

The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland

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Abstract

This article explains why autocrats love constitutional pluralism and constitutional identity. Though these concepts were developed by scholars and jurists with the best of intentions in mind, we explain why they are also attractive to and inherently prone to abuse by autocrats. We then describe how the regimes in Hungary and Poland have made use of these concepts in their drive to consolidate autocracy. We conclude that given the dangers inherent in constitutional pluralism and its susceptibility to abuse, it should be replaced with a more traditional understanding of the primacy of EU law.

Keywords: constitutional pluralism, constitutional identity, primacy, Hungary, Poland, authoritarianism

I. INTRODUCTION

In EU law—as so often in life—the road to hell is paved with good intentions. The scholars who developed the theory of constitutional pluralism had the best of intentions in mind, but their creation is having destructive consequences that threaten the entire EU legal order. Constitutional pluralism is a theory developed by scholars who sought to resolve the conflict between the Court of Justice of the European Union (‘CJEU’) and some national constitutional courts, above all Germany’s Federal Constitutional Court (‘*BVerfG*’) concerning whether the CJEU or national constitutional courts had the ultimate authority to rule in cases concerning the boundaries of the EU’s legal competence. Though the CJEU and national constitutional courts accepted that each other were supreme on legal questions within their respective domains, this left open the question of ‘boundary disputes’ between legal orders: which court had the competence to rule on the boundaries between EU’s legal competences and a national system’s competences?

This so-called *Kompetenz-Kompetenz* debate centred around which court could rule on whether EU law had overstepped the bounds of its authority and trod on

some reserved area of national competence, including a sacrosanct area of national competence that constituted an inviolable aspect of a state's so-called 'constitutional identity'.¹ Scholars developed the theory of constitutional pluralism as a fudge to avoid the outbreak of a *guerre des juges* over who would have the final say in such boundary disputes between EU law and national constitutional law. The theory suggested that questions of *Kompetenz-Kompetenz* should be left unresolved in favour of a 'heterarchical' (ie non-hierarchical) system in which neither the CJEU nor national constitutional or supreme courts could claim definitive primacy on questions of *Kompetenz-Kompetenz*, but instead would engage in ongoing dialogue, self-restraint, and mutual accommodation.²

As we discuss below, the theory of constitutional pluralism had inherent flaws, but it could function as a serviceable fudge in the sense that it avoided stipulating what should happen where a direct and insoluble conflict emerged between EU and state courts; preferring, instead, to emphasise sincere cooperation, good faith dialogue, and mutual accommodation.³ However, with the emergence and ongoing consolidation of competitive authoritarian regimes in Hungary and Poland, the days when one could assume all national judiciaries would engage in sincere cooperation and mutual accommodation have ended, and the dangers that were always inherent in the concept of constitutional pluralism and the connected concept of constitutional identity, have become manifest for all to see.⁴ Indeed, as this article will show, in an effort to justify dismantling all checks on their power and shielding themselves against potential EU interventions, Hungary and Poland's governments have turned—quite predictably

¹ G Beck, 'The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of *Kompetenz-Kompetenz*' (2011) 17 *European Law Journal* 471. As the *Kompetenz-Kompetenz* debate makes clear, the concepts of constitutional identity and constitutional pluralism are closely related. The doctrine of constitutional pluralism accepts the legitimacy of national constitutional courts' constitutional identity claims, but suggests that conflicts between the European Court of Justice and national constitutional courts should be resolved through dialogue and mutual accommodation rather than through uncompromising assertions of primacy.

² See for instance, N MacCormick, 'The Maastricht Urteil: Sovereignty Now' (1995) 1 *European Law Journal* 259; N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317; M Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N Walker (ed), *Sovereignty in Transition* (Hart, 2003), p 502; M Kumm, 'The Cosmopolitan Turn in Constitutionalism', in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009), pp 258–324; M Avbelj and J Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart, 2012); A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1; M Goldmann, 'Constitutional Pluralism as Mutually Assured Discretion' (2016) 23 *Maastricht Journal of European and Comparative Law* 119; N Walker, 'Constitutional Pluralism Revisited' (2016) 22 *European Law Journal* 333.

³ See R D Kelemen, 'On the Unsustainability of Constitutional Pluralism' (2016) 23 *Maastricht Journal of European and Comparative Law* 136. For critical responses to Kelemen's analysis, see for instance N Walker, 'Constitutional Pluralism Revisited', op cit; A Bobic, 'Constitutional Pluralism is Not Dead' (2017) 18 *German Law Journal* 1395.

⁴ See note 3 above and see also R D Kelemen, 'The Dangers of Constitutional Pluralism' in G Davies and M Avbelj (eds) *Research Handbook on Pluralism and EU law* (Edward Elgar, 2018), pp 392–403.

we argue—to the twin concepts of constitutional identity and constitutional pluralism. Thus, for instance, when Hungary blatantly violates the EU asylum *acquis* and refuses to recognise the primacy of EU law in this domain, it claims that control over migration is part of its constitutional identity. Likewise, when Poland attacks the independence of the judiciary, it claims that such matters fall within the exclusive bounds of its authority and cites scholars of constitutional pluralism and the EU’s ‘national identity clause’⁵ to justify its stance.

Of course, most, if not all, scholars of constitutional pluralism would be mortified to see their ideas abused in this way. Defenders of this concept as setting limits on the CJEU’s assertions of primacy and *Kompetenz-Kompetenz* could argue that the fact that their ideas are distorted and abused by legal miscreants need not discredit the ideas themselves.⁶ While it is true that any ideas, even the most noble or sound ones, can be manipulated and abused, some ideas are inherently dangerous, and constitutional pluralism is certainly one of them. To borrow reasoning from the field of tort law, constitutional pluralism is an abnormally dangerous product and its manufacturers should be held to a standard of strict liability for the damage it has caused. It is time for scholars of constitutional pluralism to issue a recall on the dangerous product they released into the marketplace of ideas: they should now recognize the dangers inherent in their concept and its susceptibility to abuse, and they should either refashion it to reduce its dangers and make it ‘autocrat proof’ or, better yet, simply call for their flawed design to be replaced with a more traditional understanding of the primacy of EU law—namely that developed by the CJEU in a long line of jurisprudence since *Costa*.⁷

The remainder of this article is organised as follows. We begin in Part II by analysing the inherent flaws in the theory of constitutional pluralism and explaining why it holds such appeal for autocrats. Part III details the abuse of the concepts of constitutional pluralism and constitutional identity by the governments—and their kangaroo courts—in Hungary and Poland. Part IV concludes.

II. WHAT IS WRONG WITH CONSTITUTIONAL PLURALISM AND WHY AUTOCRATS LOVE IT

It will be argued below that constitutional pluralism is a fundamentally flawed and unsustainable concept, inherently prone—alongside the closely related notion of ‘constitutional identity’—to abuse by autocrats and other enemies of the rule of law.

⁵ Article 4(2) TEU states, ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’. For the genesis of this provision, see L Besselink, ‘National and Constitutional Identity before and after Lisbon’ (2010) 6(3) *Utrecht Law Review* 36.

⁶ For an example of such a defence of constitutional pluralism against these developments, see the discussion in Lawrence’s contribution to the current volume.

⁷ *Costa v ENEL*, C 6/64, EU:C:1964:34, p 594.

A. *Constitutional pluralism as a fundamentally flawed and unsustainable concept*

Constitutional pluralism is built on an unsustainable foundation composed of a mix of wishful thinking and evasion of tough choices.⁸ Insofar as a pluralist approach would allow the apex courts of Member States to disapply EU rules they deem incompatible with their constitutions or particularly inviolable aspects of their ‘constitutional identity’, this would lead to an outcome in which commonly agreed EU rules end up applying in some countries but not in others. The CJEU explained the consequences of this approach in stark terms in its early landmark ruling on the primacy of EU law in *Costa v ENEL*, when it explained that if Community law were allowed to be overridden by domestic law, this would give rise to discrimination on the basis of nationality and would lead to Community law being ‘deprived of its character as Community law’, and lead to ‘the legal basis of the Community itself being called into question’.⁹ As Federico Fabbrini has pointed out, this scenario would also violate the EU law principle of equality of the Member States, in that it would allow some Member States to evade common EU obligations that bound others.¹⁰ Finally, this situation would also violate fundamental rule of law principles, such as the requirements of legal certainty, and that law be ‘general’ and ‘applied to everyone according to its terms’.¹¹ Ultimately, constitutional pluralism is unsustainable because it invites legal chaos in which national constitutional courts could, in Fabbrini’s words, ‘pick and choose’¹² which EU laws their states need to follow and which they do not, an outcome that would unravel the EU legal order.¹³

⁸ Similarly, see J Baquero Cruz, ‘Another Look at Constitutional Pluralism in the European Union’ (2016) 22(3) *European Law Journal* 356, p 369, arguing that, ‘The discourse of constitutional pluralism is built on the basis of this unrealistic vision’.

⁹ *Costa v ENEL*, note 7 above, p 594.

¹⁰ See F Fabbrini, ‘After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States’ (2015) 16 *German Law Journal* 1015.

¹¹ For a presentation of the European Commission (and CJEU’s) approach to the concept of rule of law, see COM(2014) 158 final, *A New EU Framework to Strengthen the Rule of Law*. For a more general discussion of the tensions between rule of law and legal pluralism, see B Tamanaha, ‘The Rule of Law and Legal Pluralism in Development’ (2011) 3 *Hague Journal on the Rule of Law* 1. For an early critique of constitutional pluralism in the EU from the perspective of legal philosophy, see G Letsas, ‘Harmonic Law: The Case Against Pluralism’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press, 2012).

¹² Fabbrini, note 10 above, p 1016.

¹³ Kelemen, note 4 above. See also Baquero Cruz, note 8 above, p 368, where he explains that constitutional pluralism, ‘undermines the main objective of integration and the basic social function of law’. For further exploration of the logical contradictions inherent in constitutional pluralism, see Kelemen, note 3 above, p 146, who points out that, ‘Governments seeking to avoid obligations of EU law could evade them by enacting constitutional norms that contradict these obligations’. Notably, even some prominent scholars who are critical of the CJEU’s approach to the question of *Kompetenz-Kompetenz* agree that the doctrine of constitutional pluralism is based on an obfuscation of the fact that in cases of normative conflict, ultimately some judicial authority must have the final say. See eg G Davies, *Constitutional Disagreement in Europe and the Search for Pluralism* (2010) Eric Stein Working Paper 1/2010; and M Loughlin, ‘Constitutional Pluralism: An Oxymoron?’ (2014) 3(1) *Global Constitutionalism* 9.

Constitutional pluralists, insofar as they recognised these risks, hoped such chaos could be avoided through a mixture of ongoing dialogue, sincere cooperation, and mutual accommodation between national courts and the CJEU.¹⁴ And indeed, until recently, head-to-head conflict and outright defiance of the CJEU by national courts was mostly avoided. But this tenuous situation was sustainable only so long as the German *BVerfG* and the handful of other national constitutional courts that raised objections to the CJEU's interpretation of primacy and *Kompetenz-Kompetenz* exercised self-restraint and operated in a spirit of sincere cooperation. But it was naïve to think that *modus vivendi* could last, and indeed it has been collapsing before our eyes.¹⁵

B. Constitutional pluralism as a concept inherently prone to abuse by autocrats

The EU professes to be a union of democracies. Recognising that national democracies vary in many ways, EU leaders have not sought to impose anything approaching a uniform model of democracy. Yet, Member States did commit themselves to uphold a set of fundamental democratic values, embodied in Article 2 Treaty on European Union ('TEU'), which provides that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. Since 2010 in Hungary and since 2015 in Poland, however, governments have come to power that reject many of these core values and seek instead to entrench national level autocracies within the EU.¹⁶

Clearly, there is a profound tension between the EU's purported commitment to the defence of a core set of democratic values and the desire of certain member governments to defy those values. How then can an aspiring autocrat shield himself from federal intervention and succeed in maintaining an authoritarian enclave within a democratic federal union? In part, the survival of such regimes is a matter of politics.¹⁷ As one of the present authors has argued elsewhere, the same sort of partisan

¹⁴ See Maduro, note 2 above, p 501.

¹⁵ On the risks posed to the EU legal order by the trend of more national constitutional courts challenging the supremacy of EU law, see D Sarmiento, 'The OMT Case and the Demise of the Pluralist Movement' (*Despite Our Differences Blog*, 21 September 2015), at <https://despiteourdifferencesblog.wordpress.com/2015/09/21/the-omt-case-and-the-demise-of-the-pluralist-movement>; R Uitz, 'National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades' (*Verfassungsblog*, 11 November 2016).

¹⁶ While the descent towards authoritarianism is most advanced in these two member states, there are early signs that the autocratic blueprint pioneered by Orbán is now being deployed by leaders in Romania and Bulgaria. See eg Council of Europe Venice Commission, Opinion – Romania, No. 924/2018, 13 July 2018 and Opinion – Bulgaria, No. 855/2016, 9 October 2017.

¹⁷ The persistence of authoritarian regimes at the state level within broadly democratic federal unions is common around the world, from Latin America, to Asia, to the post-Civil War United States. Partisan politics often plays a key role in the survival of these autocratic regimes, with national level parties protecting local autocrats if they contribute votes to their national coalition. See E Gibson, *Boundary Control* (Cambridge University Press, 2012).

political factors that explain the survival of subnational authoritarian enclaves in many federations also help explain the EU's tolerance of the rise of autocratic Member State governments.¹⁸ But even if local autocracies can gain some political protection from action by federal lawmakers, they may still run into problems with federal courts—and this is where doctrines like constitutional pluralism and constitutional identity may prove important.

Local autocrats operating within unions that guarantee the protection of fundamental rights and core democratic principles are naturally attracted to legal doctrines like constitutional pluralism that would provide them with a justification to ignore the union's common norms. Thus, it is no coincidence that racist autocrats and segregationists in the American South have a long history of attempting to invoke their own version of a constitutional pluralism doctrine, one that they labelled nullification, ie, the theory that US states have the right to nullify federal laws they deem unconstitutional.¹⁹ Though it can be traced back to the Virginia and Kentucky resolutions of the late eighteenth century, nullification was most famously championed by John Calhoun in the early 1830s. Versions of it have been resurrected in the twentieth and twenty-first centuries,²⁰ for instance by segregationists who sought to block school desegregation after *Brown v Board of Education*, or by (then) Alabama Supreme Court Chief Justice Roy Moore who declared that Alabama did not need to recognize same-sex marriages legalized by the US Supreme Court's *Obergefell v Hodges* decision.²¹ Such doctrines are particularly appealing to leaders of local authoritarian enclaves if—as has been the case with constitutional pluralism in the EU context—they come with a distinguished legal pedigree that lends claims based on them a patina of legitimacy. The attractiveness of such doctrines to autocrats is evidenced in the contemporary EU. As we will see in Part III below, theories of constitutional pluralism and constitutional identity championed in good faith by distinguished legal scholars like Neil MacCormick and respected courts like the *BVerfG* are now being cited by autocratic regimes to justify defiance of fundamental EU values and of the rule of law itself.

Sadly, all of this was predictable—and indeed some have been predicting it.²² The issue is not simply that the Polish or Hungarian governments are using the arguments in bad faith (though they certainly are doing that). Rather, these autocratic

¹⁸ R Daniel Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union' (2017) 52(2) *Government and Opposition* 211.

¹⁹ See R Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis* (Oxford University Press, 1987).

²⁰ See S Levinson, 'The Twenty-first Century Rediscovery of Nullification and Secession in American Political Rhetoric' (2014) 67 *Arkansas Law Review* 17.

²¹ Moore was removed from his position as chief justice of the Alabama Supreme Court as a result of his defiance of federal law. See J Adler, 'Roy Moore is Constitutionally Illiterate' (*The Weekly Standard*, 15 November 2017), at <https://www.weeklystandard.com/jonathan-h-adler/roy-moore-is-constitutionally-illiterate>.

²² Kelemen, note 4 above; Sarmiento, note 15 above, Uitz, note 15 above.

governments are simply carrying arguments about constitutional identity to their logical conclusions.²³ If the esteemed courts of committed democracies such as the *BVerfG* can use constitutional identity claims to justify defiance of EU law, then so can the captured constitutional courts in Hungary and Poland. In other words, the aspects of the concepts of constitutional pluralism and constitutional identity that have made them such useful tools for EU-based autocrats are not reparable bugs, but core features. And this is why no one should be surprised to see ‘kangaroo courts’ or other bodies under the sway of autocrats use the same ideas sincerely advanced by respected legal scholars and learned judges in Karlsruhe to advance their political masters’ authoritarian agendas and brazenly defy EU law when instructed to do so.

III. THE ABUSE OF CONSTITUTIONAL PLURALISM/IDENTITY BY AUTOCRATS IN HUNGARY AND POLAND

As William Dobson puts it in *The Dictator’s Learning Curve*, ‘today’s dictators and authoritarians are far more sophisticated, savvy, and nimble than they once were’.²⁴ They understand, to quote Professor Gábor Halmai, that ‘in a globalized world the more brutal forms of intimidation are best replaced with more subtle forms of coercion’.²⁵ Therefore, they work in a more ‘ambiguous spectrum that exists between democracy and authoritarianism’²⁶ where they look ‘almost democratic’²⁷ such as the leader of Hungary, a Member State of the EU.²⁸

A similar diagnosis may already be offered regarding another EU Member State, Poland, where the ruling party has undertaken a systemic dismantlement of the country’s checks and balances in obvious breach of the national constitution and its international obligations.²⁹ After years of dithering, EU institutions have finally reacted to the consolidation of autocratic regimes in these two Member States: the EU Commission activated for the first time the Article 7 procedure against Poland in

²³ It may be worth noting that they do so in a broader context where authoritarian populists have successfully capitalised on the amplification (if not fabrication in some instances) of identity-based narratives/fears and nationalist sentiments. See recently, Political Capital Institute, *Beyond Populism. Tribalism in Poland and Hungary* (2018), at http://www.politicalcapital.hu/news.php?article_read=1&article_id=2277.

²⁴ *The Dictator’s Learning Curve. Inside the Global Battle for Democracy* (Harvill Secker London, 2012), p 4.

²⁵ G Halmai, ‘Legally Sophisticated Authoritarians: The Hungarian Lex CEU’ (*Verfassungsblog*, 31 March 2017), at <http://verfassungsblog.de/legally-sophisticated-authoritarians-the-hungarian-lex-ceu>.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ See L Pech and K Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

December 2017,³⁰ and the European Parliament followed suit in September 2018 when it activated the same procedure against Hungary.³¹

To pre-empt or counteract external criticism as well as justify non-compliance with their European obligations, autocrats in both Hungary and Poland have relied on a number of similar strategies and rhetorical devices,³² including, as this Part will show, the two interrelated concepts most favoured by aspiring autocrats within the EU: constitutional pluralism and constitutional identity.

Advocate General Maduro proved remarkably prescient in a 2008 Opinion when he warned of the potential abusive use of the notion of constitutional identity:

[R]espect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules. Were that the case, national constitutions could become instruments allowing Member States to avoid Community law in given fields. Furthermore, it could lead to discrimination between Member States based on the contents of their respective national constitutions. Just as Community law takes the national constitutional identity of the Member States into consideration, national constitutional law must be adapted to the requirements of the Community legal order.³³

The Advocate General's worry has become today's reality. Hungary and Poland's autocratic authorities have found the interrelated concepts of constitutional pluralism and constitutional identity particularly helpful as they give a veneer of conceptual respectability to their autocratic 'reforms' which also makes it more difficult for international bodies such as the EU to challenge what amounts in fact to a systemic hollowing out or dismantlement of these countries' democratic and rule of law norms and institutions.

A. *Constitutional identity as a justification for non-compliance with EU immigration and asylum law*

Since a European migration crisis emerged as a salient issue in 2015, Viktor Orbán's government has sought to bolster its popularity by stoking fears about migrants and by styling himself as the defender of Hungary against the EU's migration policies.

³⁰ D Kochenov, L Pech, and K Lane Scheppele, 'The European Commission's Activation of Article 7: Better Late than Never?' (*EU Law Analysis*, 23 December 2017), <http://eulawanalysis.blogspot.co.uk/2017/12/the-european-commissions-activation-of.html>; T Koncewicz, *The Polish Counter-revolution Two and a Half Years Later: Where Are We Today?* (*Verfblog*, 7 July 2018) at <https://verfassungsblog.de/the-polish-counter-revolution-two-and-a-half-years-later-where-are-we-today>.

³¹ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 2017/2131(INL). For background and a critical analysis, see S Carrera and P Bárd, 'The European Parliament Vote on Article 7 TEU against the Hungarian government' (*CEPS Commentary*, 14 September 2018).

³² For an overview of some of the main arguments used by autocrats to justify their actions and hide their intentions, see D Kochenov and P Bárd, *Rule of Law Crisis in the New Member States of the EU. The Pitfalls of Overemphasising Enforcement* (RECONNECT, July 2018) Working Paper No. 1.

³³ Opinion of Advocate General Poiares Maduro in *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*, C-213/07, EU:C:2008:544, para 33.

Where his hostile migration policies have plainly violated EU legal requirements, Orbán has tried to justify them by invoking the notion of ‘constitutional identity’. In essence, his government has claimed that complying with EU migration and refugee policies would in some cases violate Hungary’s constitutional identity, and that his government is therefore justified in ignoring them.³⁴

Before briefly exploring the content of the 2018 ‘constitutional identity’ provisions of Hungary’s Fundamental Law, it is important to stress that already in 2016 Hungary’s Constitutional Court (which by then had been captured by the ruling party) issued a ruling signalling it would support Orbán’s ‘constitutional identity’ justification for defying EU migration law. As the Hungarian Court put it,

If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated due to the exercise of competences based on Article (E) (2) of the Fundamental Law, the Constitutional Court may, in the course of exercising its competences, examine the existence of an alleged violation on the basis of a relevant petition.³⁵

As noted by Professors Kochenov and Bárd, the Court’s understanding of constitutional identity is ‘so vague that it can be considered as an attempt at granting a *carte blanche* type of derogation to the executive and the legislative from Hungary’s obligations under EU law’.³⁶ More broadly speaking, and as compellingly argued by Professor Halmai, the Court’s ruling is ‘nothing but national constitutional parochialism’ which hides ‘an attempt to abandon the common European constitutional whole’ under the guise of the notion of constitutional identity,³⁷ which, as the Hungarian justices are unsurprisingly keen to emphasize, had been relied upon by a number of foreign courts and in particular, the *BVerfG*. However, unlike the *BVerfG*, the Hungarian Constitutional Court did not rubberstamp ‘the government’s constitutional identity defense’³⁸ to justify a stricter defence of human rights (as most defenders of the *BVerfG*’s case law on constitutional identity had in mind), but the nativist, xenophobic migration policy of the Orbán regime.

While the Constitutional Court’s ruling proved already helpful to defy the EU, the Orbán government preferred to have its constitutional identity justification for defying EU law explicitly embedded in the constitution’s text. In the words of the Hungarian Prime Minister, amending the Hungarian constitution would be necessary so as to enable him to more effectively oppose EU law on migration and in particular

³⁴ B Novak, ‘Hungary’s Constitutional Identity Is Whatever Viktor Orbán Says It Is’ (*Budapest Beacon*, 28 March 2018), at <https://budapestbeacon.com/hungarys-constitutional-identity-is-what-ever-viktor-orban-says-it-is>.

³⁵ Case 22/2016 quoted and translated by G Halmai, ‘Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law’ (2018) 43(1) *Review of Central and East European Law* 23, pp 34–35.

³⁶ Kochenov and Bárd, note 32 above, p 12.

³⁷ Halmai, note 35 above, p 41.

³⁸ *Ibid*, p 25.

the EU-wide refugee resettlement quota,³⁹ and protect Hungary's 'sovereignty and cultural identity' against an influx of 'Muslim invaders'.⁴⁰ Leaving aside the politics of this constitutional amendment, the primary legal aim of such a move is to give the Hungarian government a legal fig leaf to disobey EU law when convenient using a legal concept recognised by EU law itself.

Finally, after winning a constitutional majority in the 2018 election (which Organization for Security and Co-operation in Europe ('OSCE') observers deemed unfair),⁴¹ Orbán was able to amend once again Hungary's constitution to include the constitutional identity provisions he desired. In this regard, three changes are worth noting: (1) the addition of a clause providing that 'it is a fundamental obligation of the state to protect our self-identity rooted in our historical constitution'; (2) a new Article (E) Section (2) providing that Hungary may only participate to the EU and comply with its EU obligations to the extent that these are 'consistent with the fundamental rights and freedoms laid down in the Basic Law, and shall not limit Hungary's inalienable right of disposal related to its territorial integrity, population, form of government and governmental organisation'; and (3) the addition of a clause providing that '[a]ll bodies of the State shall protect the constitutional self-identity of Hungary'.⁴²

In the absence of any definition of Hungary's constitutional 'self-identity' (or of its 'historic constitution' for that matter), one may be left wondering about the exact contours of such identity. To quote the title of a newspaper article, the lack of definition should not surprise us as 'Hungary's constitutional identity is whatever Viktor Orbán says it is'.⁴³ And when it comes to the country's identity, Orbán's views are very much reminiscent of an approach which was dominant in certain European countries in the 1930s. As he put it in a 2017 speech:⁴⁴

There is no strong culture without a cultural identity ... there is no cultural identity in a population without a stable ethnic composition. The alteration of a country's ethnic makeup amounts to an alteration of its cultural identity.

The country's autocrats have always sought to rely on EU law itself to undermine both Hungary's and the EU's foundational values such as the rule of law. As the European Parliament already pointed out in July 2013 in the first of a (by now

³⁹ Hungary lost the annulment action it brought alongside Slovakia against the Council of the EU's decision of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. See Joined Cases C-643/15 and C-647/15, EU:C:2017:631.

⁴⁰ R Staudenmaier, 'Hungary's Orbán Tells Germany: "You Wanted the Migrants, We Didn't"' (*DW*, 8 January 2018), at <http://p.dw.com/p/2qV1w?tw>.

⁴¹ OSCE, Hungary Parliamentary Elections, 8 April 2018, ODIHR Limited Election Observation Mission Final Report, 27 June 2018, p 2.

⁴² Unofficial translation of Bill number T/332, Seventh Amendment of the Basic Law of Hungary, Budapest, May 2018, provided by the Hungarian Helsinki Committee, at <https://www.helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf>.

⁴³ Novak, note 34 above.

⁴⁴ Speech at the 28th Bálványos Summer Open University and Student Camp, 22 July 2017, at <https://visegradpost.com/en/2017/07/24/full-speech-of-v-orban-will-europe-belong-to-europeans>.

long) series of resolutions on the concerning situation in Hungary, ‘the European core values set out in Article 2 TEU result from the constitutional traditions common to the Member States and cannot therefore be played off against the obligation under Article 4 TEU, but make up the basic framework within which Member States can preserve and develop their national identity’.⁴⁵ This means that:⁴⁶

a violation of the Union’s common principles and values by a Member State cannot be justified by national traditions nor by the expression of a national identity when such a violation results in the deterioration of the principles which are at the heart of European integration, such as democratic values, the rule of law or the principle of mutual recognition, with the consequence that a referral to Article 4(2) TEU is applicable only in so far as a Member State respects the values enshrined in Article 2 TEU.

But despite the fact that it is clear that appeals to the ‘constitutional identity’ provision of the EU Treaties should not be used to justify violations of core EU values, the Hungarian government continues to do just that. Indeed, the 2018 constitutional amendment bill claims that Article 4(2) TEU entitles Hungary not only to override EU law based on aspects of its national identity but also to oppose EU law based on its ‘choice of political and social values considered as significant from the aspect of the national and political self-identity’.⁴⁷

This line of reasoning, using constitutional identity explicitly and constitutional pluralism implicitly to justify defiance of EU migration policies, is as cunning as it is (deliberately) misguided. However, as we can see here—and as we shall see below in the Polish case—autocratic authorities care little about conceptual logic or an honest reading of EU law, and they continue to find in the dual concepts of constitutional pluralism and identity a very useful veneer to disguise their defiance of EU law.

B. Constitutional pluralism to justify the end of judicial independence and non-compliance with EU rule of law standards

Poland’s White Paper on the so-called judicial ‘reforms’⁴⁸ put forward a number of historical, political, managerial, and legal claims to justify the adoption of more than a dozen laws which, within a period of two years, have affected ‘the entire structure

⁴⁵ European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), 2012/2130 (INI) [2016] OJ C75/09, Rec K.

⁴⁶ *Ibid*, Rec M.

⁴⁷ Article 2, Unofficial translation of Bill number T/332, note 42 above.

⁴⁸ The use of quotation marks is required as the changes adopted by the Polish authorities are not ‘reforms’ but rather a set of unconstitutional measures whose main effect, if not main goal, ‘has been to hamper the constitutionally protected principle of judicial independence’ so as ‘to enable the legislative and executive branches to interfere with the administration of justice’. UN Human Rights Council, Report of the Special Rapporteur on the Independence of Judges and Lawyers on His Mission to Poland, A/HRC/38/38/Add.1, 5 April 2018, para 72.

of the justice system in Poland'.⁴⁹ As the European Commission explained, these changes have enabled the executive or legislative powers to systematically 'interfere significantly with the composition, the powers, the administration and the functioning of these authorities and bodies'.⁵⁰ In this section, key aspects of the White Paper will be considered in detail.

In its White Paper, the Polish government relied on the twin concepts of constitutional pluralism and constitutional identity to justify these moves in the following terms:⁵¹

169. The legal system of the European Union is based on constitutional pluralism of the member states Each country has specific constitutional solutions that are rooted in its history and legal traditions and these differences are protected by the treaty law of the [EU]

170. Constitutional identity, a core value of each national community, determines not only the most fundamental values and resulting tasks for state authorities, but also sets the limit for regulatory intervention of the European Union.

While the second paragraph of Article 4 TEU, as previously noted, does provide that the EU shall respect its Member States' national identity, the White Paper conveniently ignores its third paragraph, which simultaneously requires from each EU Member State compliance with the principle of sincere cooperation, something which the Polish government is clearly violating. The reasoning above is in any event particularly disingenuous as the changes to the judicial system which the government seeks to justify on the basis of *constitutional pluralism* in question were pushed through with *regular legislation* implemented in obvious violation of Poland's own constitution. To quote the First President of Poland's Supreme Court:⁵²

the recent legislative initiatives are of concern not because of the powers of the Polish legislator to structure the judicial system in Poland but because the Polish legislator abuses such powers in violation of clear constitutional standards and in conflict with their interpretation laid down in the case law of the Constitutional Tribunal, the Supreme Court and the legal doctrine that has developed since the adoption of the 1997 Constitution of the Republic of Poland.

It evidently follows that 'breaking a state's constitutional rules by the parliamentary majority cannot be justified by the principle of constitutional autonomy'.⁵³ Right after the first significant reference to constitutional pluralism, the Polish government

⁴⁹ The Chancellery of the Prime Minister, White Paper on the Reform of the Polish Judiciary, Warsaw, 7 March 2018, at <https://www.premier.gov.pl/en/news/news/the-government-presents-a-white-paper-on-the-reforms-of-the-polish-justice-system.html>.

⁵⁰ COM(2017) 835 final, *Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland*, para 173.

⁵¹ White Paper on the Reform of the Polish Judiciary, note 49 above.

⁵² First President of the Supreme Court, *Opinion on the White Paper on the Reform of the Polish Judiciary*, Warsaw, 16 March 2018 (on file with the authors).

⁵³ Iustitia, Polish Judges Association, *Response to the White Paper*, Warsaw 2018, VIII.2.A, p 106.

refers to constitutional identity. The Polish government appears to think that constitutional identity imposes ‘limits’ solely on the EU’s ‘regulatory intervention’ but no limits whatsoever on national authorities. However, in fact, as noted by the response to the White Paper by the Polish judges association, ‘the autonomy of constitutional identity presupposes that the Member State respects the *patere legem quam ipse fecisti* principle, especially towards its own constitution’.⁵⁴ They continue that ‘national authorities are required to comply with their constitutional obligations, and they cannot invoke “constitutional pluralism” to shield themselves from EU scrutiny as they violate their own constitution’.⁵⁵

The White Paper then turns to external sources of authority—both the German Constitutional Court and prominent scholars of constitutional pluralism—to justify its approach to constitutional identity and pluralism:⁵⁶

171. Defence of constitutional identity is a key matter for the German Constitutional Tribunal

173. This special character of the European legal system—comprised both of national systems AND *acquis communautaire* was best described by a Scottish law philosopher, Neil MacCormick. In his commentary to the German Federal Constitutional Tribunal in its ruling over the Treaty of Maastricht (case Brunner) where one can find roots for the nowadays ample and developed theory of constitutional pluralism.

This line of defence, as the example of Hungary shows, is not original. Viktor Orbán is known to have responded ‘to criticisms against the laws and constitutional provisions adopted by his government by citing similar laws and provisions in democratic states’.⁵⁷ The Polish government is following suit with its own strategic cherry-picking of foreign courts’ case law. What the White Paper unsurprisingly fails to mention is that the *BVerfG* made clear that ‘the constitution-amending legislature’ cannot violate ‘the identity of the [German’s] free constitutional order’.⁵⁸ This omission is not surprising as what we have seen in Poland is a ‘legislative-amending legislature’ violating repeatedly Poland’s Constitution.

As for the references to Professor MacCormick’s work, the Polish government draws from it the need for both the EU and its Member States to show self-restraint and mutual respect when it has shown none, before misleadingly implying that it is the EU which is disrupting the ‘peculiar construct’ of the European legal system by objecting to its ‘own sovereign institutional solutions’ regarding Poland’s judiciary. For example, it claims that:⁵⁹

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ White Paper on the Reform of the Polish Judiciary, note 49 above.

⁵⁷ O Varol, ‘Stealth Authoritarianism’ (2015) 100 *Iowa Law Review* 1673, p 1717.

⁵⁸ Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08 (English version at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html), para 216.

⁵⁹ White Paper on the Reform of the Polish Judiciary, note 49 above (bold in original).

189. This is exactly why the reforms that cut down the long shadow of communism in the Polish justice system are in line with European standards and embrace the values on which the European Union is founded. **Not consenting to the evil of 20th century totalitarianisms is also an insuperable element of the Polish constitutional identity.**

The Polish government's references to the EU's values are particularly ironic, here. As for the reference to Polish constitutional identity, it is not clear what the drafters meant to say by 'insuperable element' (the Polish version would suggest a translation error with 'insuperable' used instead of 'inseparable') or how one can possibly connect in any rational way twentieth century totalitarianisms with changes made to Poland's judiciary in the twenty-first century, thirty years after the fall of communism. What is in any event striking is the absence of any attempt to offer any details on of what this Polish constitutional identity may consist.

Finally, the concluding section of the Polish government's White Paper contains two paragraphs that make extraordinary claims:⁶⁰

206. The European legal system is founded on the recognition of constitutional pluralism enshrined in Article 4 of the Treaty on European Union which also guarantees that each member state may shape its own judicial system in a sovereign manner, as long as it does not threaten judicial independence.

207. Tensions between the executive and the judiciary lie in the nature of democratic systems, yet their very existence does not mean that judicial independence is endangered. The Treaty on European Union safeguards constitutional identity of the member states as their exclusive national competence, which means that reforms of the judiciary should be assessed at the national level by competent authorities.

What the second paragraph mildly refers to as 'tensions between the executive and the judiciary' that fall within the realm of exclusive national competence protected by 'constitutional identity', in fact refers to a situation that is nothing less than an attempted constitutional coup d'état.⁶¹ To quote the currently under-siege First President of Poland's Supreme Court, 'the current situation is not one of tensions between different branches of power ... rather, this is a genuine revolution in the judicial system which annihilates the independence of the judiciary in breach of the provisions of the Constitution'.⁶²

As for the first paragraph, it misrepresents Article 4 TEU, which does not explicitly refer to constitutional pluralism or any right to shape one's judicial system 'in a sovereign manner'. While the EU may not have any legislative competence regarding

⁶⁰ Ibid.

⁶¹ M Steinbeis, Interview with W Sadurski, 'What Is Going on in Poland Is an Attack against Democracy' (*VerfBlog*, 15 July 2016) at <https://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy>.

⁶² First President of the Supreme Court's Opinion on the White Paper on the Reform of the Polish Judiciary, Warsaw, 16 March 2018 (on file with the authors).

the organisation of national judiciaries, no ‘reform’ can undermine judicial independence, a point which was made crystal-clear by the Court of Justice in a ruling issued ten days before the White Paper was published:⁶³

The Member States are therefore obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields.

What Hungarian and Polish autocrats tend to conveniently forget is that while Article 4 TEU does impose on the EU an obligation to respect its Member States’ national identities, it certainly does not give a blank cheque to national authorities to adopt ‘reforms’ designed to violate fundamental EU principles such as the rule of law and judicial independence, and to unilaterally decide on their compatibility with the national constitution and EU law.

With the benefit of hindsight, one can now more easily see how the inclusion of a ‘national identity’ clause in the European Treaties was a mistake that has been further compounded by a number of senior courts in countries such as Germany or France relying on the open-ended and abuse-prone concept of constitutional identity.⁶⁴ The worm has been in the fruit ever since. As noted by Vlad Perju, the CJEU has an essential role to play here as it ‘can contain and control the effect of national identity by centralizing its meaning’, for instance, by ‘defining a range of acceptable meanings of the concept of national identity’.⁶⁵ We would submit in this respect that a good starting point would be for the Court to adopt and enforce the balanced position of the European Parliament, whereby a referral to Article 4(2) TEU can only be considered legitimate and reasonable ‘only in so far as a Member State respects the values enshrined in Article 2 TEU’ and behaves in full compliance with the principle of sincere cooperation laid down in Article 4(3) TEU.⁶⁶

IV. CONCLUSION

Constitutional pluralists were well-intentioned and their theory was nuanced, but they did not anticipate how their theories might be readily abused by legal

⁶³ *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, para 34.

⁶⁴ CC, 27 juillet 2006, *Loi relative au droit d’auteur et aux droits voisins dans la société de l’information*, n° 2006–540 DC, spéc. cons. 19: « Considérant, en premier lieu, que la transposition d’une directive ne saurait aller à l’encontre d’une règle ou d’un principe inhérent à l’identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti ». See E Dubout, ‘Les règles ou principe inhérents à l’identité constitutionnelle de la France: une supra-constitutionnalité’ (2010) 3 *RFDC* 224.

⁶⁵ V Perju, ‘On the (De-)Fragmentation of Statehood in Europe: Reflections on Ernst-Wolfgang Böckenförde’s Work on European Integration’ (2018) 19(2) *German Law Journal* 403, p 433.

⁶⁶ European Parliament resolution of 3 July 2013, note 45 above, Rec M.

miscreants. Constitutional pluralism is a theory designed for polite society, but we live in brutal times. Many legal scholars in recent years rejected the first generation of EU legal scholarship saying that too many scholars previously acted more as cheerleaders of the CJEU than as sober critics when they applauded and parroted the doctrines—such as primacy and direct effect—enunciated by the CJEU rather than engaging in critical legal scholarship. These scholars had a point. A number of historians and sociologists have done fascinating studies of the tight networks of lawyers, judges, and scholars who formed the early ‘European legal field’ and who in many cases worked quite intentionally to build the EU legal order.⁶⁷ So, perhaps a counterbalancing was in order and the emergence of scholarship on constitutional pluralism was part of a general trend amongst scholars to become more critical of CJEU assertions of unquestioned supremacy. But things have gone too far and now, as we describe above, the dangers of constitutional pluralism have become clear. In their rejection of Luxembourg’s perceived arrogance, many scholars embraced Karlsruhe’s assertions of constitutional identity without considering where all this might lead in more dangerous times. In an age when liberal, constitutional democracy is facing a clear and present danger, the time has come to dismantle constitutional pluralism.

⁶⁷ See for instance, A Vauchez, ‘The Force of a Weak Field: Law and Lawyers in the Government of the European Union’ (2008) 2 *International Political Sociology* 128; M Rasmussen, ‘Constructing and Deconstructing “Constitutional” European Law’ in H Koch et al (eds), *Europe: The New Legal Realism* (Djoef Publishing, 2010), pp 639, 650–51; B Davies, *Resisting the European Court of Justice. West Germany’s Confrontation with European Law, 1949–1979* (Cambridge University Press, 2012); M Pollack, *The New EU Legal History: What’s New, What’s Missing?* (2013) 28 *American University International Law Review* 1257.