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Four Visions of Constitutional Pluralism

Matej Avbelj and Jan Komárek (eds.)



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**MATEJ AVBELJ AND JAN KOMÁREK (eds.)**

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## **Abstract**

What is constitutional pluralism? What does it stand for? What does it want to achieve, contribute, or change in the European integration? Is it a viable, desirable or perhaps even an indispensable theoretical take on it? These were the leading questions discussed in the Symposium “Four Visions of Constitutional Pluralism” at the European University Institute in January of this year. Within the framework of the Legal Theory Working Group and under the auspices of the Academy of European Law, the organizers, Matej Avbelj and Jan Komarek, hosted four key scholars from the field of the EU legal and constitutional theory. Julio Baquero Cruz, Mattias Kumm, Miguel Poiates Maduro, and Neil Walker engaged in a groundbreaking three-hour discussion of their respective theoretical visions of the European integration. This working paper contains a full transcript of the Symposium.

## **Keywords**

European integration – constitutionalism – pluralism - constitutional pluralism - EU legal theory



## *Four Visions of Constitutional Pluralism*

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### **1. Introduction: The Four Visions**

The present working paper offers a transcript from the symposium “Four Visions of Constitutional Pluralism” held at the European University Institute on 11 January 2008 under the Academy of European Law’s auspices. Four different perspectives on constitutional pluralism were put together and thoroughly discussed by those, who brought them into the scholarly discourse: those by Julio Baquero Cruz,<sup>1</sup> Mattias Kumm,<sup>2</sup> Miguel Poiares Maduro,<sup>3</sup> and Neil Walker.<sup>4</sup> The symposium was organized by Matej Avbelj<sup>5</sup> and Jan Komárek,<sup>6</sup> who also moderated the discussion.

Constitutional Pluralism has grown in its popularity, especially in the last five or so years. However, it has paid price for its popularity. The concept has gained so many meanings that often the participants in the debate talk past each other, each endorsing a different understanding of what constitutional pluralism actually means. The core aim of the symposium therefore was to clarify the following questions: What is constitutional pluralism? What does it stand for? What is expected to achieve, contribute, or change in European integration? Is it a viable, desirable or perhaps even an indispensable theoretical take on European integration?

But let the transcript speak in its own words:

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***Matej Avbelj***

As we really have a unique opportunity to host four key scholars from the field of EU legal and constitutional theory, it would be imperative not to lose any more time and just open the floor. However, as the debate in the next minutes will doubtlessly be extremely dynamic and as not everyone is equally familiar with all the details and intricacies of the four visions that will be outlined, allow me to sketch some background to today's debate: by putting the emergence of EU constitutional pluralism in context and by presenting, if only briefly, some of the key theoretical points our speakers hold.

To my understanding, and the speakers will have a chance to express their agreement or disagreement with it, the theory of constitutional pluralism has developed against a backdrop of what should be best understood as a classical constitutional narrative about the European integration.<sup>7</sup> This is a theoretical perspective of integration, which has for at least two decades, starting in the early 1980s, dominated both the theory as well as the representation of practices of integration.

Following this approach, that all of you are certainly familiar with,

- the *telos* of European integration was an ever closer union between the peoples of Europe which required that integration proceeds just one way.
- Harmonization, if not even unification, was the main paradigm and all the differences and diversity existing in the integration were perceived as obstacles, originally to free trade and then to the integration as such.
- They were expected to give way to the supreme Community law requiring uncompromised uniformity of its application across all the Member States.
- The employment of the constitutional narrative was expected to serve exactly this integrationist cause.
- On the basis of the statist constitutional federal experiences, it was presumed that as constitution confers unity and order in the statist environment the same virtuous affects should occur in the supranational environment as well.
- The statist origins of classical constitutionalism, if considered and recognized at all, were accordingly not perceived as something contentious or problematic. To the contrary, the formal constitution of integration was explicitly declared to be of a hierarchical nature and literally indistinguishable from that of a federal state.
- Also in substantive terms, where the economic constitution was to be complemented by a complete political constitution the latter was supposed to mirror, especially in pursuit of appropriate model of democracy and human rights policy, a (federal) state.

However, for various reasons, which will be certainly touched upon during the symposium, this classical constitutional vision came under strain and it appeared to be increasingly descriptively, explanatorily as well as normatively inadequate.

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<sup>7</sup> For a more detailed discussion of the evolution of the EU constitutional narratives, *see*, M. AVBELJ, "Questioning EU Constitutionalisms", *German Law Journal*, 2008, Vol. 9, No. 1, pp. 1-26.



As Julio Baquero Cruz observed: that which had been appreciated as a “True World” suddenly turned out to be just a fable.

Our speakers stepped in at this point. Already in 1998, when classical constitutionalism was still dominating the EU legal mindset, Mattias Kumm outlined a more pluralist approach to the integration with a special focus on the uneasy relationships between the national constitutional courts and the ECJ.<sup>8</sup> A couple of years later he presented a detailed jurisprudential account for the resolution or avoidance of constitutional conflicts in integration.<sup>9</sup> Its purpose was to contribute to the coherence of the European legal order as a whole by finding a best fit balance between the national and EU constitutional concerns all things considered. This is how Mattias’ theory of “best-fit universal constitutionalism”, as I prefer to call it, has come to life.

He was followed by Miguel Poiates Maduro who has taken up a very similar approach, perhaps transcending a mere-court oriented focus - and developed his own pluralist vision of integration. This could be best captured under the title of “harmonious-discursive constitutionalism.” Miguel’s main theoretical concern has namely been: how to ensure that this admittedly pluralist, heterarchical integration remains in harmony - in a type of contrapunct. The answer is to be found in a discursive practice among all the actors involved whose common basis is to be ensured by a set of contrapunctual principles. The interesting details of how precisely this is supposed to work, will be, I am sure, explained by Miguel.<sup>10</sup>

Neil Walker, on the other hand, has gone even a step further. He connected new developments in European integration with a broader picture of an allegedly declining Westphalian paradigm, accompanied with a simultaneous revival of and unprecedented challenges to constitutionalism that was expected to provide answers to an increasingly fragmenting, multi-level and complex world of social affairs. His theory of epistemic meta-constitutionalism is charged with addressing these points. Neil claims that while legal reality of European integration is marked by a plurality of legal orders existing as different epistemic sites, these can be connected through the meta-language supplied by constitutionalism.<sup>11</sup> How exactly is this to happen, we should learn today.

Finally, Julio Baquero Cruz has resisted the allure of pluralism and has remained on the skeptical side. In his very recent piece, published as a Robert Schumann working paper,<sup>12</sup> he warned against overly enthusiastic pursuit of pluralist solutions in integration and, in a way very strongly, pointed his critical finger at the ‘pluralist movement’ contending that the latter might well be acting at integration’s disadvantage, rather than vice versa. In his, what I would call, re-vindicated classical constitutional

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<sup>8</sup> M. KUMM, "Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice", *Common Market Law Review*, 1999, No. 36, pp. 351-386.

<sup>9</sup> M. KUMM, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty", 2005, *European Law Journal*, 11, 262-307.

<sup>10</sup> M.P. MADURO, "Contrapunctual Law: Europe’s Constitutional Pluralism in Action", in N. WALKER (ed.), *Sovereignty in Transition*, Hart, Oxford, 2003, 501-537.

<sup>11</sup> N. WALKER, "The Idea of Constitutional Pluralism", 2002, *Modern Law Review*, 65, 317-359.

<sup>12</sup> J. BAQUERO CRUZ, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, Robert Schuman Centre for Advanced Studies (RSCAS) Working Paper No. 2007/13, European University Institute; an updated version has been published in, 2008, *European Law Journal* 14, 389-422.

account, he interestingly asks: even if a current reality of European integration is pluralist, why justify it and defend it as such?

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The transcript follows the structure of the symposium. In its first part Julio Baquero Cruz, Miguel Poiares Maduro and Neil Walker discussed the questions that we have set in the introduction. As Mattias Kumm was able to join the symposium only in its second part, we started by asking the other three speakers to formulate questions that his work had raised to them. After that there was an open discussion with the other participants of the symposium. The questions collected from the audience are only summarized in this transcript due to technical problems with recording; however, we hope that this summary reflects well the dialogic nature of the whole symposium.

Matej Avbelj and Jan Komárek

## 2. What is Constitutional Pluralism?

### *Jan Komárek*

There are a lot of labels in the European constitutional discourse. Because we are now talking about constitutional pluralism, the first question would be to the theorists: what do you mean by constitutional pluralism? And this in my view encounters two sub-questions. The first one asks what the constitution is, or perhaps what is behind this talk about constitution. What is a constitutional authority, not in a formal sense, but in some deeper normative sense? The second sub-question wonders: “what does pluralism mean?” Does it really suggest that there are various mutually irreconcilable views of different *constitutional* perspectives? And is this pluralist view, some would say even radical pluralist view, compatible with the idea of constitutionalism? Can we have constitutional pluralism? This is the first question and I would ask Miguel to address it.

### *Miguel Poiares Maduro*

First of all, thanks to Matej and to Jan for organizing this and providing us with an opportunity of exercising a kind of psycho-analysis: we are supposed to articulate more clearly and coherently some of the ideas raised in our writings and which we did not fully developed in them. And Matej has made the task more difficult than I had thought at the beginning. When they were organizing this I said, jokingly, that they had self-appointed themselves as a kind of apostles of constitutional pluralism and I thought it was actually the role of apostles to furnish deeper explanations while our role should be limited to the labels. Now, it seems they really expect us to dig deeper into the normative foundations of our work on constitutional pluralism what won't necessarily be an easy task.

Be that as it may, you have asked a series of questions, and the first one that you want us to address is what is constitutional pluralism: what we mean by it and how does it relate with what we mean by constitutionalism in general.

These questions are of particular interest to me because they feed into the argument that I have been trying to develop, both in my “contrapunctual law”<sup>13</sup> and “as good as it gets”<sup>14</sup> pieces, according to which constitutional pluralism should not be seen simply as a solution, be it pragmatic or normative, to the problem of conflicting constitutional claims. Rather it should be conceived of as something which is inherent in the theory of constitutionalism itself. In this way I agree with the invitation inherent in your question to focus on constitutionalism in a deep normative sense, especially as I would define constitutionalism as a normative theory of power. As I have argued before, we can identify three dimensions of constitutionalism comprehended in this normative fashion.

The first one refers to constitutionalism as a set of legal and political instruments to limit power, in short: constitutionalism as a limit to power. The second one regards the role of constitutionalism in creating a deliberative framework for free, informed and inter-subjective rational deliberation in which different competing visions of the common good can be arbitrated and made compatible with each other in a manner that tries to balance democratic concerns in the control of the political process by a few with concerns of the tyranny of the many. The third is the notion of constitutionalism as a kind of repository of prevailing notions of the common good in a particular political community. But I see these three dimensions as a constitutional instrument for the rationalization of democracy, in the sense of promoting maximization on the one hand of participation, and this has to do with the intensity and the scope of participation, but also and at the same time of representation. However, under the idea of representation I mean something particular in this context. I hold that constitutionalism is also concerned with the fact that politically legitimate decisions should take into account the differentiated impact that different decisions may have on different groups. In my view the underlying purposes and goals of constitutionalism require taking into account the scope and intensity of participation but also the differentiated impact of different decisions on different people. Now this creates immediately inherent tensions and paradoxes in constitutionalism and that is why, in my view, pluralism is inherent in constitutionalism: you can derive in similar situations equally normatively valid competing constitutional claims. In this way, it is inherent in the nature of constitutionalism that there can be no monopoly of constitutional claims and that often these constitutional claims are expressed by different institutions that compete in giving meaning to the Constitution.

Constitutional pluralism in the sense that we have developed in the EU has, however, a broader dimension: it refers to a pluralism of constitutional jurisdictions. Those equally valid normative constitutional claims are now supported or developed by different jurisdictions. That is a new dimension of the constitutional pluralism which, however, is inherent in constitutionalism itself.

What are the expressions of this new constitutional pluralism that we have nowadays? For me there are five of them.

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<sup>13</sup> M.P. MADURO, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", *supra* note 10.

<sup>14</sup> M.P. MADURO, "Europe and the constitution: What if this is as good as it gets?", in J.H.H. WEILER, M. WIND (eds.), *European Constitutionalism Beyond the State*, CUP 2003, Cambridge, 74-103.

The first one is a plurality of constitutional sources and we see that in the EU. European constitutional law is drawn from different constitutional sources, not from a single constitutional document, and those sources are national and European. The second one is a pluralism of jurisdictions or of different constitutional sites. This is particularly the case regarding constitutional adjudication, it is linked to the more well known aspect of European constitutional pluralism: the Kompetenz-Kompetenz question, in which Matej and Jan have worked on. The third one is an interpretative pluralism if you want. It is a pluralism which is based not only on different sources but on competing interpretations of the same source by institutions that are not organized in a hierarchical manner. Even in traditional constitutions, in the context of a traditional political community, you cannot say in many instances that there was a clear hierarchy between the political process and courts for example, i.e. a clear monopoly of one of these institutions over the interpretation of the constitution. Traditionally the arbitration between these institutions has been left to courts but that is not a logical necessity and it has varied historically and between political communities. In terms of the normative conception of the constitution you cannot say that courts have or always ought to have a monopoly or final authority of interpretation of the constitution over the political process. And this is linked to this kind of interpretative pluralism. So that leads us to a pluralism of institutions that is something more than simply the pluralism of jurisdictions that has been the dominant concern in the EU context. The fourth expression of pluralism is a pluralism of powers. We increasingly have new forms of public and private power that challenge traditional legal dogmatic categories and raise constitutional questions because they affect the mechanisms of accountability linked to those legal categories. I see this as part of this new constitutional pluralism. And the fifth pluralism is a pluralism of polities. This has two consequences or two dimensions. The first one is that political pluralism in the EU is expressed in a more radical form because different political views of the constitution are supported not simply by different political groups but by different political communities. It is a more radical form of political pluralism than what you normally have at the level of a single political community.

***Neil Walker***

But is that different from pluralism in states?

***Miguel Poiares Maduro***

It is different because what I am talking about is a political pluralism where the different political views are presented as expressing the self-determination of different political communities. The other dimension is mobility between political communities. We do not have only a constitutional pluralism in the EU that is developed on the basis of competing constitutional claims from different jurisdictions or from different political communities. We also have a politics constitutional pluralism at the European level because we can also choose between different constitutional modes of organization by choosing between different political communities. This creates a competition between national constitutional models, if you want.

***Jan Komárek***

Thank you very much for this introduction, setting well the terms of the debate. I would give word to Julio, who is perhaps an opponent of these visions of pluralism and to the suggestions that they could be called “constitutional.” Right?

***Julio Baquero Cruz***

Well, I don't see myself as an opponent of anything. I just defend my own views and what I think would be best for EU law. What is constitutional pluralism is a complex question. I think the important word is not “constitutional”, since we know what it means, but “pluralism” – and how pluralism may affect, enrich or undermine the basic content of constitutionalism. I have three ideas. The first is that our constitutionalism is inextricably linked to modernity, and that it has little to do with ancient and medieval constitutionalism. I agree with Miguel Maduro that it includes all the elements he mentioned, like limits to power, deliberation, etc., but there are other elements which are specifically modern. One of them is *generality*, the idea that a constitutional order covers all aspects of reality. It works against the fragmentation of legal orders which was common currency in European pre-modern history. This was ended by the constitutionalism of modernity, through the centralization of the administrative State or through the creation of federal structures, in which chaotic fragmentation is replaced by ordered division and coherent interaction. In modern constitutionalism you also have a sense of hierarchy, order, and effectiveness.

Pluralism adds a post-modern flavour to constitutionalism. By post-modern I mean all that is fluid and fragmented. And that is what pluralism tries to reflect, the reality of a fragmented law which is always in flux. Perhaps it is more realistic, if the reality of law is more like that, and not at all like the modern constitutional *ideal*. But there may be a risk in that step. Lawyers have probably been the last to embrace postmodernism. First were the architects, then philosophers, linguists, etc., and a minority of academic lawyers have been the last to embrace it, and perhaps they have done it with a risk to their social role, because they may not be compatible. We renounce to an ideal of constitutional law if we embrace the postmodern view of law which is reflected in radical pluralism, not only in the European Union but also in State constitutional law.

I would finally like to draw a distinction between pluralism *within* a legal order and pluralism *between* legal orders. It is clear that in a pluralist society, law, politics and institutions have to reflect that plurality. Otherwise the legal order will create great tensions within the social fabric. But I do not know whether the relationships *between* legal orders in complex political systems like the EU may be properly and effectively constructed along pluralist lines. It is fine to have pluralism within legal systems, within institutions, of the sort you already have in the EU, if you look at the composition of the Court, the Council, the Parliament and the Commission, but I don't know whether the interface between legal orders can be pluralistic. The costs in terms of clarity, certainty and effectiveness may be too high.

*Neil Walker*

Thank you. Thanks for organizing this. Let me begin by reacting briefly to what Miguel and Julio have said. First, I am interested in Miguel's reconstruction of his idea of constitutional pluralism. I do not think I have ever heard him saying before that pluralism, as he defines it, is an inherent feature of constitutionalism and that the plurality of constitutional jurisdictions is just one particular manifestation of that inherent reality of constitutional pluralism. I do not disagree with his reasoning in the sense that I think that there are - in the way that he suggests - clearly pluralist aspects within all constitutional orders. However, I would introduce just a definitional caveat to the effect that there is something which is distinctive about pluralism within the European context and the transnational context more generally; and that distinctiveness does have to do with the pluralism of jurisdictions and everything that implies, which covers not only the pluralism of authority claims but also the pluralism of political communities. I think for analytical purposes it is well worth hanging on to that more particular definition.

Secondly, on Julio's modernity point, I think it is worth pinning down what we mean by modern and post-modern, because otherwise we will be talking past each other. It seems to me that one way of defining the so called modernist project has to do with a deep sense that the world - the social and political world - is something which we can make over to our own design. Is something that we can design, something that we can control, that we can order rationally, that we can bend and reduce to our collective will. And that is why the state is so central to the modernist project; because the state in some ways is a machine - a mechanism which tried to perfect that reduction, with all of its pathologies as well as the virtues of such a an ambition. So the question arises whether it is possible to reconcile constitutional pluralism with modernity. Or is constitutional pluralism already an admission that we have reached a point where there is no possibility and no value in trying to reduce our world to a collective will?

And of course such a conclusion might or might not be welcomed. I tend to think, putting my cards on the table, that modernity was and remains a good thing, insofar that we believe the world of public affairs is something that we can at least in some measure reduce to our collective will. It leaves all sort of the difficult questions about what the collective will is, who gets to represent it etc., but I am basically *for* the modernist project. But, by the same token, I am not for sticking my head in the sand and somehow concluding through a process of wishful thinking that the world that we should still seek to reduce to our collective will is less complex than it is. And that is for me when the problem and the challenge of constitutional pluralism comes in. Because it is precisely in the European context, but not just in the European context - also in many other post-Westphalian contexts - that you no longer have this mutual exclusivity of peoples, territories and jurisdictions which was emblematic of the original modernist Westphalian constitutional form. Instead overlap becomes endemic. The question is, can you have and acknowledge that overlap and somehow still retain the virtues associated with constitutionalism. I think these constitutional virtues are also modernist virtues. In my recent work, to get at this question I tend to define constitutionalism and its virtues in terms of a number of different frames - a number of different ways in which we engage in and acknowledge a collective framing exercise.

There is a frame of the legal order, and a frame of the political or institutional system. There is then a popular frame, the idea of constituent power. And there is also what I call a social frame - the way in which we seek to embed the legal, institutional and popular order within a particular society. Now we all distinguish in rather different ways between a thin and thick constitutionalism. But I would say that most people would agree that what we have had so far at the European level is a thin constitutionalism. And that when some of these same people then ask what all the fuss about the Constitutional Treaty amounts to when we already have a constitution, what they mean is that we have a thin constitution in the sense of the legal order frame and the institutional system frame. But the big question, and the question which was not resolved by the failed Constitutional Treaty, is whether we can or whether we should have a thicker constitution in terms of both the self-authorization or constituent power frame and the societal embedding frame - the idea of the Constitution as form of social technology which helps embed the society. This social frame, and whether and to what extent it can be constructed through a constitutional process, is a very difficult thing to grasp, but something which we all know is implicitly the case of national constitutional orders. Now, it seems to me what is probably the biggest question of constitutional pluralism is whether these sorts of things – these deep forms of constitutionalism - can exist simultaneously at the national level and at the European level, given the significant overlap between territories, peoples, citizenships, identities, etc. etc. Can these things co-exist, because if they cannot co-exist then it becomes very difficult to understand how that modernist project somehow can be retained and developed and extended in the context of pluralism. So that for me is the pluralist challenge in a nutshell.

### **3. The Relevance of the *Maastricht Decision* for the Pluralist Paradigm**

*Jan Komárek*

Thank you. I will move to another question, but it is still connected to what you have just been discussing here, because it puts the idea of constitutional pluralism into a kind of historical perspective: the question of how it has emerged in the European Union. One of the arguments in Julio's article was that constitutional pluralism emerged only after the German Constitutional Court had delivered its Maastricht decision. That it was an attempt to conceptualize what the constitutional court was trying to put its own right perspective on the European integration. Would you therefore agree that pluralism, as Miguel has just suggested, is a necessary feature of constitutionalism, not even just the European constitutionalism, but constitutionalism as such?

*Julio Baquero Cruz*

It is clear that pluralism did not start with the Maastricht decision of the German Constitutional Court, and that's not my point. There had been many judgments before, the *Solange* cases, the Italian cases, and the classical view of Community law was already in question in those judgments: the classical view of *Simmmenthal*, for example, which was put forward by the Court in indirect conversation with the Italian Corte Costituzionale. But the German judgment of 1993 on the Maastricht Treaty was very important. It was paradigmatic, it was a piece of dogmatics with a well developed

reasoning linked to a theory of the State. Immediately afterwards the Danish Supreme Court issued another decision on the Maastricht treaty, and the Maastricht-Urteil has been cited and followed in recent times by a number of constitutional courts around Europe. So it was also a catalyst. We all know the influence that German public law has around Europe, especially in some countries like Spain, Italy or Portugal, and in Central and Eastern Europe.

I also think the Maastricht-Urteil had a great influence with regard to the pluralist movement: Neil MacCormick, who started it, wrote a piece entitled "Beyond the Sovereign State"<sup>15</sup> and also a shorter piece in the *European Law Journal* reacting to the Maastricht-Urteil.<sup>16</sup> In the second one he defended the Maastricht-Urteil and argued that it had much to commend it in terms of legal pluralism. The effort of Mattias Kumm, for example, was also prompted by the German decision. It was at bottom aimed at making sense and managing the legal interaction of the EU and national legal orders after the Maastricht-Urteil.

### *Neil Walker*

Yes. I think here we should draw a distinction between plurality and pluralism. Maybe this is too simple, but perhaps one could argue that the Maastricht decision was about the origins of constitutional pluralism, and no longer just constitutional plurality. We already had the existence of overlapping jurisdictions – and so objective plurality - but the way in which they co-existed within a single pluralist unity was not or at least not explicitly, with some exceptions such as the Solange decisions, considered by the ECJ or the national courts. Because pluralism has to be defined subjectively, as an attitude which in some way embraces and recognizes objective plurality and works with it, that actually wants to maintain it and not to destroy it. That may seem an odd thing to say given the sense of the Maastricht judgment as in some ways aggressive, as fairly offensive towards the European order. But it was still a form of recognition, however challenging. It was a shot across the bows, a wake-up call that we live not just within a plurality of adjacent orders, but within some sort of idea of constitutional pluralism. Now, the point about that is that Maastricht clearly then was a catalyst, but I think we still have to ask what lay behind it? I recall reading Julio's article and thinking that while it beautifully describes the catalytic effect of the decision, it does not quite so well capture what lay beneath it, because at the end of the day the Maastricht judgment itself was only a symptom of something deeper.

What were the major concerns in the Maastricht judgment? One was, the increasing competence of the EC and the EU, developing a new pillar structure, the monetary union etc., the growing notion of a generally open-ended process of increasing competences. The second was how there was a disjunction between this increasing competence and the lack of what I described earlier as a thick constitutionalism. So you got increasing competence but without the idea of constituent power and without the idea of societal embeddness at the European level. And thirdly was the idea of the ensuing danger to some necessary core of the national order. There had to be something

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<sup>15</sup> N. MACCORMICK, "Beyond the Sovereign State", 1993, *Modern Law Review*, 56, 1-23.

<sup>16</sup> N. MACCORMICK, "The Maastricht-Urteil: Sovereignty Now", 1995, *European Law Journal*, 1, 259-266.



which made the national order a national order -something that gave it its identity, its epistemic unity, and that somehow may be under threat by the first two developments. So basically these were perceptions which sprung out of the evolving social and political reality of European integration. Now, they did not have to be articulated as they were in the German constitutional court, but that articulation did not come from nowhere. It was based upon an observation and understanding that we have to recognize the new plural reality, and that we have to give the new pluralism that flows from this a voice, otherwise we might drift into a some kind of constitutional monism at the European level.

***Miguel Poiares Maduro***

Let me first turn very briefly to the question of modernity - postmodernity. I certainly do not see the project of constitutional pluralism necessarily as a postmodern project. And this certainly does not coincide with my vision of constitutionalism. I think that a real question has been raised by Neil: whether we can still have the values of constitutionalism as project of modernity? Including the generality, comprehensiveness and coherence that you [Julio] stress very much in your article as the values of constitutionalism as a project of modernity. In my view, to have them, in the context of constitutional pluralism, does not require an authoritative definition of those values. That is what I think constitutional pluralism tells us and certainly that is what I've tried to argue by developing my meta-principles of constitutional pluralism (or the rules of contrapunctual law). These meta-methodological principles aim to secure those values in a context where you do not have an ultimate authoritative source to do that. But certainly, I do not see it necessarily as a post-modern project. To the contrary, since my conception of constitutionalism is deeply embedded by a concern with the rationalization of the democratic process.

On the question that you pose now: first, as I said before, at a deep normative level I conceive of constitutional pluralism as inherent in constitutionalism itself. Second, I think it was already part of European law, in part because already before Maastricht you had national constitutional courts challenging the authority of EC law. You had the Italian constitutional court and the French Conseil d'Etat, and you had the *So lang* decision of the German Constitutional Court itself. But, moreover, in many other national courts the constitutional narrative explained the application of Community law at the domestic level by reference to certain national constitutional provisions. In this way, the issue of constitutional pluralism was inherent even in the national constitutional orders where a constitutional challenge to EU law was never as fully articulated as in Maastricht. But that is also the paradox of the Maastricht judgment, because at the same time that it challenges European constitutionalism it engages with it in a way that had never been done before. It even provides some suggestions for a future legitimation of European constitutionalism when for example it discusses the conditions under which the EU could develop as a polity. That is the paradox of the Maastricht judgment.

Now, the academic discourse is, of course, the other level. I think it is more to this that Julio was referring: that the Maastricht decision was what triggered the attention of academics. This is probably true to a large extent. Nevertheless, it was also, in part, inherent in the academic literature that already presented the development of European

law as the product a discourse between the European Court of Justice and national courts. I'm referring to the work of Joseph Weiler for example and of some other scholars which already contained some elements of constitutional pluralism. But in a kind of a deeper theoretical manner it was only articulated for the first time in a piece by Neil MacCormick and I can accept Julio's view that Maastricht triggered such academic debate.

#### **4. Constitutional Pluralism in Practice: Are We All Pluralists Now?**

##### *Jan Komárek*

Do you think that we are all pluralists now? It seems to me that constitutional pluralism is used as a label in many discourses without even thinking about its consequences. And that is also why we were so much interested in Julio's paper: he was the one who questioned these perhaps implicit assumptions in pluralism.

The question would then be the one which is based on Mattias' argument in his article. Pluralism can also be misused in other processes. Mattias provided an example of the German government claiming in the Council negotiations that a particular solution can not be adopted because it would be invalidated by the German Constitutional Court. That makes or adds the political argument to the constitutional dimension. And my question is, the importance of constitutional pluralism can be different in different contexts. Constitutional pluralism can mean different things in these different contexts. When lawyers or judges are talking about constitutional pluralism it can mean something else and can also have different consequences than if politicians are using this concept in their negotiations. What do you think?

##### *Miguel Poiares Maduro*

Well, judges never talk about constitutional pluralism and in part that is inherent in the theories of constitutional pluralism itself. The actors that operate in the system are expected to adopt the internal perspective of that system. They have to remain faithful to the narrative that results from that internal perspective even if the narrative can be shaped and adapted to fit an external context of pluralism. Constitutional pluralism is necessarily a kind of external theory. So, what you can expect, and what the courts ought to do, is to shape an internal perspective of the system which is informed by constitutional pluralism. They have to be knowledgeable of its consequences, be aware that they live in the world of constitutional pluralism. Therefore I do not want the courts to be institutionally blind. They should rather reason their decisions institutionally aware of the relationships with other actors and other jurisdictions in the context of constitutional pluralism. But I do not expect a court to come and say, well we know that our authority will be challenged by this other court. That I think you can not expect.

##### *Neil Walker*

Are we all constitutional pluralists now? I think there is a certain structural inevitability about constitutional pluralism as I define it. But I think, it is important again to

distinguish between levels, and that there is a dimension of constitutional pluralism to fit each of the aspects that I talked about earlier. I think there is a legal system dimension, there is an institutional dimension, there is a constituent power dimension, and there is a societal or political community dimension. One of the reasons why in some respects constitutional pluralism has got a bad name is that people concentrate too much on the legal order dimension. It then becomes reduced to a question of the big constitutional court clash which never happens, or is partially or narrowly avoided. And so all the efforts and all the intellectual energy goes into looking at that particular dimension of it, but partly that is just a kind of professional deformation. You know that lawyers are going to look at these sorts of things. But, then of course you may end up with a debate which seems 'academic' in the pejorative sense. Or you end up - and I know that this is something that Julio objects to quite strongly - somehow legitimating what you see as a kind of ersatz legal order. One may be led to say that the law has no option but to recognize a non-legal answer when it reaches beyond and across the authority of particular legal orders, but is it not a contradiction in terms to suggest that the law recognizes non-law in certain situation? So in strictly 'legal order' terms constitutional pluralism may be seen as a fairly narrow thing and also a negative and destructive thing. If however you see a whole constitutional debate and practice across all these dimensions as an attempt to grapple with a pluralist reality then I think it becomes a far more constructive inquiry. For my part, I see the whole constitutional debate and the whole post-constitutional debate on the Reform Treaty as about dealing with that pluralist constitutional reality – as a sometimes treacherous and paradoxical attempt to 'find' the authority necessary to address the clash of authorities. This goes to a much deeper and more expansive level than the visible part of the iceberg above the sea - where you actually see the big constitutional clash in the courtroom. So I think that constitutional pluralism is important, but we have to understand that it exists simultaneously in all these different dimensions.

### ***Julio Baquero***

There is an aspect of pluralism which is fashionable. But why? Because it is very well adapted to the present political circumstances. Pluralism is very diplomatic. It is not confrontational. It says: "we will sort it out informally, we do not need clashes, we do not need an ultimate authority". I think the idea of an ultimate authority, by the way, is also an essential part of the constitutionalism of modernity. Without it it would be very difficult to have unity and coherence.

### ***Miguel Poiares Maduro***

And that is our key difference. You do not believe that is possible to have unity and coherence without an authoritative decision.

### ***Julio Baquero***

An ultimate authority, an institution that may have the last word.

Let me say something else. I wonder whether constitutional pluralism is really dominant in the academia. Maybe not. Many Community lawyers do not even know that these

issues are being discussed. They do not care. And others do not dare to criticize them. There are two discourses talking past each other. In French journals, for example, you never see articles about this. In German journals, *Europarecht*, sometimes, but it is not mainstream. In the College of Europe in Bruges I do not think students are taught about these things. There is a disconnection.

***Miguel Poiares Maduro***

Can I just interject there?

***Julio Baquero***

Of course.

***Miguel Poiares Maduro***

Because I think what Julio was saying is very true. I wanted to make that point also. It is not only a point of constitutional pluralism. It is more general. There are entire communities of discourse in European law that totally ignore, not only constitutional pluralism, but many other EU law discourses that we may consider as dominant. European law is still constructed in very isolated communities of discourse on law. Perhaps, in part, because of the language factor that helps insulating those discourses.

But what I think is more important is the spillover of academic discourse, in this respect, to the practitioners' discourse, or to the discourse of other legal actors in the system. Our discourse must adapt itself to the different discourses of different legal communities and their respective legal jargons. As an actor of the system I cannot use the same language that I use as an academic in order to be effective. You must adapt to each community of discourse but, while doing it, you can also stretch the boundaries of the language that is normally used by that community. Again, it is the promotion of an internal action informed by the external perception and knowledge of the system.

The challenge is to translate your normative concerns and your theories into something that is operational in the language that is used in that system. And that is what I mean by saying that I want judges to be informed by constitutional pluralism. I do not want them to adopt the language that we normally use when we talk about constitutional pluralism as academics.

***Julio Baquero***

I wanted to say something else about the Convention, which was a pluralist exercise without its members knowing it. There are many things in the Constitutional Treaty and in the Lisbon Treaty which are pluralist in nature. And the pluralist discourse has also appeared in a number of judicial pronouncements here and there. For example, I analyzed a judgment of the Conseil d'État of 2007 in which I found something very similar to what Matthias Kumm has proposed: that EU law should generally prevail and only in cases involving concrete provisions of the French Constitution which have no parallel in other constitutions or in EU law should a national court consider whether the

national constitution may prevail. I do not know whether they have read Kumm. I doubt it. I think they arrived at a similar solution independently.

***Neil Walker***

Miguel made a point earlier I want to return to. Any particular understanding of the pluralist reality is not going to be as neatly detached as the external ‘alien’ understanding he discusses in his work. Indeed, partly what one is doing by labeling the new European juridical space as pluralist is saying that there is an inherent *situatedness* about legal authority, and about legal knowledge and perception. And within this overall European space people are in very different and distinctive situations. They are nested either in the national orders or within a supranational order. And pluralism, strong pluralism is precisely premised upon the significant extent to which they understand the world from their own perspective. That would not be a surprise. It would not be an undermining of pluralism, but its vindication. Most of the people most of the time experience the law as being settled, and being settled in terms of an authoritative pedigree they recognize. And the complex architecture which is European law, in the larger sense of European law and national law taken together, has many so-called bridging mechanisms for ensuring the settlement, e.g. the preliminary reference procedure etc. So one can normally ensure the settlement of first order legal questions without having to put the question of who decides who decides - the question of ultimate authority - at issue. But the fact remains that, reflecting the underlying plurality of legal orders, there may be an occasional fracturing of authority - a broken window somewhere. There may be a breeze coming in somewhere (Julio Baquero – a very cold breeze). Yes, it is a very cold breeze – it is coming from Scotland - and you know sometimes that cold breeze may be felt in the operation of the law. Somehow, it is affecting, it is structuring it, influencing it.

***Miguel Poiares Maduro***

Sure, it is a breeze. It is renewing the air.

***Neil Walker***

It may indeed be a breath of fresh air. So in that sense, part of what we are doing, and part of the more detailed work of the people around this table has been to ask how you relate the inside to the ‘alien’ outside. How do you move from that everyday, taken-for-granted insider perspective to an awareness of the claims of others? How do you make that outside part of your inside without deferring to, without reinventing some sort of hierarchy, some authority? So, these are important questions, but they are not day-to-day questions. They are not quotidian questions. They are questions of the extreme, or questions of the momentous, as in the context of Constitutional Treaty – where the search for some form of *resettlement* throws everything is up in the air. To repeat, generally speaking that is not how people normally experience their legal world. But it is a fault-line beneath the ground on which they normally stand.

***Miguel Poiares Maduro***

Can I just say something in this respect, that I think it is important? You are absolutely right, the fact that the courts and other actors decide within the internal logic of their system is the default mode that they have and this is, to a certain extent, a vindication of constitutional pluralism. But it is a vindication of constitutional pluralism as a kind of descriptive theory of that reality. And I think that most of us also defend constitutional pluralism as a normative theory. And in that respect we also claim that those actors similarly have to start informing their action by the notion of constitutional pluralism, by the fact that there are other constitutional sites, that there are other competing claims. And I think this is the real challenge of constitutional pluralism today. In which way should this normative theory develop in terms of a theory of constitutional adjudication for example? Or in terms of a theory of separation of powers? This is the real challenge: in which way can constitutional pluralism reshape traditional dogmatic theories of constitutionalism that, for example, courts use?

***Jan Komárek***

If I may continue on that line, because I think this quite important: different perspectives of different actors, and you suggested that constitutional pluralism is in a way an external perspective which looks on different actors acting in their own language...

***Miguel Poiares Maduro***

From a descriptive perspective yes, but I think it is also a normative theory that ought to be enforced.

***Jan Komárek***

Yes, and then the point is to what extent you can have this own perspective being informed by pluralism, whether it would not in fact deny it. The example would be the European Arrest Warrant cases.<sup>17</sup> I think that if we apply your view [Maduro's] then we would, in a way, deny constitutional courts' independent action within their own logic. I think that you push the way they should be informed by the principles too far. You in fact oppose constitutional courts' internal logic. According to your view, they would be acting as if they were European courts, not national courts. So in a way it seems to me that it is not pluralism because your principles deny the very idea of this different perspectives.

***Miguel Poiares Maduro***

We have had this discussion several times, Jan. I recognize my pluralism is not a radical pluralism. And that is why I have put forward these meta-principles. My notion of constitutional pluralism aims to prevent the consequences that Julio claims pluralism

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<sup>17</sup> J. KOMAREK, "European Constitutionalism and the European Arrest Warrant: In Search of the Contrapunctual Principles' Limits", 2007, *Common Market Law Review* 44, 9-40.

can lead to. There must be some kind of meta-methodological agreement between the actors of the different systems. With some principles; recognizing pluralism by recognizing precisely the competing claims of each other and by signalling that they are ready to mutually defer but also to establish the conditions for that mutual deference. The idea is that there is a commitment of all these actors to assure coherence while promoting the values of such pluralism. The idea also requires searching for some kind of systemic compatibility. These are all principles that, I know, limit the degree of pluralism. But I think it is necessary not only to have a viable form of pluralism, that, as I've put it, it's contrapunctual and not a mere cacophony or dissonance.

### *Neil Walker*

Yes, it seems that we are always simultaneously concerned about the two opposing cliffs that pluralism can fall off. It can fall off the cliff into a form of monism, right. And so in a sense at least implicitly, this is what you [Jan Komárek] fear of Miguel's position, that in the name of pluralism it becomes a new monism. That these principles of consistency, coherence etc. are just euphemisms for new forms of hierarchy. And of course that is a serious concern if you think back to historical debates about federalism. You get precisely that debate within federalist theory, within federalist literature. Does federalism necessarily display a structural bias towards centralism? By its very nature, because it is talking about the relationship between a centre and the regional parts – an ordered relationship - does that mean that the centre always holds, as the default position is in favour of the centre retaining its integrity as a centre? And some people looking at the long history of federalism would say that is also actually what happens. And when the classical notion of divided federalism – of a federalism of separate spheres, gives way to co-operative federalism in the 20<sup>th</sup> century, what you are actually getting is just a modified version of unitarianism. Now, it may well be that in the EU context, even though we talk about a brave new world of pluralism, that actually what we are doing is just inventing a new vocabulary which in the final analysis will end up pushing us in that federal-but-centralizing direction. That is a very, very difficult question to answer.

But, of course, on the other side there is Julio's fear that unless you have something which is a final authority then there is no other way to guarantee law as a settled practice. So these are the twin fears that preoccupy people, and pluralism is trying to say you do not have to give into either fear – that there is something in the middle. There is a *via media* between these two possibilities. You need not fall off either cliff. But, one can hope that is the case. One can argue how this fine line might be maintained. But one can not guarantee it.

## **5. Constitutional Pluralism as a Descriptive or a Normative Theory?**

### *Jan Komárek*

Let us move now to the next question: is constitutional pluralism something which just describes what the European Union is or is it a normative theory we should believe in, we should have in the European Union?

***Julio Baquero Cruz***

The whole issue is circular. It depends on how you define pluralism. But I also wanted to point to a problem that is normally disregarded, that European law does not work as it should anyway. That it is largely a fiction, in some States a very big fiction, in other States less of it, depending on how their officials, judges and courts abide by or ignore EU law. When I started doing research on this issue and I asked colleagues about their experience, they all gave me many examples of cases in which national courts disregarded European law out of ignorance, out of rebellion, did not refer, etc. This is a major problem. I think the theories of constitutional pluralism have to take this into account, because the judicial system is not really working as it should.

***Miguel Poiares Maduro***

[To Julio Baquero Cruz]: that is one of the paradoxes of what you say, also in the article. If you say that this is a reality and that the reality is actually much more dramatic than what constitutional pluralism actually says, then my question to you is: what do you say it should be done? How can we then secure the conditions which you identify with the rule of law and modern constitutionalism...well... the main critique your paper makes on constitutional pluralism that I thought could answer such paradox is that by legitimizing this reality constitutional pluralism enhances the risk that there will be ever more evasions. But you are telling us that the degree of evasion is actually much bigger than what we are actually saying. So, my question to you is: what would you tell to national courts? How could you be able to create that kind of coherence and uniformity that you aspire to so much?

***Julio Baquero Cruz***

Well, I think both things are theoretically and practically different. The first issue is that of effectiveness. Is EU law applied properly as and when it should? And the second, that of pluralism, is: what happens when there is a fundamental clash of values? The first problem should be solved independently of the second one, because it affects the rule of law. Judges should act as they should and national administration should act as they should, because the EU decision-making system is constructed on the assumption that the law is properly applied. And this is not true all the time, in some Member States it is not true most of the time.

Thence to pluralism. Do we have a pluralistic reality? It depends on the country and on the case. Consider the case of the Belgian Conseil d'Arbitrage on the European arrest warrant. It was the only national court that referred a question to the European Court of Justice. The Court gave an answer and the Belgian court followed it. We do not have pluralism there, do we? We have normal Community law, with supremacy, uniformity, and certainty. On the other hand, when the German Constitutional Court, in the same issue, did not follow the suggestion of the German government, which strongly pleaded for it to send a preliminary reference to the European Court, and went on to decide the case on its own, some people in this room would say that it was acting as a pluralist court. It rendered its judgment and it did not really pay much attention to EU law, creating a legal mess, because it saw the case from the exclusive point of view of the German Constitution. Is that pluralism at work, or not?



On the normative issue, I would be willing to accept, but only as a second best, a moderate version of pluralism, as long as national constitutional courts and other courts of last resort refer when they have to refer, giving a chance to the European Court of Justice to make its voice heard, and respecting its judgment unless they have extremely powerful reasons not to follow the law, with all the consequences that may entail. This would be a sort of political disobedience. I would not see it as a structural part of the system, as contrapuntal law, etc., tend to be, but as a very exceptional escape from it. I don't think any of you makes that point about the obligatory nature of preliminary rulings in so many words: you don't say that the procedure has to be followed. And that is the main problem: that we have a mandatory bridging mechanism, that we have the instruments for a well-ordered dialogue, but they are not used. And they are not used, I believe, not because of fundamental value clashes, but because of considerations related to power, to institutional prestige, etc., that is, for reasons that carry very little weight.

Finally, I am also happy with pluralism within the institutions of the Union, and I think there is a great deal of pluralism in them, also at the Court. You have a judge from each Member State. When hard cases have to be decided about fundamental rights or values, normally the research division of the Court makes a detailed study concerning the situation in the legal orders of the States. And the Court takes into account that situation to make sure that its intervention will not be disruptive for this or that legal order. That is pluralism within the institution. Do you need more? Can you have more and still have a legal *order*? I doubt it.

### ***Neil Walker***

To come back to your Belgian case, I would say all that happened there was that there was no outbreak of pluralist conflict. The Belgian court accepted the view from Europe, O.K. But, that does not mean that somehow pluralism vanishes as an explanatory and descriptive template in that particular case. It just means that pluralism is not about conflict, pluralism is about the ontological reality of there being different legal orders having to find terms of accommodation between each other. And often these terms of accommodation operate quite smoothly and quite effectively. So, you know, the fact that sparks did not fly, does not mean that pluralism became inapplicable in that situation. That was perhaps just a normal running of a pluralist order.

On the normative point, I would say three things. One is that it seems to me first of all that the way you phrase the question is rather loaded: is it just descriptive?... At the end of the day I actually think that there is a normative value in having an accurate understanding of the world. That is in itself a normative value. So, the first normative premise is to say, yes it is a good thing to have a well-informed understanding of the world. There is no point of sticking your head in the sand, and just wishing the world was otherwise, if it has actually developed in a particular way. And insofar as pluralism announces a candid recognition of overlapping authority, that is a first normative value. Of course, it could be an over-recognition, it could be an essentialization of difference. Miguel in his article talked about the Martians coming down and saying you see people sitting in the national courts or in European courts, believing different things. Well, the Martians have a point. There are actually differently constructed realities there, and we are better able from a modernist perspective to intervene in the world and to change the world if we understand it. So, that is the first normative value.

The second normative value, I would say, has to do with recognition. One of the great emblems of the 90s is the politics of recognition. In some ways this is an aspect of the politics of recognition. What pluralism is saying at the meta-level - at the highest level – is that within our continental configuration we have to acknowledge a multiplicity of different sites, with their different claims, with their different agendas, with their different commitments etc. etc. And that too is a good. It is a good to recognize the relationship between sites in a way that does not require one to defer to another, or one to be supreme and authoritative over the other. Because if the occupiers of these sites do not understand themselves in these terms – if the peoples and people of Europe are not happy with a idea of hierarchically ordered federation, so be it. It is imperative under the politics of recognition to respect that. That is part of what pluralism is saying.

Now the third normative point is maybe the most interesting. This asks whether there is something productive in thinking about legal and political relations on a basis of heterarchy, rather than hierarchy. Beyond simply the recognition point and beyond the empirical reality point, the third point is to explore whether there are productive possibilities in thinking of law in terms that cannot be resolved by some sort of final authority. Can law, considered as a modality of deliberation or public reason which is not reducible to a final authority in circumstances where that deliberation and reason threatens to exhaust itself, actually function? Of course, there is an increasingly interesting literature, which is by no means limited to the EU, about dialogue between constitutional courts - whether national courts or international courts or supranational courts, or WTO. There is a body of work where the interesting question is: when we are talking about high constitutional principles are we better resolving these high constitutional principles in a context of dialogue where no court and no political body can finally just stop listening because they get the final word. If you take away the authority of the final word does it make for a better constitutional law? I know, I am posing it as a question not as an answer, but that would be the third normative opening of constitutional pluralism.

### *Miguel Poiares Maduro*

I think I would have two points on what you [Neil Walker] were saying and what Julio was saying. It seems that when there are no conflicts the tendency is to say that constitutional pluralism is not relevant and when there are conflicts the consequence may be that they are not respecting European law and so what is then the value of constitutional pluralism? But that is why I think that constitutional pluralism has to have some kind of thicker normative content to determine, to a certain extent, the “rules of engagement”. I do not think what the German constitutional court did was necessarily correct in terms of constitutional pluralism as a normative theory. Because I do not think they have respected what I conceive as the meta-principles of constitutional pluralism. But, of course, some others may define a different threshold. What is important to me is that it requires a form of loyalty among the participants. It is not simply that you assert your own authority. That, in my view, is not constitutional pluralism at least not in a normative sense. For me constitutional pluralism means, on the contrary, some form of mutual engagement. You are ready to engage with the other jurisdiction and you are also ready to defer. And that is what we have to provide in my view when we propose constitutional pluralism: those rules of engagement. To tell

constitutional courts under which conditions they should defer to the EU jurisdictions, and instead when they could feel authorized to try to create new rules of the game.

And I actually think that this is not irrelevant for the other domain mentioned by you: the day-to-day application of European law and not the potential for conflict at the systemic level. On the one hand, I think that if we found the legitimacy of European law on this pluralist construction, and with the right principles for constructing that, then you make national courts understand that they are actors of that system and they are not simply subject to them. And if they assume themselves as actors of that system, they will start to internalize the methodology of EU law, the hermeneutics of EU law. If they understand that they share a common methodological ground for example. That, in my view, will lead to a decrease in the instances of a kind of soft evasion: when national courts do not refer when they ought to refer. This is not necessarily conflict at the higher level but it's still a form of evasion from EU law. If you make national courts part of the system and if you make them realize that they are actually constructing that legal order you make them truly European courts. That is what C.I.L.F.I.T. is about. A requirement of universalizability that is a requirement to operate as European courts. To say to a national court that it must decide taking into account the possible views of other national courts and the impact of their decision on the broader EU legal order. You are an actor in a system that includes many other actors and you owe loyalty to that system. But, you are much more effective in doing that in a context where you recognize the pluralist construction of the Community legal order.

***Julio Baquero Cruz***

Yes, but in what way does that kind of moderate pluralism differ from the classical Community account you find in Pierre Pescatore, for example? Because you have loyalty, you have dialogue, you have engagement, you have bridging mechanisms, you have the whole thing plus order, the possibility of order and the final word.

***Miguel Poiares Maduro***

This is why I insist for example on the issue of institutional choice. Because this is applicable to the European Court of Justice too. The Court of Justice should not be institutionally blind either. It is a discursive mechanism. And the element that guarantees the discursive mechanism is the possibility of constitutional conflicts and its prevention at the systemic level. That is what makes the European Court of Justice internalize in its own conception of the system that this is a two way relationship. But this is not to say that for the system to operate with national courts the latter can at all times legitimately decide whatever they want. That is not the point.

**6. Questions for Mattias Kumm**

***Matej Avbelj***

OK, welcome back everyone. It is now my pleasure to greet also Mattias Kumm with us. We will have a chance to listen to the fourth vision of constitutional pluralism in

European integration as well. The way we decided to proceed is that the speakers, who have spoken before, will each ask a question to Mattias so that he will be able to, basically, jump into the debate that he missed. Therefore, let us just get started. The sooner the speakers are finished with their questions, the more time there will be for a general discussion.

***Miguel Poiares Maduro***

My question to Mattias is the following. I have been following your work for a while in many domains, for reasons that you know. And, on the one hand, in terms of constitutional pluralism, and I think even in terms of what has raised most interest for Matej and Jan and also other people, your focus has been on the Kompetenz-Kompetenz question and on potential conflicts of ultimate authority. But on the other hand I have always seen your work in that respect linked to a broader conception of constitutionalism. But you have never articulated that. I once classified your work as a kind of project in constructing a philosophy for the constitutionalisation of political life. Many of the concepts that you use, e.g. “practice contestation” would in my view gain a new dimension and interest if you would be able to relate them better with an underlying conception of constitutionalism that is linked to your specific work in terms of constitutional pluralism.

So, my question to you is the following: is your notion of constitutional pluralism motivated by a kind of pragmatic concern with answering the question of ultimate authority in potential constitutional conflicts, or is deeply linked to your underlying notions of constitutionalism?

***Mattias Kumm***

Thanks for this question, Miguel. It provides me with the challenge to explain a significant part of my life’s work in five minutes... The pragmatic and the theoretically ambitious complement one another, of course. On the one hand the account of constitutional pluralism I provide establishes a framework of principles that are then applied to specific contexts to provide pragmatic workable responses to a set of pressing practical questions: How courts should address constitutional conflicts between the European Union and Member States in the European Union. On the surface this seems to be an exercise of what Kuhn would have called ‘ordinary science’: the academic lawyer tries to come up with a solution to a problem that arises in legal practice. On the other hand what fascinated me about *this* practical issue is that the conceptual frameworks used by courts to justify solutions, be it the insistence on the effective and uniform application of EC Law by the ECJ, or the idea of ultimate constitutional authority being constituted by “We the People” within the framework of the state, seemed to be inadequate to the task of designing conflict rules that reflect a careful assessment of the obviously relevant concerns in play. Furthermore these frameworks could not explain the practice that courts were actually engaging in. There was an interesting disconnect here, something that seemed to point to something deeply wrong in the competing ways either proponents of European law’s primacy or classical constitutional jurists thought about the foundations of constitutional authority. With other words this seemed to be the kind of problem that required rethinking the basic

conceptual framework that we use for discussing constitutional authority. It is an issue that seemed to require a *paradigm shift* for thinking about constitutionalism, a truly revolutionary reconceptualization of constitutional practice, both within and beyond the state. This is the project I see at least three of us here contributing to. Julio is here to keep us on our toes and remind us that grand announcements of paradigm shifts more often than not turn out to be little more than short-lived fashions.

But make no mistake: This is not a fashion. This is an enterprise that is likely to dominate the intellectual agenda for ambitious constitutional lawyers for years to come, simply because the problems it addresses won't go away. Run of the mill practitioners either on the European or national level might not pay much attention to it. There is no reason why they should. Car mechanics or building statisticians continue working competently within the framework of Newtonian physics, even after that paradigm had been shattered by the work of Einstein, Heisenberg and others. Similarly, most cases can be resolved by lawyers without reference to or understanding of the issues that are at the heart of this project of reconceiving constitutionalism within a new paradigm of constitutional authority. But just as the practical applications of quantum mechanics are rich and varied, so the implications of the new constitutionalism go way beyond constitutional conflicts and have only begun to be explored.

So let's go back and situate the emergence of constitutional pluralism in the context in which it arose.

In the late 1990's there were those who just assumed that the ECJ had gotten it right, that ultimately there was a new legal order whose law rightly claimed unqualified primacy over national law. If national courts didn't fully agree, the belief went, it was only because they were not yet sufficiently educated and familiar with EU Law. Progress, in the sense of gradual acceptance of the ECJ's primacy claims, seemed to have already occurred and further progress was believed to be inevitable. Yet on the other hand there were those judges and scholars writing for national constitutional courts and national constitutional lawyers, who continued to insist as a matter of course that the domestic constitution was the supreme law of the land and the only question was how to interpret the conflict rules of the national constitution with regard to EU Law in order to find out how EU law fits into domestic practice. The Maastricht decision helped to make it clear to a European audience that this practice was not based on intellectual laziness and ignorance, but was grounded in a reasonably sophisticated, classical account of constitutional authority, that directly conflicted with the ECJ's account. All of a sudden European lawyers paid attention: "Hey, wait a minute! What's happening on the domestic level is not just explained by recalcitrant ignorance. They are actually thinking about it. They are coming up with a reasoned argument about whether or not they should adopt the position of the European Court of Justice. And they end up unconvinced and reject it".

So, to simplify things somewhat, there seemed to be a big conflict between the ECJ supported by European lawyers embracing the rule of European Constitutional Supremacy on the one hand, and most national constitutional courts supporting a rule of National Constitutional Supremacy on the other hand. Now, what struck me immediately, is that framing the issue as a choice between two fundamentally competing claims of ultimate authority seemed to miss central features of actual practice, that I had spent considerable time studying closely. The more I studied actual

decisions by national courts, the more implausible this way of framing the issue seemed to me.

Just to illustrate the kind of complexity that you discover once you start looking little more closely, I'll give a somewhat stylised and rough account of British practice and debate, that reflects an evolution that, in some form or another, tends to have a similar structure in other constitutional systems. In the beginning (position 1) there is a claim to National Constitutional Supremacy, which, in Britain, took the form of a claim to Parliamentary supremacy. In case of a conflict between a British statute enacted later in time and a piece of EC legislation, the British statute prevails. But soon came the first qualification (position 2). Soon the House of Lords said "yes, well, of course there is parliamentary sovereignty, but when we interpret a national statute that might be in conflict with the piece of EC regulation, we will, as an interpretative matter, give weight to EC law and make that a factor in our interpretation of our national law". A factor. That's weak. But it's not the same thing as a straightforward rule, which just says "we just interpret our national law the way we interpret any other law and we don't care about what else might be going out there". And then came the next step (position 3): At a later point EC law was not just a factor to be taken into a consideration when interpreting national statute, it was THE determinative factor. So if in doubt, if there is space to interpret national law to be compatible with EC law, that space would be used to ensure compliance. And then we have a further step (position 4) and this many would describe as the current law in Britain: It does not matter whether the parliamentary statute is open to interpretation or directly in conflict with EC law. We will always assume the legislator just did not want to violate prescriptions of EC law unless it *explicitly and directly* writes that into legislation. We can imagine another step (position 5), that has been proposed by some but arguably does not at this point reflect current British law: Even if Parliament explicitly and directly writes into a law that it wants to overrule EC law, it may not do so. All Parliamentary sovereignty means is that Parliament may revoke the Act that is the basis for British membership in the EU. A final step (position 6) might be to recognize the primacy of EC law without qualification: Parliamentary supremacy would be conditional on compliance with EC Law.

Now the point here is not to suggest that there is an inevitable progress trajectory here. I take no position on whether position 4 is better or worse than, say, positions 3 or 5. The point here is to focus attentions on positions that are possible candidates for the resolution of constitutional conflicts, but that are impossible to describe in terms of a binary choice between national or European constitutional supremacy (here: positions 2-5). There is a puzzle here. Might this be an indication that something quite different is going on, something that we ought to be able to describe using a quite different conceptual framework for constructing constitutional authority?

In the end, my answer was 'yes'. But before we jump to paradigm shifting new conceptual frameworks as a solution to the puzzle that constitutional practice has placed before us, let's take seriously Ockhams razor and first explore other, simpler attempts to make sense of it. Of course there might be a simple solution: The decision about the right constitutional conflict rules is a question of national constitutional interpretation. Determining the right conflict rule is just a question of looking at national constitutional provisions and their proper interpretation. The complexity of constitutional conflict rules might derive from the fact that the interpretation of the national constitution is

often a difficult thing and might lead to complex answers of the kind we see national courts embracing. But that answer is unpersuasive. It does not fit the facts. First, the conflict rules developed by national courts have changed, even when the underlying constitutional text has not. Indeed, in Britain there is no underlying constitutional text, but just an interpretation of a practice, in which great rhetorical significance is placed on the highly contested idea of parliamentary sovereignty. More generally, a closer analysis of national constitutional practice in other jurisdictions confirms the hypothesis that the conflict rules developed by national constitutional courts are not developed by anything that is plausibly described as ordinary acts of constitutional interpretation, but more often than not reflects a straightforward functional, purposive type of reasoning (think of the German FCC's Solange formulas). Something else is going on. So if it is not ordinary constitutional interpretation, and it is not recognition of European primacy, what is a plausible account of what is going on?

Well, here is another simple answer. Let's call it a "realist" or "cynic" answer: "You know, let's not fool ourselves. Constitutional judges are savvy political actors. They understand that their task is to manage a complex system of political and legal interdependencies. So using whatever methodology and arguments resonate with their own legal tradition they find a way to craft rules that minimize conflict and make the whole thing work, while insisting to keep open avenues for resistance, just in case. Rules relating to constitutional conflict present a kind of constitutional emergency regime for which the ordinary rules of interpretation don't apply. Courts do what works best. So when we talk about constitutional pluralism as a way of understanding constitutional conflicts we are analysing an exceptionally limited domain where ordinary rules of constitutional interpretation are suspended. In this domain we move beyond law. We move from legal interpretation to legal diplomacy and comity. We are talking about the savvy management by judicial actors of the interface between EC and domestic law. Beyond this narrow domain constitutional law and our ideas of constitutional authority are left standing as they are. That's all there is to it."

But if we don't want to be dogmatic cynics and we refuse to be fooled into naively believing that courts are merely interpreting the national constitutions they accept as ultimate authority, what alternatives are there of making sense of practice? This is where the radical claim relating to a paradigm shift in constitutionalism comes in. The whole conventional story, the classical way we understand the legitimacy of domestic constitutions, needs to be revised. Not only does the classical story not fit with the way courts address the issue of constitutional conflict. On closer inspection, it also fails to be convincing on its own terms.

Why is it the case that we should regard domestic constitutions as the ultimate legal rules governing the national political community?

Positivists would simply say: "Well, we recognize it as a matter of fact". But here we've already seen, the facts are far more complicated. The actual conflict rules recognized do not simply reflect a rule of NCS or ECS. The identity of the Grundnorm or rule of recognition or in European constitutional practice is a complicated affair. Furthermore these rules are in flux and contested. So referral to conventions don't help much to understand or guide legal practice in Europe. Some kind of a normative conceptual framework is needed to make sense of and guide existing practice.

So here is the classical conceptual framework used for justifying the ultimate legal authority of national constitutions. “The constitution is the supreme law of the land because ‘We the People’ have enacted it to establish a legal framework through which they govern themselves”. There are different versions of theories with this structure, but most focus on the moment of bringing into existence of the constitution, the creation of an ultimate authority out of a legal void - the Big Bang or the *creatio ex nihilo* of the constitution. First there was nothing and then there was the highest law. And what we want to ideally see is “We the people” in some kind of high profile participatory deliberative way, bringing into being such an authority. That’s the conventional way of looking at it. So if you want to find out whether EU Law or national constitutional law is the supreme law of the land you ask: “Well, is something like that is going on the European level”, and you conclude “you know, there might be some faint analogies of such a process in the various moments of Treaty ratification, but it really does not amount to anything we can plausibly interpret as a constituent act of a European “We the People”. So European Union law can’t be the supreme law of the land and Europe can’t have a constitution properly so called, but at best a functional equivalent (after all, golf clubs have constitutions too, as Jack Straw once quipped), that ultimately derives its authority from the Member States. So that’s the classical framework. Unfortunately the idea that ultimate legal authority is based on “We the people”, that through an act of volition establishes an ultimate authority is deeply flawed. Miguel is among those who have written about what is paradoxical and unpersuasive about the conventional ways of thinking about domestic constitutional authority and Neil has as well. Even though this is not the place to actually make that case, what does the alternative look like? According to the ECJ it’s the principle of legality – the effective and uniform application of EC law, that grounds the ultimate authority of the EC. Contrary to Julio, I find that also unconvincing, for reasons I can’t develop here. Neither emphatic “We the People”ism nor the monist legalism that the ECJ advocates either reflects actual practice by national highest courts or is otherwise convincing.

So what is the something else that is to take its place? The foundation of law and of constitutional authority in Europe, I have argued, are the basic constitutional principles of political liberalism: the rule of law, democracy, human rights, complemented by subsidiarity to address questions concerning the allocation of legislative decision-making authority. But these principles are held together neither by the idea of a sovereign democratic state that is the source of all positive law, nor the idea of a legal system as a formal hierarchical order guaranteed by an ultimate authority recognized by everyone. Instead these constitutional principles are held together *normatively* by the idea of human dignity as the foundation of law and *institutionally* by the commitment of all constitutional actors to play their part in securing the overall coherence and effectiveness of legal practice.

Of course these constitutional principles, like all legal principles, ultimately require the support of officials and citizens to be effective. But they do not require enactment by “We the People”. Their authority derives from the reasons that support them, connected ultimately to the idea of human dignity as the normative foundation of law. Constitutional texts reaffirm these principles, but mostly to make them more visible (think of the Preamble to the Charter of Fundamental Rights) or to provide a more concrete interpretation of them. These principles are not just principles that the people as the true sovereign have happened to choose to govern themselves. The meaning of



collective self-government and the limits to that idea are determined by these principles and their interpretation. They are the foundations of law in Europe. They constrain and guide constitutional practice. They provide the language we use to settle debates and to contest old settlements. And they should be the direct focus of those trying to reconceive and guide constitutional practice on the domestic or European level.

I think I have shown in my work that these principles better than any other conceptual framework serve to explain and guide the practice of national courts fashioning rules of engagement to address constitutional conflicts between EU and national law. But as the heartpiece of a theory of constitutional authority, the new post-statist, post-nationalist and post-positivist constitutionalism that many of us here embrace has the purpose to more generally reconceive the foundations of law as it's practiced in transnationally integrated liberal democracies. So that's how the pragmatic and the theoretical come together.

### ***Neil Walker***

A follow up question, if I may? It seems to me, reading your work and listening to you here, that there is a strong claim that provided we move away from certain understandings of what is the glue behind national law, certain understandings based upon either authority or even local culture, then some of the problems - some of the difficulties associated with making legal sense of constitutional pluralism, begin to disappear. Because, instead we understand law as a practice based upon reason. Reason knows no boundaries of community, reason does not to defer to authority. Therefore once we go beyond the boundaries of national community we still have reason. The difficulty with that is that most of us actually understand law as a compound of different things. There is an authority or command dimension of law - one does not need to be an ethical positivist to understand the sociological reality of this authority dimension within law, and there is also a cultural dimension within law. Take Dworkin for example, Dworkin's theory of best fit, is precisely something which tries to put reason and culture together. He asks "what is the best understanding of law, conceived of as the best fit for this community"? So, there is a cultural dimension to law. But there is also a universal reason dimension to law. Because Dworkin tries to put these two together, he has to find an accommodation between the two, leaving aside binding authority almost entirely from his theoretical framework, or treating it simply as a product of the other two. But the problem is: if we try to move beyond constitutional pluralism, one does not have to deny the importance of reason (and I certainly do not), some dimension of universal reason within law, to wonder whether there are enough ingredients in place for law always to hold in a transnational context. If that part of law associated with the linkage between legal orders is devoid of autonomous authoritative foundations and compound cultural foundations, and if moreover it is contending with and confronting the insistent presence of these authoritative and cultural aspects in the different legal orders themselves, it seems to put a big strain on the reason component.

### ***Mattias Kumm***

First, the idea to sharply contrast authority and reason might not be very helpful for thinking about the complex kind of law, because as you rightly say, referring to my

colleague Ronald Dworkin, it is a central feature of law that it somehow integrates both. The question is how the two are integrated. Here is a very short version, ridiculously oversimplified, of how I see the two connected.

When a particular legal actor, be it the European Court of Justice, a national constitutional court, a legislator, an administrative agency, thinks about what its role is and what it should be doing, in a particular context, it understands its own actions as part of a wider practice. In that practice other institutions are charged with doing other things. Modern law institutionalizes a division of labour between different actors for a variety of reasons. These include establishing a division of powers to avoid abuse, allow for effective participation and control (voice), allow for decisions to be influenced by the relevant expertise etc. It is also part of the modern understanding of law, that with regard to many issues there is likely to be disagreement about what the law should be or how it should be interpreted, even if all relevant actors are well informed and acting in good faith.

What constitutionalism does suggest - and I think that is something that Miguel would agree with this - is that the exact nature of each actor's role and the exact limits of what a particular actor ought to be doing in a particular situation given decisions by other legal actors is very rarely determined exclusively by an authoritatively enacted rule regarding competencies. In most situations there are likely to be settled understandings of the law, but in principle these understandings are always susceptible to be challenged in the name of constitutional principles. The extent of the authority of any actor is thus always, in principle, susceptible to justificatory pressures. Such justification of authority in turn relies on jurisdictional, procedural and substantive principles. When a court has to decide a human rights case, it does not simply say: "I have been given jurisdiction to review human rights cases and therefore I will decide the issue on my best understanding of how these rights should be understood, no matter what anyone else thinks." Courts tend to be sensitive to procedural principles. In the context of applying the proportionality principle, for example, they might give special deference to decisions reached by long and arduous public and parliamentary deliberations or questions that require particular expertise that the executive branch has effectively brought to bear on the issue. In many instances officials might plausibly say: "this is authoritatively decided". But courts will often say: "look here we have a decision by some other actor that has some weight and let's see exactly what weight it has and whether, all things considered we should overrule it anyway". The degree to which the decision of another is accorded weight depends on the jurisdictional reasons supporting the authority of the other institution, the procedure used to make it, and the plausibility of the reasons that support it. Of course the humdrum practice of law generally deals with situations where most of these difficult issues are settled. But if they are settled that's a sociological fact only. We can imagine a political context where many of these settlements become disputed again. So constitutionalism provides you with the vocabulary to articulate and frame debates, about questions of authority. So it's not about authority versus reason. It is not about culture versus reason either. Obviously the culture of reasoning and the understanding of what counts as reasonable within a legal framework is likely to be influenced by certain self-understandings and practices as they happen to be in a particular place, in a particular situation and in a particular time.

***Julio Baquero Cruz***

My question is about your argument that in principle EU law should prevail unless countervailing principles have greater weight. You mention three exceptions, and their ground seems to be the greater democratic pedigree of national law. Assuming that this is the case, I wonder whether you can balance these principles as you do. On the one hand you have the rule of law, with predictability, the ability to know in advance who is going to decide and according to which rules. And you unsettle that on the grounds that national law is more democratic. This is problematic, because you cannot have democracy without the rule of law. If you accept this kind of balancing, you may end up damaging the rule of law in the European Union, and also in national systems because the European dimension of the rule of law is part of the national rule of law. And you do not improve democracy on the European level or on the national level. You just preserve what you take to be superior national constitutional law. So how do you deal with the heterogeneity of these two values? Can you really balance them in any meaningful way?

***Mattias Kumm***

I guess there are two ways of interpreting your question. One would be to say: “look, you have different sets of principles and you claim you can balance them against one another and how are you gonna do that?” So that’s a general problem of balancing competing principles against one another and the possibility of rationally doing so, given that they might be incommensurable. I do not think that this goes to the heart of your question, so I will leave that aside.

The other way of understanding your question is that you are suggesting that there is something basic about the Rule of Law, that justifies giving it absolute priority over other principles, perhaps because without it, other principles become unintelligible. That position, has a long pedigree in the Western legal thought. The idea has been central to the discussion of civil disobedience. So there is a legal decision and a citizen disobeys. And he disobeys because he thinks the government shouldn’t be doing what it’s doing. He thinks, or she thinks, that by disobeying in a certain way things might be improved. That’s a political act the purpose of which might be to change the practice. The question is under which circumstances might you legitimately be engaged in such a practice. And one answer is: “NEVER, because the Rule of Law is undermined! The Rule of Law is the very precondition for any meaningful understanding of justice, democracy etc.!” And I’ve always found that wholly unconvincing.

First of all, the law is being disobeyed a lot of the time, in lots of systems, in lots of situations, by a lot of people. And it tends not to immediately lead into a civil war or anarchy. So, just as a sociological point, the practice of law tends to be pretty robust. Of course there are also situations where it breaks down completely. But it is difficult not to be amused by the rhetoric of disaster, mutually assured destruction, complete disintegration etc., for example because the German Constitutional Court might issue a ruling that is incompatible with the ECJ’s holding concerning the availability of preliminary remedies in the context of challenging decisions under a regulation dealing with the import of bananas. I never understood why only a monist construction of the legal world and an unqualified submission to the authority of law could conceivably save humanity from disaster.

***Miguel Poiares Maduro***

But if I may, just in an attempt not to isolate Julio too much, I do recognize that there is an argument that he's putting forward which is rather powerful. That is the argument that if you collapse the description of that world into a *normative* statement, then you are actually legitimising derogations from the rule of law to the point that they may no longer be the exception. Then, this can threaten the concept itself. I think that's the danger which Julio is mentioning...

***Mattias Kumm***

That's a standard slippery slope argument. There are very few circumstances, where it is convincing. And I have yet to see any empirical studies that would support it in this context, certainly not by those who routinely invoke disaster scenarios.

***Julio Baquero Cruz***

Only two doubts: that your argument, at least in the 2005 article, is not really conceived in terms of disobedience. Like contrapuntal law, it is a structural argument about the very essence and the normal state of the relationship between EU law and national law. Second: the argument from civil disobedience may work with individuals, but I don't know whether it can be extrapolated to institutions. We need to think more about that.

***Matej Avbelj***

OK, I think despite the fact that you [Mattias Kumm] came late you had an opportunity to present your view equally comprehensively as all the others. Thank you very much for that. And now, there is time for you to take the floor. Yes, the next minutes belong to you: you the people. We have more than 30 minutes for questions and answers, so I would just like to start collecting your questions as well as comments, whichever might be.

**7. The Questions and Comments from the Audience**

The first comment from the audience stressed the need for a wider debate, not limited to "legal" questions concerning e.g. the precise relationship between the Court of Justice and national courts, if constitutional pluralism intends to be a theory that captures the whole of the European integration. It noted the lack of the real political debate in the European Union and its states.

The following question wondered about a wider relevance of the pluralist theory beyond the confines of the European Union. It compared the current debates in the European Union to "the age-old question of the relation between international law and national law." Is the theory applicable there as well?

Another question raised the issue of relevance of constitutional pluralism beyond the context of the European Union. It had firstly mentioned that some forms of pluralism

existed in other constitutional systems, e.g. the United States. However, it continued, the competition between different authorities reflects not only various political communities, but also institutions. Should it be so much court-centred, as it seems to be in the EU? In a way, the following question only reflected on this, asking what the precise problem between the various courts was: competition of jurisdictions, while each actor recognizes the others and the disagreement exists only as regards who should decide what?

The last question concerned the normative content of constitutional pluralism and went back to one of the “fundamental questions” discussed at the beginning of the symposium. If pluralism is a theory about disagreement, what is the precise content of such disagreement?

***Miguel Poiares Maduro***

I do not want to answer all questions; may be the last three of them. They have a common point: It is whether constitutional pluralism is something specific of European Union law and its relation with national law, particularly national constitutional law, or if it is something that is applicable beyond that. I think all answers from the three of us go in the direction that it is something applicable beyond that too. At the beginning I even stated that I think that it is actually inherent in constitutionalism itself.

What you have are different levels and expressions of constitutional pluralism. In the European Union this constitutional pluralism manifests itself even at the level of competing jurisdictions for ultimate authority. But that is just one more level of expression of this constitutional pluralism. What is the importance of this? The importance is not only that it tells us something about what constitutionalism is but also that once you develop a normative programme for constitutional pluralism, some of the elements of it are applicable at different levels, like at the international level, particularly the element of the institutional awareness required from courts. But not only courts, all institutions ought to define when they should defer to other institutions which may be in a better position to pursue the fundamental values of their legal system. What are the criteria for that? [Question from the audience by Bruno De Witte: [Can I ask you something? Why do you include international law in your concept of constitutionalism? Why do you call all that “constitutionalism”? Isn't that stretching?]

To the extent that the international level assumes independent forms of power, constitutionalism enters into play since I define constitutionalism as a normative theory of power. In certain domains of international law it is exactly that which is required. We can make this statement in empirical terms because in certain areas international law derogates from national constitutional law. To the extent, for example, that it affects the ideas of autonomy and self-government inherent in national constitutional law, then there is an argument that the legitimacy of that derogation has to be supported, in my view, on the basis of a constitutional argument in favour of international law that may require, at least, a partial constitutionalisation of international law itself.

But this is not only at the level of international law. And I think that is partly what you were saying: that constitutional pluralism existed already at the level of the state, including regarding the issue of ultimate interpretative authority. Simply, it was historically resolved - you used the expression sociologically resolved - by attributing

that authority to courts. But even that example of judicial supremacy is, in part, illusory. It is not totally correct because in reality, e.g. the doctrine that shaped what courts should do, the truisms of constitutional adjudication, are, to large extent, embedded by the logic of constitutional pluralism by the idea that the political process in many instances should trump the judicial process.

This makes the point that, in reality, constitutional pluralism exists and is applicable at different levels. Within the state you also have constitutional pluralism, but it manifests itself in a different manner.

*Neil Walker*

A couple of points. I think we have to be careful about the extent in which we assimilate the debate within the national level to that between the national and the supranational level. If it is key to constitutional pluralism that there is a disputed final authority, then that is different than there simply being no indisputable final authority. At any time, any system of authority is contingent, is in theory disputable. The status of a Supreme Court always rest upon the contingency that people continue to agree on its grounding in an authoritative Constitution. But at the state level, this is normally not ultimately a matter of dispute, even where there is much surface disagreement. So, for example, even when Bush comes up with his challenge to the status of the Court through his strong departmentalism and his idea of the unitary executive he continues to say “it is within the Constitution that we have the final word”. There is no ultimate dispute over the authority of the Constitution.

*Miguel Poiares Maduro*

But I think that the key element is the extent to which this is internalised on the operation of the actors of the system even if they don't formally contest the ultimate authority of the Court.

*Neil Walker*

Sure, sure, I agree with you. But as I was going on to say, I think that may the point about the European level is different. It's pretty clear that not only is there no indisputable final authority in principle, but that there is actually an endemically disputed final authority. It's there as an empirical fact, it is there in a way that is embedded in practice.

A couple of other points. And I think that international questions are interesting ones. It is noteworthy that there is so much new interest in so-called international constitutional law. And much of that starts from the premise that some of the materials of international law, whether general principles, or customary international law, subsist regardless of the views of national constitutional orders. So the moment you move away from a purely state-contractualist notion of international law - international law as a vehicle of the state - then you are almost necessarily pushed towards the constitutionalisation of the very idea of international law, with constitutionalization pointing to the idea of a self-standing legal order. But when it comes to the particular creature of international law

called European law we are dealing with the potential for a thicker constitutional frame of the type I discussed earlier, not just as thin claim to the autonomy of a legal order. So, I think that's the difference there. That's quite a significant difference.

As to the point on judicialization, I think what is important here is, as I said earlier, that it is not the whole picture. If we understand the overlap between different constitutional orders with an overlapping jurisdiction, citizenship, territory etc., as having political, popular and social dimensions, then constitutional pluralism clearly cannot just be about conflicts between courts. It's a more deeply structural thing.

So what you get is an incredibly difficult debate about the nature of the constitutional debate in the EU. You try to have a frame for that debate, but the very idea of such a frame is problematic precisely because that frame lacks the settled authority that an already established constitution would give it. It is a very complex question.. But it's there, and it operates not just in the narrow legal register. And there I think we should not give in too quickly on the notion of constituent power and "we the people". When we are making thick claims for constitutionalism, then, obviously there is a hugely fictional aspect to the notion of "we the people" if we deem it be based on actual aggregative consent or contract. But I am not talking about that. I am talking about whether one can legitimately *impute* a particular political process to a collective, however we frame the test of imputation (tacit consent, retrospective consent, horizontal solidarity etc.). Can one legitimately think about this in terms of as a form of self-legislation of that particular collective? Because it seems to me, if one cannot, one has a very thin constitutional authority. If one can then one has a thicker constitutional authority. It may be that as I have argued in one piece that that collective 'we the people' in the European context is a hybrid and may be a collection of European *people* and European *peoples* but, we can still have the notion of constituent power there, which to me, it is one of the fundamental building blocks of thick constitutional legitimacy.

Why would we want to get rid of it? Maybe because we think it's just implausible in the supranational context, but it seems to me it brings something normatively valuable to the debate. It's fundamental in this area when we are talking about constitutional pluralism, when we are talking about the constitutional claims of the international order, or the WTO law, or the EU, whatever, we have to ask some hard questions about where they are getting their legitimacy from and one of those hard questions has to deal with what I call the collective self-legislation, the self-authorization function. Is there a democratic mandate for this in the broadest sense of the term Is there some constituency to whom we can at least plausibly impute a notion of democratic self-legislation?

### ***Mattias Kumm***

You ask what are the kinds of constitutional orders that are recognized as legitimate authority in the strong constitutional sense. And the answer is: Whatever constitutional order performs well over time in terms of realizing, respecting and fulfilling foundational constitutional principles. If a constitutional order respects, protects and fulfil these principles we might also think of that practice as enabling collective self-legislation, though not much is gained by using this vocabulary. The focus on "We the People" still traps constitutional thinking in a Hobbesian frame. Once "the people" substitute for the king as sovereign, what you get conceptually is not liberal democracy,

but nationalism, that may or may not be substantively enriched by principles of liberal democracy.

But there was another important question asked: what is the normative edge to the idea of constitutional pluralism? What's the politics here? Why should it be normatively attractive to embrace it? Now of course this is a dangerous question, because ultimately you want a sophisticated theoretician of legal practice not to be biased by a political agenda, you don't want a constitutional theorist to be a political provocateur, or a political activist on a mission. But nonetheless, it is important to ask what the normative implications of conceptual frameworks are, even if the conceptual frameworks aren't devised as political projects primarily but as attempts to make sense of and guide an ongoing practice. So here is the answer: On the conceptual level constitutional pluralism allows basic commitments of liberal democracy to be articulated in a way that divorces them from the Hobbesian statist conceptual framework in which they originally had to fit. It allows us to reconceive legitimate authority and institutional practices in a way that makes without the ideas of the state, of sovereignty, of ultimate authority, and of "We the People" as basic foundations of law and the reconstruction of legal practice. That opens the door to a more intelligent discussion of a wide range of questions relating to international law, European law and the design of institutions that might help solve the great policy challenges of the future.

### ***Julio Baquero Cruz***

I won't have much to say because I did not really feel concerned by most of the questions that were asked... After all I am not a pluralist! However, you enter very risky terrain because if everything melts in the air then you can no longer breath as a lawyer. It is very difficult to walk in quicksand...

But I wanted to say something else... Something about the court-centredness and also the law-centredness of pluralism. Perhaps in the European Union there is deficit of the political. Political conflicts tend to be seen in legal terms and sent to courts instead of being dealt with politically. This is linked to pluralism, since pluralism deals with political issues translated into law. And I don't know whether courts should be dealing with them in the first place.

In that sense the promise of pluralism, if it has a promise, is more connected to the political process and political institutions than to law and courts. And perhaps not so much to those of the European Union, which may already be plural enough, in the way they are structured, the way the negotiation takes place, etc., than to national institutions. I think national institutions, including national courts, are not plural enough. They tend to be more narrow-minded. They tend to confuse the world with their own world... Whereas European institutions naturally tend to see a larger picture as a consequence of the interaction that takes place within them. Sometimes they also get stuck in their autonomous discourse, but they are more naturally open in view of their own structure, and composition, and procedures, etc.

[The last question from the audience concerned the relevance of the Constitutional Treaty and the process that led to its adoption for constitutional pluralism.]



***Neil Walker***

I think that it is a very good question and maybe we should have raised it earlier... My sense of this is that if you believe in something called constitutional pluralism, then you have to be against any notion of constitutional finality. You have to accept that if there is a conflict between authorities and no final authority which can resolve that, then any resolution of that conflict of authorities is a contingent one.

You also have to concede that, even if you accept, as I do, that there is a universal element within constitutional reasoning, there is also an element which is inherently particularistic – specific to particular constitutional communities.

So there are two dialectics to constitutionalism. There is a dialectic of different authority claims and there is dialectic between the universal and particular. And it seems to me that in European context any constitutional settlement cannot be anything other than a continuation of a constitutional conversation in the context of that double dialectic. Any nominally non-constitutional settlement, such as the Treaty of Lisbon, is also a continuation of that same constitutional conversation by other means. The label cannot create its own finality.. It can do other things, which are symbolically, politically and practically very important in pushing the debate forward and developing a thicker constitutional frame but it cannot put the whole constitutional debate to rest. The whole point of constitutional pluralism is that it disallows that possibility of final settlement.

***Mattias Kumm***

I think the events surrounding the ratification of the Constitutional Treaty and now the Reform Treaty clearly suggest that there will not be a constitutionally monist order established in the European Union any time soon. On the contrary, what you can observe is a sharpening of the pluralism and sharpening of conflicts that might exist between national and EC law in some contexts.

Julio is right about one thing: One of the challenges of a normatively attractive plausible theory of constitutional pluralism, is that it has to give an account of the conditions under which it is attractive and the conditions under which a monist resolution of constitutional issues is preferable. It would be a peculiar kind of *pluralism fetishism* to think that pluralism is always attractive. Why was Hobbesian monist thinking so attractive in its time? Well, the Leviathan was written during the Civil War in Britain, just after the Thirty-Year War in Europe had ended. Not a good time to advocate legal pluralism.

So what is it about constitutional practice at the beginning of the 21<sup>st</sup> century that makes constitutional pluralism more attractive? I think here there are three core factors: First, there widespread agreement on foundational constitutional principles as the language we use to contest and settle political and legal questions across constitutional sites. Second there are the benefits of relatively thick political and legal integration, that provide further incentives to cooperate. These two features lower the costs of pluralism and enhances the chances of constructive engagement even without the recognition of a common ultimate authority. Third, the fact of relative diversity and social and political pluralism, complemented by problems of organizing a full-fledged democratic process on the European level, limits the attractiveness of European constitutional monism.

Let me finish by saying something about the domain of application of constitutionalist thinking. Constitutionalist thinking is not restricted to the relationship between national and European practice. It is also applicable to the relationship between European and International practice. And it also applies to the relationship between different constitutional actors within the national, European or international level. National courts, for example, called upon to adjudicate a rights issue, tend to always reflect on their role when they apply a proportionality test in human rights and constitutional rights context and think about how large the margin of deference should be to the legislator. That's constitutionalist thinking within the most commonplace contexts of domestic constitutional practice. Constitutionalism provides a universal framework for thinking about law and the exercise of power in the name of the law.

***Miguel Poiares Maduro***

I agree with Mattias on this.

Your question can be answered at different levels. One would be what is the agenda for constitutional pluralism as a normative theory and I have already said something about that, so I will not repeat it.

Let me say something different therefore and address the question, as Mattias did, having as the starting point the failure of the Constitutional Treaty. You may remember that in my piece on contrapunctual law I had criticized the idea of having a clause on constitutional supremacy in the Treaty. I thought that that was ignoring constitutional pluralism. But Mattias has said that likely we will have even more constitutional conflicts. I am not sure about this. I think that the constitutional conflicts that will come up in the future will have a very different nature. They will have more to do with constitutional pluralism at the horizontal level: constitutional conflicts between national polities. I think that in the European Arrest Warrant decisions the reaction of some national courts has less to do with European constitutionalism as it has to do with the differences between national legal orders. There was some resistance towards to the idea of recognising decisions coming from other national legal orders when they are not sure if their constitutional standards fit their own set of values?" That is a new challenge that will tend to increase with the new areas of mutual recognition. We'll need to develop instruments for this horizontal discourse; for coherence to be built at the horizontal level. That is the first point I wanted to very briefly raise.

The second one has to do with the later debate between Julio and Mattias. Julio was arguing that there is an excessive tendency to delegate political questions on courts and to constitutionalize political questions. And if I understood it correctly, that's the same argument that Sunstein has made in favour of judicial minimalism. His argument is not only a pragmatic argument, it's normative: "judicial minimalism is good because it leaves more space for political deliberation, for political debate."

On the other hand, however, there is an argument that can be made in favour of a judicial role with respect to those, so-called, "political issues". We can make an argument that with regard to certain issues some insulation from the day to day passions of the political process may be a good thing and that courts can be an instrument of rationalization of the political process. Moreover, courts' decisions may sometimes be

necessary to restart political deliberation on certain issues. I think Mattias idea of courts as elements of Socratic contestation departs from a similar conception.

In my view both Mattias's maximalism and Sunstein's minimalism have a point and the problem with these approaches is that they are single institutional (to use Komesar's expression). In this respect they are not really pluralist since they do not build in each institution an institutional awareness to the competing claims of other institutions that, depending on the circumstances, may be more constitutional legitimate. It is not sufficient that you say there is a potential problem with the political process for courts to be legitimate to step in but or, vice-versa, a problem with courts does not necessarily require the political process to take precedence. These decisions have to be taken with institutional awareness and on the basis of an institutional comparison, as Neil Komesar has so often argued for. In my view, one of the issues on the agenda of constitutional pluralism is to develop criteria for such comparison.

***Julio Baquero Cruz***

This is a great responsibility and I will only say the following: that in my view the future debate on pluralism will be about three kinds of limits: the limits of pluralism, the limits of law and courts, and the limits of constitutional law. We must ask ourselves what can we expect from constitutional law, and under what conditions may constitutionalism deliver it. I have the impression that we may be expecting too much from it, at least in the EU and its States, and in a context in which it cannot deliver all the goods that we expect from it.