1993, Issue, 1-18 and *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford, Oxford University Press, 2002.

courts involved to fulfill, in a pluralist context, the promise of constitutionalism that they are bound to pursue.

Another group of authors believes, however, that constitutional pluralism requires a radical departure from constitutionalism itself. Matej Avbelj, in his contribution to this book, put this in the form of an alternative faced by pluralists: either to remain faithful to the conventional meaning of constitutionalism and give up on pluralism or remain genuinely pluralist and radically redefine constitutionalism.<sup>63</sup> In a similar vein, Nico Krisch also argues that the solution is to be found beyond constitutionalism, particularly if understood in its foundational modern form. Pluralism is the best way to pursue the ideals of constitutionalism in a postnational world but that requires a radical departure from constitutionalism as we know it.<sup>64</sup>

However, as I stressed before, pluralism is inherent in constitutionalism, even in its conventional form. The tension between the unitary conception of the law and political authority, on the one hand, and the pluralist conception of society and the political space, on the other, is at the core of the constitutional project, at least in the modern liberal form that came to dominate its conventional understanding. As such, constitutional pluralists are not confronted with anything new. But we must address that tension in a new context. In other words, a new reconciliation must be attempted between pluralism and unity to update constitutionalism to the needs of postnational political communities.<sup>65</sup>

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<sup>63</sup> Can European Integration be Constitutional and Pluralist – Both at the Same Time?

<sup>64</sup> N. Krisch, *Beyond Constitutionalism*,

<sup>65</sup> Referring both to the emerging political communities beyond the State and to the challenges face by traditional political communities in a context of regional and global integration.

Constitutional pluralists try, in effect, to address the old constitutional paradoxes in the new forms that result from the current practice of law in a pluralist context. As Neil Walker puts it: “the constitutional pluralist seeks to retain from constitutionalism the idea of a single authorizing register for the political domain as a whole while at the same time retaining from pluralism a sense of the rich and irreducible diversity of that political domain”.<sup>66</sup> To sum up, the promise of constitutional pluralism lays in the success with which it will be able to reconcile again the opposing pulls of pluralism and unity that have always dominated constitutionalism.

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<sup>66</sup> N Walker, ‘Constitutionalism and Pluralism in Global Context’, RECON Online Working Paper 03/2010, p. 1.