Four Visions of Constitutional Pluralism

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What is constitutional pluralism? What does it stand for? What does it expect to achieve, or change in European integration, or otherwise contribute to it? Is it a viable, desirable or perhaps even an indispensable theoretical take on European integration? These were the leading questions discussed at the Symposium 'Four Visions of Constitutional Pluralism' at the European University Institute in January 2008. Within the framework of the Legal Theory Working Group and under the auspices of the Academy of European Law the organisers, Matej Avbelj and Jan Komarek, hosted four key scholars from the field of EU legal and constitutional theory. Julio Baquero Cruz,[1] Mattias Kumm,[2] Miguel Poiares Maduro,[3] and Neil Walker[4] engaged in a groundbreaking three-hour discussion of their respective theoretical visions of European integration. This short note can provide just a taste of an extremely rich debate; however, its full transcript was published by the EUI Department of Law as its working paper.

The symposium started off with an observation that especially in the last five or so years the idea of constitutional pluralism has immensely grown in its popularity. This has happened against a background of a gradual decline of a more classical constitutional narrative of European integration. The latter has, for at least two decades, dominated both the theory as well as the representation of practices of integration. Relying too uncritically on the analogy with statist constitutionalism, it has fostered a belief that European integration was constitutionalised and that it was henceforth almost inevitably destined to a linear progress to an ever closer Union with ever more uniformity. However, for various reasons, this

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European Constitutional Law Review, 4: 524–527, 2008

doi:10.1017/S1574019608005245

classical constitutional vision came under strain and it appeared to be increasingly inadequate: descriptively, explanatorily as well as normatively. As a result, the speakers – with the exception of Julio Baquero Cruz, who came up with a strong critique of their visions – have called for and tried to develop a different approach to the integration that has since become known as constitutional pluralism.

However, the discussion among the panellists demonstrated that they are far from agreeing what the exact contours of constitutional pluralism are in European integration, as well as beyond it. Miguel Maduro, for example, surprised everyone by arguing that pursuant to his understanding of constitutionalism as a normative theory of power, pluralism is inherent in constitutionalism itself. In his words, this is expressed in five different respects: plurality of constitutional sources, pluralism of different constitutional jurisdictions, interpretative pluralism, pluralism of powers and finally pluralism of polities. In that sense pluralism and constitutionalism are certainly not bad friends. Instead they already go hand in hand in the statist environment, as well as in the EU, whose pluralist character is only a bit more pronounced. In a response to that, Neil Walker felt obliged to start with a definitional caveat. He insisted that there is something distinctive about pluralism in the European and, more generally, transnational context. It has to do with the pluralism of jurisdictions, which covers not only the pluralism of authority claims but also the pluralism of political communities. According to Walker,

> 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 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?

However, Julio Baquero Cruz challenged both speakers by insisting that in his mind, pluralism is an impulse of post-modernity, of everything which is fluid and fragmented and which as such is incompatible with constitutionalism, an inherently modern idea whose imperatives are hierarchy, order and effectiveness. He cautioned that for lawyers to embrace post-modernism and pluralism might be a risky, almost self-deficient enterprise, one which is not compatible with their social role.

This last comment sparked a lively discussion on the virtues of modernity and post-modernity and the role of (constitutional) law in that context. The speakers almost unanimously pledged their allegiance to the contributions of modernity, in particular to its defining belief that the social and political world is something that depends on and can be controlled by our collective will. However, especially Neil Walker warned that in preserving that essential sense of modernity we can not

afford to stick our heads in the sand and pretend that the world is less complex than it actually is. For that reason, in his words, perhaps the first and most obvious normative value of pluralism is that it provides for an accurate understanding of the world. Miguel Maduro joined in by stressing that in his eyes, constitutional pluralism does not appear as a post-modernist project, but one which stands for the rules of engagement underpinned by certain meta-principles allowing for coherence in the absence of those classical requirements of clear-cut hierarchy and one ultimate source of authority.

Mattias Kumm, who joined the symposium in its second part, agreed. He insisted that neither the ECJ's monistic legalistic defence of its own allegedly single authority nor the national claim to the same result, backed up by the recourse to 'We the People', are convincing. For him, the foundations of law and of constitutional authority in Europe are the basic constitutional principles of political liberalism: the rule of law, democracy and human rights, complemented by subsidiarity to address questions concerning the allocation of legislative decision-making authority. They 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 playing their part in securing the overall coherence and effectiveness of legal practice.

Having said that, the speakers were then pressed on the actual viability of their visions, and in particular whether some of them are not actually monists in disguise. Neil Walker understood the tenor of the question well. He emphasised that, indeed, when talking about constitutional pluralism there is always a chance that too much insistence on consistency and coherence, as expressed by Maduro and Kumm, can end up in a hierarchical solution, whereas on the other hand, and this is where Baquero Cruz's fear lies, it can conversely lead to an uncontrolled fragmentation. Nevertheless, there is a middle path between the two unfortunate solutions, which can be argued for but never ultimately and definitely guaranteed.

Finding and sticking to this middle path is, apparently, not an easy task. In the words of Mattias Kumm, it requires a genuine paradigm shift in thinking about constitutionalism, a truly revolutionary reconceptualisation of constitutional practice, both within and beyond the state. This ought to take place, however, not just in theory but also in practice. There are some traces of that reconceptualisation already present, most notably, in the case-law of the ECJ and national constitutional courts, which has been, in a way even paradoxically, boosted by the, perhaps unjustly, decried Maastricht judgment of the German Constitutional Court. Our speakers were, however, rather unanimous that more will have to be done and that European constitutional actors, both national as well as supranational, will have to find ways of overcoming their rather strongly embedded constitutional complacency in order to integrate the vision of the constitutional actors external to their

respective constitutional systems into their own perspectives. The hard challenge that they stand before is therefore, to quote Neil Walker, how to make that outside part of your inside without deferring to, without reinventing some sort of hierarchy, some authority.

Eventually, following the questions from the audience, two final and very important points were made. The first related to the reasons why it is that constitutional pluralism has been made so attractive precisely now, whereas the second questioned the capacity of translating constitutionalism beyond the state. As to the first question, Mattias Kumm identified three reasons for constitutional pluralism's attractiveness. There is a widespread agreement on foundational constitutional principles; there are the benefits of a relatively thick political and legal integration that provide further incentives to co-operate, which reduce the costs of pluralism; and finally the facts of relative diversity and social and political pluralism, complemented by problems of organising a full-fledged democratic process on the European level, limit the attractiveness of European constitutional monism.

On the continuous relevance of constitutionalism beyond the state the opinions were not as unanimous as one would have expected. Mattias Kumm, supported by Miguel Maduro, argued that constitutional thinking is not restricted to the relationship between national and European practice, rather it covers the relationship between European and international practice as well. Indeed, for him constitutionalism provides a universal framework for thinking about law and the exercise of power in the name of the law. Neil Walker was a bit more cautious. In line with many people, he is willing to agree that European integration features a thin constitutionalism in the sense of a legal order and institutional system frame. However, it still remains to be seen whether the EU is ready for a thicker constitution, which would encompass its own constituent power as well as a sufficient degree of social embeddedness.

Finally, Julio Baquero Cruz concluded in a way that both rounded off the entire symposium and simultaneously showed the future direction of a debate. In his view, we might be expecting just too much from constitutionalism and constitutional law, at least in the EU and its member states, without paying enough attention to its limits. The future debate on constitutional pluralism shall therefore be about three kinds of limits: the limits of pluralism, the limits of law and courts, and the limits of constitutional law. And indeed it will be, as the EU legal and constitutional theory caravan shall meet once again in Oxford in March 2009.