The Magic World of Constitutional Pluralism

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Gráinne de Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism* (Cambridge University Press 2012) ISBN 978-0521177757

Matej Avbelj and Jan Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) ISBN 978-1849461252

Introduction

It was my former colleague at the European Court of Justice (ECJ), Miguel Maduro, who introduced me several years ago to the world of constitutional pluralism. This theory confronts a dilemma almost as old as Union/Community law itself, at least since the days of *Costa* v. *ENEL*.[1] Union law has primacy over national law, including national constitutional law. From the perspective of the Union legal order the primacy principle is absolute and as such continues to be firmly upheld by the case law of the ECJ.[2] However, for most supreme courts of the member states and more particularly their constitutional courts the perspective is different. They will normally consider the national constitution as the supreme source of the law under their jurisdiction and not accept a general subordination of the national legal order to the EU legal order. The EU legal order is considered to be derived from the national order and to find its ultimate legitimacy in the national constitutional order. They will accept primacy of EU law in principle but not unlimited. Where Union law would be considered to infringe upon primordial values of the national constitution or be held incompatible with inalienable characteristics of the State, primacy is not accepted. Considering that the EU legal order does not dispose of the necessary instruments or sanctions to effectively uphold the application of its rules in a member state against the hard core of the

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[1] Case 6/64 (1964) ECR 1194.

[2] Case 409/06 *Winner Wetten* (2010) ECR I-8041, Case C-416/10 *Krizan*, judgment of 15 Jan. 2013 nyr para. 70, Case C-399/11 *Stefano Melloni*, judgment of 26 Feb. 2013 nyr para. 59.

European Constitutional Law Review, 10: 349–358, 2014

doi:10.1017/S1574019614001217

national constitution, the result is a clash between claims of ultimate authority and in the end a deadlock, at least on the level of the courts. EU law is applicable but not able to be applied.

By qualifying the relationship between the national legal orders and that of the Union as heterarchical instead of hierarchical, constitutional pluralism first of all intends to give a systemic explanation of this situation but intends also – and here comes the magic trick – to legitimize it. That might at the same time explain the warm reception it has received in a relatively short period of time. Indeed, a spell seems to have been cast on EU legal scholarship. To quote from a reliable source: 'Constitutional Pluralism is today the only party membership card which will guarantee a seat at the high tables of the public law professorate.'[3]

To a large extent I can share the factual analysis of the constitutional pluralists. However, what has puzzled me from the start is when that analysis is being elevated to a normative theory. Pluralism is not only a description of the present state of the relationship between EU and national law, but it should also be it. How to justify this jump from fact to norm? What are its compelling advantages and values?

I have also been puzzled by the usual qualification of pluralism as *constitutional* pluralism. For an outsider a normative conception of pluralism at first sight is difficult to reconcile with the concept of constitutionalism. That concept seems to imply a system of law characterised by coherence, a hierarchy of norms and the like. Is calling pluralism constitutional intended to counterbalance, to soften the impression of disorder, of legal uncertainty that a notion of pluralism seems necessarily to imply? In other words why exactly is pluralism called constitutional?

This intellectual curiosity explains why I did accept, perhaps unwisely, the invitation of the editors to review two recently published books on the subject, the first edited by Gráinne de Búrca and J.H. H. Weiler, *The Worlds of European Constitutionalism* (Cambridge University Press 2012), the second edited by Matej Avbelj and Jan Komarek, *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).

Now that I have digested somewhat more than 700 pages, have my questions been satisfactorily answered? What have I learned? What follows is not a classic book review. It is more a personal comment inspired by the many interesting things I have read. I shall focus on the EU and the relationship between its legal order and that of its member states. But I should add immediately that some of the authors suggest a more universal scope for the concept of constitutional pluralism in order to explain the relationship between international and national legal sys-

[3] J.H.H.Weiler, Prologue: Global and Pluralist Constitutionalism – Some Doubts, in Gráinne de Búrca and J.H.H.Weiler (eds.), *The Worlds of European Constitutionalism* (Cambridge 2012) p. 8.

tems.[4] And apart from that, it should also be emphasised that *The Worlds of European Constitutionalism* also addresses wider subjects than constitutional pluralism alone. Its first two chapters revisit classics as how to classify the EU; is it still to be considered an international organisation (Bruno de Witte); where to situate the EU between the international and the national (Neil Walker)?

Before entering into the questions I want to discuss, it should first be emphasized that constitutional pluralism is not a concept with an established, generally accepted meaning. It is a multi-coloured thing. Weiler, in his introduction to *The Worlds of European Constitutionalism,* calls it a terribly underspecified term[5]; in their introduction to *Constitutional Pluralism in the European Union and Beyond* Avbelj and Komarek distinguish at least six 'more prominent' conceptions of constitutional pluralism.[6] One must therefore be careful when discussing the concept for not addressing the wrong issues. So what follows must be read with that reservation in mind.

The way in which the *Kadi* judgment, which figures with some prominence in both books, is being interpreted by some of the authors well illustrates such terminological differences. For Gráinne de Búrca, who is overall quite critical about the judgment, *Kadi* reflects a robust pluralist approach because of the Court's emphasis on separate and distinct legal orders.[7] Halberstam, on the contrary, qualifies that approach as dualist (kind of).[8] De Búrca reproaches the Court for having excluded a *Solange* or *Bosphorus* type of solution showing deference to a UN system of fundamental rights protection if adequate procedures would be introduced to that effect.[9] Halberstam seems to share that view, but he admits that other interpretations of the judgment are possible.[10] On the contrary, Kumm[11] considers that the *Kadi* judgment suggests that a *Bosphorus* approach would be acceptable to the Court, whereas Groussot[12] mentions *Kadi* as an example of a *Solange* approach. I resist a strong temptation to enter into this discussion, which as far as *Bosphorus* and *Solange* are concerned, is not directly relevant for the understanding of Constitutional Pluralism.

[4] See more particularly the contributions of Neil Walker to *Constitutional Pluralism in the European Union and Beyond* and of Daniel Halberstam to *The Worlds of European Constitutionalism* and *Constitutional Pluralism in the European Union and Beyond*.

[5] *The Worlds of European Constitutionalism,* p. 18.

[6] *Constitutional Pluralism in the European Union and Beyond*, p. 4.

[7] *The Worlds of European Constitutionalism,* p. 127.

[8] *The Worlds of European Constitutionalism,* p. 189.

[9] *The Worlds of European Constitutionalism,* p. 143.

[10] *The Worlds of European Constitutionalism,* p. 189.

[11] *Constitutional Pluralism in the European Union and Beyond*, p. 62/63.

[12] *Constitutional Pluralism in the European Union and Beyond*, p. 319.

Constitutional pluralism as a descriptive analysis: Does it fit?

As already said, I can largely share the insights of Constitutional Pluralism as a descriptive analysis of the relationship between the national and Union legal orders. On a more abstract level, the reality of a clash of ultimate authorities is real and undisputable with regard to the well-known cases, in which national supreme or constitutional courts have put into question the absolute nature of primacy of Union law. But I wonder, nevertheless, whether that relationship, more particularly seen from the perspective of the courts, is not more complex and more nuanced. First of all, courts do not apply the concept of constitutional pluralism. The ECJ shows no pluralist inclinations, continuing to insist, as it does, on the unconditional validity of the primacy principle. But nor can the highest national courts in the said cases be considered to demonstrate a full pluralist approach. They do not regard, in my view, the relationship between EU and national law as heterarchical. The analysis of the ECJ in *Costa/ENEL*[13] and *Walt Wilhelm*,[14] according to which the EU legal system has become an integral part of the legal systems of the member states, has been largely followed in the practise of these national courts, including the acceptance of the primacy principle. Declaration No. 17 concerning primacy, annexed to the Lisbon Treaty, has only reinforced the legal basis for that acceptance in practice. Moreover many national constitutions have been amended to provide for explicit clauses opening up the national legal systems to an unhindered reception of Union law. Primacy is only contested in exceptional cases, particularly where Union law is considered to put at risk fundamental principles of the national constitution.[15] One wonders whether Constitutional Pluralism is not unnecessarily magnifying the problem by converting an explanation of the exceptional into a general theory about the relationship between Union and national legal orders. In this regard I found interesting the suggestion of Baquero Cruz to conceptualize these cases as instances of institutional disobedience, by analogy to the principle of civil disobedience.[16]

There is still another dimension to this. In the practice of their case law, national supreme courts basically demonstrate loyalty to the Union legal system and show willingness to accommodate, as much as possible, tensions between Union law and the Constitution. This can also be said with regard to the *Bundesverfassungsgericht*, even if the accommodation is sometimes couched in threatening language. The ECJ in its turn shows openness to national, constitutional sensi-

[13] Case 6/64 (1964) ECR 1194.
[14] Case 14/68 (1969) ECR 1 para 6.
[15] Cp. Kumm, *Constitutional Pluralism in the European Union and Beyond*, p. 61.
[16] *Constitutional Pluralism in the European Union and Beyond*, p. 256-267.

tivities.[17] This should not be considered, in my view, as an implicit recognition of national authority claims, but much more as a token of caution, of concern by the Court for its own legitimacy as perceived by and within member states, and in the last instance of sheer good sense. The recent *Akerberg Fransson* decision might be mentioned as an example. In case Union rules do require implementation or execution by national rules (which is the normal scenario), there does exist in principle a margin for reviewing respect of national constitutional principles, provided that the level of protection provided for by the Charter and the primacy, unity and effect of EU law are not thereby compromised.[18] It is remarkable that the Court, after concluding that the case in hand falls within the scope of Union law, does not say that consequently the Charter must be respected. The order is being reversed. It is because Union law leaves room for national action that this action may be subject to review of respect of national fundamental rights, but on the condition that the level of protection guaranteed by the Charter is not affected. In doing so, the Court shows respect for the national constitutional order. And of course there is the obligation for the Union under Article 4(2) TEU to respect the constitutional identity of member states, which now is also starting to be referred to in the case law. I shall come back to that.

The implicit, sometimes explicit dialogue between these courts through their case law is real and effective, also in terms of conflict avoidance. This dimension risks remaining somewhat underexposed in the pluralist discourse. Not always, to be fair. I very much like the notion used by Halberstam of mutual embedded openness to express the intermingling of the national and the Union systems.[19]

If pluralism may be understood and accepted (albeit with the reservations just mentioned), as a factual description of claims of ultimate authority without a real legal answer in case of conflict, there remains the qualification 'constitutional'. How could pluralism become constitutional? At first sight, this seems to be a contradiction.

The simplest answer would be to say that it merely indicates the subject matter to which pluralism relates: a plurality of constitutional orders. However, most authors discussing the question have something else in mind. The 'Constitu-

[17] Cp. Christiaan Timmermans, Multilevel Judicial Co-operation, in Pascal Cardonnel et al. (eds.), *Constitutionalising the EU Judicial System, Essays in Honour of Pernilla Lindh* (Oxford 2012) p. 15.

[18] Case C-617/10 judgment of 26 Feb. 2013 nyr para. 29.

[19] *Constitutional Pluralism in the European Union and Beyond*, p. 97; see also his reference to the notion of 'principled mutual accomodation' in his contribution to *The Worlds of European Constitutionalism*, p. 161. One might also recall in this context the concept of 'constitutional tolerance' developed by Joseph Weiler (who is not a constitutional pluralist); see his Prologue to *The Worlds of European Constitutionalism*, p. 13. Cp. also Maduro, *Constitutional Pluralism in the European Union and Beyond*, p. 74.

tional' in Constitutional Pluralism apparently reflects the search for some kind of recipe for how the plural claims of ultimate authority should live together and interact with each other. Indeed, most constitutional pluralists are looking for precepts, values, principles bringing some order and coherence to the otherwise unruly bunch of pluralist sites.[20] That is why they are *constitutional* pluralists, contrary to radical pluralists like Avbelj[21] and Krisch[22] who reject any binding agent connecting the sites and proclaim competition between them as superior, allowing the fittest solution to emerge. Of course, the interesting question is where to find the legal sources for these binding agents in the absence of an overarching legal system. Indeed, were there to be any, pluralism would evaporate and be supplanted by a hierarchy of norms. By the way, the father of Constitutional Pluralism, Neil McCormick, did evolve in that sense by finally accepting public international law as having to govern conflicts between pluralist orders.[23]

The main sources of inspiration for developing a common grammar allowing a dialogue between pluralist orders promoting coherence appear to be either meta-values of a constitutional nature[24] or mechanisms of conversation and accommodation as applied within the EU in the case-law of the ECJ and national courts (or a combination of both). Maduro famously distilled, from that judicial practice as well, meta-principles of contrapunctual law.[25] These principles are not hierarchically imposed, 'they are themselves a product of pluralism': 'the rules of the game are entered into by playing the game according to the rules'.[26] This is nicely put, but to use the term 'rules' in this context might seem fairly ambiguous.

[20] 'The world pervaded by plurality (…) calls for a meta-language through which the actors situated at different (epistemic) sites could reflexively engage with each other by recognising their differences with a simultaneous commitment to a certain shared framework of co-existence', according to Avbelj and Komarek in their Introduction to *Constitutional Pluralism in the European Union and Beyond*, p. 4.

[21] *Constitutional Pluralism in the European Union and Beyond*, p. 381.

[22] *The Worlds of European Constitutionalism*, p. 203.

[23] As mentioned for instance by Avbelj, *Constitutional Pluralism in the European Union and Beyond*, p. 382.

[24] Cf. the cosmopolitan constitutionalism of Kumm, *Constitutional Pluralism in the European Union and Beyond*, p. 64/5; see also Walker, *Constitutional Pluralism in the European Union and Beyond*, p. 24, Halberstam, *The Worlds of European Constitutionalism*, p. 200. Reference should also be made to the concept of multilevel constitutionalism developed by Ingolf Pernice, which I have not discussed here; see the contributions to *Constitutional Pluralism in the European Union and Beyond* of Mayer and Wendel (p. 127) together with the highly critical analysis of this concept by Barents (p. 153).

[25] See his contribution to *Constitutional Pluralism in the European Union and Beyond*, p. 82-84.

[26] *Constitutional Pluralism in the European Union and Beyond*, p. 83.

Constitutional pluralism as a normative concept?

To accept constitutional pluralism as a fair description of how things actually are is one thing; to advocate it as how things ought to be is an entirely different matter. For some, a pluralist approach must be regarded as normatively superior in the present circumstances – or even in the longer term – to a constitutionalist one. Pluralism provides for accommodation, space for contestation, the possibility of steering between conflicting supremacy claims creating checks and balances.[27] According to Krisch 'pluralism's openness comes to appear as a chance more than as a menace: as a chance to contest, destabilize, delegitimize entrenched power positions – and to pursue progressive causes by other means than constitutional settlements.'[28] Here the outcome of the clash between supremacy claims is left, so to speak, to the market without any corrective mechanism in case of a dysfunctioning market, at least not on the level of the courts. For others, pluralism can at most only be second best for want of a more constitutional solution. Smolek still goes a step further: 'law is intrinsically monistic. *Legal* pluralism is impossible'.[29]

As we have seen, for many of those advocating *Constitutional* Pluralism, the 'constitutional' reflects an effort to make the pluralist scenery more comfortable to live in by developing mechanisms or meta-values and principles fostering accommodation and coherence between the pluralist sites. This could also be considered to give a normative connotation to the concept. If so, it would nevertheless be quite a different one, to some extent even the opposite, of the normative variant of pluralism we have just mentioned.

A personal note

I am somewhat astonished that so little attention has been given in all this to the new Article 4(2) TEU. I have found only a few occasional references, but no real analysis. In my view, this article may provide a new battleground for constitutional pluralism; it should be used to channel the clashes between claims of ultimate authority and to negotiate a legally acceptable outcome.

Article 4(2) TEU imposes an obligation on the Union to respect the identity of the member states. This obligation already figured in the Treaty of Maastricht (Article F1 TEU) but the Lisbon Treaty has now defined it in much greater detail. The Article refers to the member states' fundamental structures, political and

[27] See de Búrca, *The Worlds of European Constitutionalism*, p. 128-130, Krisch, *The Worlds of European Constitutionalism*, p. 203, Maduro, *Constitutional Pluralism in the European Union and Beyond*, p. 75 et seq., Avbelj, *Constitutional Pluralism in the European Union and Beyond*, p. 381.

[28] *The Worlds of European Constitutionalism*, p. 261.

[29] *Constitutional Pluralism in the European Union and Beyond*, p. 372.

https://doi.org/10.1017/S1574019614001217 Published online by Cambridge University Press

constitutional, the essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. The Union has to respect all of that. One could interpret this article as defining a hard core of national sovereignty, which must remain immune to Union action. This would mean that insofar as Union law would really affect national identity as defined, Union law must step back and not be applied. The consequence would be an absolute and horizontally applicable reserve of national sovereignty, which did not exist before the Lisbon Treaty.

Could it not be argued that Article 4(2) TEU is codifying Constitutional Pluralism? I do not think so. The article integrates the legitimacy claim of national constitutional core values into the EU legal system itself. It traces a limit which EU law may not pass. This is not a restriction of the principle of primacy of EU law. It is a general, horizontal restriction under EU law itself to the exercise of Union competences. An act going beyond this limit should be considered invalid; it cannot benefit from primacy. This provision therefore has the potential to neutralize conflicts between EU law and national constitutional law, between the ECJ and national constitutional courts. Its effectiveness in that respect largely depends on the interpretation of the provision and on who is the master of that interpretation.

Contrary to the situation under the Maastricht Treaty (and likewise under that of Amsterdam and Nice) the Court now has full jurisdiction with regard to the opening articles (Title I) of the EU treaty, including Article 4(2). Obviously, it is not for the Court to decide what belongs to a member state's fundamental constitutional structures. But the Court should be able to review the arguments presented by a member state. Merely invoking this Article to oppose the application of Union law should not be enough. The Article imposes an obligation on the Union and its institutions, an obligation of Union law. The Court, by its very mission to ensure respect of the law, must be able to control respect of this obligation. This is now being confirmed in the first few cases, in which the Court has made reference to this new Treaty provision.[30] The most interesting feature of this

[30] See Cases C-208/09 *Ilonka Sayn-Wittgenstein* (2010) ECR I-3693 para. 92, C-391/09 *Runevic-Vardyn* (2011) ECR I-3787 paras. 86-91, C-393/10 *O'Brien*, judgment of 1 March 2012 para. 49 nyr, C-202/11 *Las*, judgment of 16 April 2013 para. 26 nyr. See also Case C-300/11 *ZZ*, judgment of 4 June 2013 nyr. In para. 38 of this judgment the Court observes '(…) although it is for Member States to take the appropriate measures to ensure their internal and external security, the mere fact that a decision concerns State security cannot result in European Union law being inapplicable'. No reference is being made to Art. 4(2) TEU but there is little doubt the same would apply if this article would have been invoked. For a contrary view about who should have the final say about the interpretation of Art. 4(2) TEU, see A. von Bogdandy and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', *CMLRev*. (2011) 1417. Cf. also the annotation of the Sayn-Wittgenstein judgment by L. Besselink, *CMLRev*. (2012) p. 671.

budding case law is that the Court does not seem to interpret the Article as an absolute reserve of national sovereignty. It is much more considering respect for member states' identity as a separate interest that must be taken into account when balancing conflicting interests.[31]

In this context it is interesting to note that the *Bundesverfassungsgericht* in its decision of 14 January 2014 in the *OMT* case, for the first time referring preliminary questions to the ECJ, also makes a short reference to Article 4(2) TEU.[32] That provision, according to the German Constitutional Court, offers insufficient comfort to solve the constitutional problems caused by the *OMT* decision of the ECB (to proceed, under specific conditions, to purchases of sovereign bonds of member states on the secondary market). The provision is insufficient, not in itself, but because of the interpretation given by the ECJ, according to which the protection of national identity represents an interest which may be balanced against others.

This passage of the decision could be read as an implicit criticism of this interpretation. Now of course we are dealing here with one judgment only (*Runevic-Vardyn*), not with a well-established case law. In my view, Article 4(2) TEU could indeed be more strictly interpreted, by allowing a more absolute protection of member states' national identity excluding a balancing against other interests. In that way the article could function as a safety valve channelling and contributing to solve possible conflicts with national supreme courts.

Final remark

Both books may be recommended not only to all those wishing to be initiated into the secrets of Constitutional Pluralism, but also to the already initiated. They will be confronted with the various, sometimes quite divergent strands of thinking about global constitutionalism and pluralism, which are well presented by a number of leading scholars in the field, sometimes quite eloquently so. One may benefit from a rich palette of pluralist thinking representing a large variety of denominations, ranging from radical pluralists, to more or less soft constitutional pluralists to the, now apparently regarded as old fashioned, monists. The language used is sometimes highly confrontational, even emotional; this really is a stormy debate. Quite stimulating is the Dialogical Epilogue at the end of *The Worlds of European Constitutionalism* figuring Joseph Weiler as an academic prosecutor questioning the authors in the best Socratic tradition. He challenges in sometimes fierce language ('remarkably inarticulate', 'blind spot', 'maddeningly illusive') the premises of the authors who have of course the right to reply.

[31] See *Runevic Vardyn* (fn. 30) paras. 87 and 91.
[32] BVerfG, 2 BvR 2728/13 para. 29.

https://doi.org/10.1017/S1574019614001217 Published online by Cambridge University Press

My own thinking about the subject has been considerably clarified. Black holes have disappeared. I now understand that a pluralist is not necessarily a constitutional pluralist and what constitutional means or could mean in this context. Have I become a convert, and if so to which school?

I do not regard pluralism as an intrinsic value *per se* or as superior to constitutionalism. Revolutionary language about radical pluralism sounds exciting, but I cannot see how this may work in legal practice. Better *Solange* or *Bosphorus* approaches than supremacy claims neutralizing each other. But even as to the apparent precept of constitutional pluralism – the mutual recognition of the legitimacy of supremacy claims – how can that work? If the ECJ were to acknowledge the legitimacy of national constitutional supremacy claims, would that not be the end of primacy of Union law? But, it might be that I have missed something. In any event, if I would have to express a preference, it would be in favour of a variant of pluralism that is constitutionalised as much as possible. Basically, however, I remain a sceptic.[33]

[33] In fact, I feel more attracted by the approach recently presented by Piet Eeckhout in his inaugural lecture at University College London. Eeckhout starts from a concept of integration of laws leading on the level of adjudication to a principle of limited and shared jurisdiction. See Piet Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration' *Current Legal Problems* (2013) 66 (1): p. 169-202.