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Constitutional Pluralism's Unspoken Normative Core

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Abstract
This article argues that discourses of constitutional pluralism contain a strong normative core which is made up of a series of largely unacknowledged implicit claims about legitimacy and community. This argument is illustrated by reference to various constitutional pluralist responses to the Hungarian Constitutional Court's ruling concerning the protection of constitutional identity in the context of EU asylum and refugee protection law and policy, demonstrating that whether this decision falls 'inside' or 'outside' constitutional pluralist tolerance depends on how the observer defines the minimum amount of shared substantive or procedural content that is fundamental to the EU order.

Keywords: constitutional pluralism, EU law, discourse, legitimacy, Hungary, Constitutional Court

I. INTRODUCTION

The concept of constitutional pluralism has become popular as a way of understanding the overlapping sets of claims to legitimate authority that characterize the transnational legal landscape. Though the origins of constitutionalism and the study of legal pluralism go back much further, contemporary writing on constitutional pluralism in the European context can be traced to Neil MacCormick's work in the 1990s on the fallout from the *Maastricht* judgment and subsequent decisions of the German Federal Constitutional Court, the *Budesverfassungsgericht* ('*BVerfG*'), that challenged traditional ideas of a monist legal hierarchy in the EU context.[1] In the quarter century since this work began, constitutional pluralism has become a common, even 'orthodox' way of understanding the legal relationship between the EU and its Member States.[2] As Matej Avbelj somewhat hyperbolically put it, 'everyone appears to be a pluralist now'.[3]

[1] N MacCormick, 'Beyond the Sovereign State' (1993) 61(1) *Modern Law Review* 1.

[2] J Weiler, 'Prologue: Global and Pluralist Constitutionalism – Some Doubts' in G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, 2011), p 8 (describing constitutional pluralism as the 'prevailing orthodoxy').

[3] M Avbelj, 'Human Dignity and EU Legal Pluralism' in G Davies and M Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar, 2018), p 102.

Constitutional pluralism comes in many forms, and the literature on the subject is vast.[4] Some of this work is analytical in nature, focused on building and perfecting abstract legal models of constitutional pluralist interactions among legal systems. Other work is more or less empirical in tone, identifying specific instances of conflict between legal orders, assessing whether or not they are representative of one of the constitutional pluralist models, and determining whether said models are right, wrong, or in need of revision on the basis of this analysis. Yet another stream of literature on constitutional pluralism is of a more explicitly normative character, discussing whether constitutional pluralism (or constitutionalism, or pluralism) is a good and desirable thing, or whether, instead, it is a 'dangerous idea' that 'threatens to destroy' the legal order.[5]

Despite the wealth of literature on the subject, one aspect of constitutional pluralism that remains relatively underexplored is the normative or constitutive effect of the term itself. 'Constitutional pluralism'—like other legal concepts—appears to suffer from what language philosophers have termed the 'descriptive fallacy': 'the erroneous assumption that there must be something in reality corresponding to the meaning of the term'.[6] Despite the purportedly diagnostic use of the term, discursive facts like constitutional pluralism draw their meaning not from their correspondence with some objective state of reality, but rather due to their place in our conceptual and linguistic map, their linkages with other terms and systems, and their modes of use in practice.[7] Thinking about language in this way draws attention to its constitutive power: what seems to be descriptive actually creates meaning by making it possible to think in a particular way.[8] Our perception of 'reality' is always filtered through and shaped by language and the implicit content that these discursive linkages bring with them.

One impact of the descriptive fallacy is that, in directing us to examine as a factual matter whether a particular state of affairs corresponds to the meaning of a term like 'constitutional pluralism', it causes us to overlook the way in which such concepts bring with them a host of implicit normative assumptions, equivalences, and political commitments. This implicit content is obscured by the deployment of the descriptive terminological widget, which appears to stand on its own terms, but is actually embedded in a complex system of normative discourse.

A second, and highly related, impact is that it causes us to overlook the way in which such concepts have a constitutive function on our understanding of a given

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[4] Matej Avbelj, for example, has subdivided constitutional pluralism into six 'representative theories': socio-teleological constitutionalism, epistemic metaconstitutionalism, cosmopolitan constitutionalism, harmonious-discursive constitutionalism, multilevel constitutionalism, and pragmatic constitutionalism. M Avbelj, 'Questioning EU Constitutionalisms' (2008) 9 *German Law Journal* 1.

[5] RD Kelemen, 'The Dangers of Constitutional Pluralism' in *Research Handbook on Legal Pluralism and EU Law*, note 3 above, p 392. See also Kelemen and Pech in this Symposium.

[6] WG Werner and JH De Wilde, 'The Endurance of Sovereignty' (2001) 7 *European Journal of International Relations* 283, p 285.

[7] See generally L Wittgenstein, *Philosophical Investigations* (GEM Anscombe tr, Blackwell, 1997).

[8] See generally JL Austin, *Philosophical Papers* (Oxford University Press, 1961); JR Searle, *The Construction of Social Reality* (Free Press, 1995).

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field of study. Deploying a term like 'constitutional pluralism' asks us to organize our thoughts in accordance with its map of the linguistic field—with all of its implicit content. To put it another way, the operation of the descriptive fallacy causes us to overlook the power relations and constitutive claims that underlie processes of meaning-making and knowledge construction.

'Constitutional pluralism' thus functions as a framing discourse.[9] And the use of framing discourses is never neutral. They ask us to conceptualize the phenomena they describe in accordance with their terms, in implied harmony with the particular set of embedded political, theoretical, and social commitments they contain. Framing discourses result from, and in turn help to further entrench, specific ideologies, turning 'is' into 'ought'. Their background assumptions and associations, which almost always remain unspoken, shape the use of the term and the framing it suggests, acting as the hidden structural elements of the discursive edifice, and shaping our perception of reality through their constitutive authority.

To bring the discussion back to the specific theme of this piece, this means that when authors describe a system as a 'constitutional pluralist' one, it is important to ask what else they are implying about the system and its constituent parts, and how the use of the term frames our understanding of the socio-political landscape. When is the term deployed? What assumptions must be made in order for its framework to hold? What conceptual or normative baggage does the term bring with it? What types of systems does it legitimize or delegitimize? What politics does it reveal or suppress?

In order to explore these questions, this article examines constitutional pluralism as a discourse. It takes a broadly constructivist approach, investigating the ways in which constitutional pluralist talk articulates the social world in accordance with the particular background assumptions, ideological commitments, and political sensitivities of those who deploy it.[10] Briefly, the argument is that in practice, discourses of constitutional pluralism contain a strong normative core, and that this core is made up of a series of largely unacknowledged implicit claims about legitimacy and community that in turn structure the constitutional pluralist understanding of the systemic framework. If constitutional pluralism is to continue to develop as an intellectual project, writers in the area could benefit from an increased awareness of these ideological commitments, and a more explicit articulation of their starting assumptions, political aims, and normative viewpoints.

In order to unpack this argument, Part II begins by describing the way in which constitutional pluralist arguments are, to a great extent, about defining the content of a shared legal and political order, and the capacity of that order to tolerate

[9] For an overview of the framing literature, see RD Benford and DA Snow, 'Framing Processes and Social Movements: An Overview and Assessment' (2000) 26 *Annual Review of Sociology* 611; PE Oliver and H Johnston, 'What a Good Idea: Frames and Ideologies in Social Movements Research' (2000) 5 *Mobilization: An International Journal* 37.

[10] For an overview, see J Brunnée and SJ Toope, 'Constructivist Approaches to International Law' in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press, 2012).

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difference. This boundary drawing exercise, it argues, entails a host of prior claims about which legal and political values we share, and which ones we believe are reasonable subjects of disagreement. Part III then demonstrates that this definitional work is central to the application of constitutional pluralist models to particular situations of legal conflict. It examines several theories of constitutional pluralism in order to uncover their 'normative core', emphasizing the ambiguity of their terms and their reliance on linkages with other indeterminate concepts such as 'legitimacy'. Part IV then demonstrates the use of these frameworks in practice, contrasting the reception of the *BVerfG*'s articulation of a constitutional pluralist standard of fundamental rights review with that of the Hungarian Constitutional Court's Decision 22/2016. The focus, here, is on describing the ways in which the treatment of the two situations by various constitutional pluralist models is linked to their commitments regarding the content of Europe's shared procedural or substantive (meta)constitutional values. As a result, Part V argues, as constitutional pluralist discourses define the boundaries of 'legitimacy' through inclusion and exclusion, they also make a secondary move, justifying particular claims to power on the basis of their conformity with the scope of the shared values they articulate. Thus, arguments regarding constitutional pluralism—even those that are presented as descriptive and explanatory—in fact make implicit normative political claims that actively legitimate and delegitimate particular allocations of power and authority.

II. CONSTITUTIONAL PLURALISM AS BOUNDARY DRAWING

The first pillar of the argument is that discourses of constitutional pluralism reflect a host of implicit political commitments and are actively involved in constructing the legal world. In part, this is because they demarcate the boundaries between what is 'shared' or 'common' and what is 'diverse' or 'plural' in a constitutional order. This demarcation is, it seems to me, central to the constitutional pluralist project.

The notion of 'constitutionalism' is fundamentally a claim that there either *is* or *ought to be* a single legal source or set of principles that acts as a common frame of reference and legitimacy in a legal or political system. As Neil Walker put it, constitutionalism is 'the normative discourse through which constitutions are justified, defended, criticized, denounced, or otherwise engaged with'.[11] Constitutional pluralism is distinguishable from this tradition in that it sets aside the focus on hierarchically layered political systems with clear and fully determined legal maps, and instead emphasizes the ability of diverse constitutional traditions to exist alongside one another without a clear resolution of the question of jurisdictional or judicial authority. However, it retains from the constitutionalist tradition, and distinguishes itself from more radical conceptions of pluralism, by a continued focus on the necessity of shared norms of conflict resolution, commitment to a

[11] N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317, p 318.

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common project, and/or acceptance of at least some baseline set of 'metaconstitutional' norms that hold a particular system together despite its heterarchical tensions.[12]

Constitutional pluralist arguments thus must entail some definition of what norms characterize the system: what the 'common project' is, what types of conflicts can be resolved within it, and/or which metaconstitutional principles apply. The ability of a constitutional pluralist system to accommodate constitutional conflicts relies on some definition of a set or sets of shared principles that define and delimit the response to jurisdictional conflicts.[13] If there is no such set of shared principles or commitments, then constitutional pluralism collapses into disaggregated diversity.

Defining what norms characterize the common system necessarily entails making claims about what its members share and what they do not. In order to determine whether the component parts of a particular constitutional *Gestalt* share a 'common frame of reference', it is first necessary to determine what that 'frame of reference' might be. This exercise divides fit subjects for dialogue, agonistic contestation,[14] and mutual accommodation[15]—about which the various actors can 'agree to disagree' without risking systemic collapse—from those that are determinate, necessary, and resolved, and about which dissent cannot be tolerated. Only once these shared values have been defined (the 'constitutional' part) can the acceptable limits of heterarchical disagreement within a common system be articulated (the 'pluralism' part). Contestation about legitimate subjects for disagreement or those for which a common frame of reference is lacking can then be recast as 'pluralist', while arguments regarding shared norms are 'simply "legal" or "illegal," "correct" or "incorrect," or "legitimate" or "illegitimate" as judged according to the central/constitutional legal order'.[16] Constitutional pluralism's defining feature is its emphasis on the role of complexity, negotiation, dialogue, 'mutually assured discretion',[17] and the persistence of unresolved tensions regarding the ultimate locus of legal power. But these accommodating processes take place within an overarching system of shared constitutional commitments that must be defined—even if implicitly—in order for the constitutional system to withstand the centripetal force of pluralist claims.

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[12] N Walker, 'Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe' in G de Búrca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart, 2000).

[13] For an extended exploration, see T Flynn, *The Triangular Constitution: Constitutional Pluralism in Ireland, the EU and the ECHR* (Hart, 2019).

[14] See generally C Mouffe, *Antagonistics: Thinking the World Politically* (Verso, 2013).

[15] MP Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed), *Sovereignty in Transition* (Hart, 2003), p 501.

[16] J Lawrence, 'Of Politics and Pluralism: Governmentality and the EU Legal Order' in *Research Handbook on Legal Pluralism and EU Law*, note 3 above, p 247.

[17] M Goldmann, 'Constitutional Pluralism as Mutually Assured Discretion: The Court of Justice, the German Federal Constitutional Court, and the ECB' (2016) 23 *Maastricht Journal of European and Comparative Law* 119.

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The overarching set of shared values or (meta)constitutional principles to which constitutional pluralism makes reference may be thicker or thinner, closer to layered constitutionalism or a more radical pluralism, depending on the context. Indeed, proponents of the many varied strains of constitutional pluralism disagree as to the level of content that can or should be ascribed to the various constituent parts of this 'remarkably underspecified concept'.[18] Despite their many differences as to the scope, minimum content, and proper application of constitutional pluralism, however, each of the various approaches to the concept do share one thing in common: the need to define (even if implicitly) the boundaries of the constitutional system. It is this definitional exercise, this process of meaning-making, that is of primary interest here.

III. DEFINING THE BOUNDARIES OF EU PLURALISM

In the context of EU law, constitutional pluralism's definitional work involves specifying—to a greater or lesser degree, depending on the species of constitutional pluralism being used and its particular context—what is to be the content or scope of shared 'European' legal and political norms, and conversely what things will fall outside of this shared value system and thus be permissible subjects of disagreement among constitutional actors.

The literature on constitutional pluralism in the EU has developed largely in response to a series of cases in which apex courts from various Member States were asked to determine whether or not a particular EU action was compatible with the national constitutional order, thus challenging the automatic primacy of EU law. The most prominent example is, of course, the series of cases before the *BVerfG* in which that court has continued to insist on its power to review EU law in terms of its consistency with fundamental rights.[19] Through these cases the *BVerfG* claimed that despite the primacy of EU law and Germany's commitment to the principles enshrined in the EU treaties, the ultimate claim to sovereign authority remained with the German people, who thus retained the ability (via the Court) to reject EU law on constitutional grounds. This finding is incompatible with the Court of Justice of the European Union's ('CJEU') understanding of EU law, according to which the EU's authority within its spheres of competence takes primacy over conflicting national rules—including national constitutions.[20] Reconciling these two conflicting claims to constitutional authority appeared impossible, leading to much scholarly debate about *Kompetenz-Kompetenz* and the appropriate locus of

[18] Weiler, note 2 above, p 9.

[19] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Case 2 BvL 52/71) (1974) 2 *Common Market Law Review* 540 (*Solange I*); *Re the Application of Wünsche Handelsgesellschaft* (Case 2 BvR 197/83) (1987) 3 *Common Market Law Review* 225 (*Solange II*); *Brunner v European Union Treaty* (Case 2 BvR 2134/92 and 2959/92 JZ 1993, 1100) (1994) 1 *Common Market Law Review* 57 (*Maastricht*).

[20] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-11/70, EU:C:1970:114.

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ultimate sovereign authority. Despite this major legal disagreement, however, the European system continued to function and the EU did not collapse. Instead, the CJEU and the *BVerfG* seemed to simply 'agree to disagree', pursuing policies of mutual accommodation and respect that allowed the EU to move forward without fully resolving the fundamental question of legal hierarchy.

This 'agreement to disagree' was possible because the EU and Germany, and their respective high courts, were committed to the greater integration project and the primacy of EU law in the overwhelming majority of circumstances. Indeed, though the *BVerfG* has continued to insist on its theoretical right to reject EU law on constitutional grounds, it has never actually done so. This fits well with what Neil Walker called 'the normative claim' associated with EU legal pluralism: that 'the only acceptable ethic of political responsibility for the new Europe is one that is premised upon mutual recognition and respect between national and supranational authorities'.[21] The *BVerfG*'s objection regarding the ultimate locus of authority on issues of fundamental rights fell within the acceptable limits of tolerance that the system could withstand, and the mutual respect between the two courts constituted, for many, a perfect example of constitutional pluralism in practice. As Ana Bobić put it, this constitutional pluralist accommodation was legitimate so long as it could 'get the job done'—the flexibility served to protect the EU legal order by allowing it to avoid the 'Cold War logic' of 'mutually assured destruction'.[22]

Precisely where the limits of this constitutional pluralist tolerance lay, however, remained an open question. As Neil MacCormick wrote, pulling back somewhat from his earlier more radical pluralist work, '[s]imply to remit to state courts an unreviewable power to determine the range of domestic constitutional absolutes that set limits upon the domestic applicability of Community law would seem likely to invite a slow fragmentation of Community law'.[23] For the EU to continue to function as a constitutional pluralist system, there must be some outer boundaries beyond which an agreement to disagree would no longer be possible as it would result in systemic rupture, thus tipping the legal acrobat from the 'tightrope' of constitutional pluralism.[24]

Different authors have given different answers regarding what precisely the meta-constitutional norms or common core of the EU's constitutional pluralist order might be. Under Joseph Weiler's notion of 'constitutional tolerance' (to which, despite his objections,[25] many have applied the constitutional pluralist label[26]), for example, the common principle that underwrites the European project is the 'meta-political objective' of an 'ever closer union' rooted in 'tolerance' for 'distinct peoples, distinct

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[21] Walker, note 11 above, p 337.

[22] A Bobić, 'Constitutional Pluralism Is Not Dead: An Analysis of Interactions between Constitutional Courts of Member States and the European Court of Justice' (2017) 18(6) *German Law Journal* 1395.

[23] N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press, 1999), p 120.

[24] Flynn, note 13 above, p 1.

[25] Weiler, note 2 above, p 8.

[26] See eg Jaklic Klemen, *Constitutional Pluralism in the EU* (Oxford University Press, 2014).

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political identities, and distinct political communities'.[27] Accordingly, the mechanism by which EU constitutional pluralism functions is 'a continually renewed, autonomous, and voluntary act of subordination', by national constitutional actors, 'in the discrete areas governed by Europe, to a norm that is the aggregate expression of other wills, other political identities, other political communities'.[28] These principles of voluntary submission and commitment to an 'ever closer union', though vague, nonetheless draw a boundary line around European constitutionalism and sets a limit to the possibility of pluralist tolerance. Kelsenian conflicts among constitutional actors with respect to the ultimate locus of power can be withstood so long as they all nevertheless demonstrate a continuous commitment to the European project of 'ever closer union'. By implication, where they fail to demonstrate such a commitment (in whatever way that might be), their actions would no longer be fit subjects for pluralist tolerance of 'distinct political identities' but would rather cross over the line into unacceptable illegality.

Miguel Maduro's constitutional pluralist vision of 'contrapunctual law' is somewhat more fleshed out in defining the set of 'principles to which all actors of the European legal community must commit themselves', and which form the 'limit to pluralism', respecting 'competing claims of authority' while guaranteeing 'the coherence and integrity of the European legal order'.[29] The first, 'foundational', requirement of Maduro's EU constitutional pluralism is that 'any legal order (national or European) must respect the identity of the other legal orders', in particular via the 'recognition and adjustment of each legal order to the plurality of equally legitimate claims of authority made by the other legal orders'.[30] The second, 'participative', requirement is that discourse among constitutional actors must 'take place in such a way as to promote the broadest participation possible'.[31] Third, the various actors in the European system must 'share the same commitment to a coherent legal order', adjusting their claims to authority in order to ensure consistency and vertical and horizontal coherence.[32] Fourth, national courts ought to justify their decisions on 'universalisable' grounds that 'could be applied by any other national court in similar situations'.[33] Fifth and finally, the principle of 'institutional choice' requires that constitutional pluralism reject a singular focus on courts and judgments, and instead recognize the actions of a broader range of constitutional actors. So long as these requirements are fulfilled, it will remain 'possible to have a coherent legal order in a context of competing determinations of the law'—conflicts over the ultimate locus of jurisdictional authority need not be resolved.[34] By contrast, where a

[27] JHH Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' (2005) 3 *I-CON* 187, pp 187–88.

[28] Ibid, 188.

[29] Maduro, note 15 above, p 524.

[30] Ibid, p 526.

[31] Ibid, p 527.

[32] Ibid.

[33] Ibid, p 530.

[34] Ibid, p 527.

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constitutional actor does not respect the identity of the other orders, promote broad participation, attempt to ensure consistency and coherence, make decisions based on universalizable grounds, or remain sensitive to a broad range of institutional actors, their actions will be deemed beyond the constitutional pale, sliding over from tolerated diversity into intolerable fractiousness.

Mattias Kumm's 'cosmopolitan constitutionalism' goes even further in terms of positing a substantive content for European constitutional pluralism. Kumm argues that there are four 'relevant principles' that must be balanced in cases of constitutional conflict: 'the formal principle of legality, jurisdictional principles of subsidiarity, the procedural principle of democracy, and the substantive principle of the protection of basic rights or reasonableness'.[35] Essentially, his system begins with the presumption that national courts must enforce EU law (legality). This presumption can be rebutted, however, if and to the extent that obeying EU law is outweighed by one or more of the other three principles (subsidiarity, democracy, and the protection of basic rights). Divergence among constitutional actors is acceptable to the extent it abides by these metaconstitutional interface norms. Where national actors diverge from this framework, however, they are no longer engaged in legitimate constitutional pluralism, but rather in illegitimate and unacceptable disregard for the EU constitutional order.

Each of these constitutional pluralist theories, in defining the terms of their metaconstitutional content and setting the limits of their tolerance for disagreement, draws a boundary between, on the one hand, behavior that is legal, legitimate, and cognizable within the system; and, on the other hand, behavior that is illegal, illegitimate, and risks systemic rupture. Exactly which behaviors will fall on which side of this boundary line, however, remains very much an open question, and one that none of these theories answers on its face. Instead, each makes reference to terms that are themselves indeterminate and subject to further chains of inference: tolerance, democracy, and reasonableness do not take us a great deal farther than the question-begging catch-all of 'legitimacy'.

In order to begin to pick away at this secondary question, it is necessary to dig deeper, and to inquire into the ways in which these visions of constitutional pluralism carry within them a host of unspoken background assumptions regarding what, precisely, should be seen as legitimate forms of political contestation. In other words, to inquire into the 'regimes of truth' that lie behind these systems of power/knowledge.[36]

IV. TESTING THE BOUNDARIES

Exploring the normative core of constitutional pluralism is particularly pertinent today, as the problem of defining the limits of the European legal system's toleration

[35] M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty (2005) 11 *European Law Journal* 262, p 299.

[36] See generally M Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978–1979* (AI Davidson ed, G Burchell tr, Palgrave Macmillan, 2008).

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for pluralist claims to constitutional authority has continued to arise, resulting in situations of increasingly greater systemic strain. In order to illustrate the functioning of constitutional pluralist discourse, this section contrasts the treatment of the *BVerfG*'s claims to autonomous authority with the parallel discussion that has taken place within the context of the swing toward 'illiberalism' in Hungary, and in particular the decision of the Hungarian Constitutional Court regarding Council Decision (EU) 2015/1601 establishing a refugee resettlement quota within the Member States.[37]

Over the years, the content of the European 'constitution' has expanded from its origins in transnational economic management to a 'thicker' understanding that includes human rights, the rule of law, citizenship, and a host of other values and rules. At present, the EU's constitutional vision on the values front is set out in Article 2 of the Treaty on European Union ('TEU'), which states:

> The 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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[38]

Along with this expansion has come pushback from certain Member States that perceive that their own prerogatives are being eroded by the steady growth in both the breadth and depth of European authority. This pushback has come in many forms, ranging from calls for a more firmly entrenched subsidiarity principle[39] to outright rejection of EU authority. One of the most prominent examples of the latter has been Hungary's recent rejection of the EU's asylum policies.[40]

Citing fears of a 'Muslim invasion' and the Hungarian desire to maintain its distinct 'cultural identity', Viktor Orbán's government has signaled its firm intention not to comply with the EU's efforts to address the so-called migration crisis in Italy and Greece by redistributing asylum seekers amongst the Member States.[41] As Orbán put it:

> Those arriving have been raised in another religion and represent a radically different culture. Most of them are not Christians, but Muslims. This is an important question, because Europe and European identity is rooted in Christianity. Is it not worrying in

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[37] Decision of the Hungarian Constitutional Court, 22/2016 (XII.5), AB on the Interpretation of Article E) (2) of the Fundamental Law.

[38] Article 2 TEU.

[39] For a discussion of the ways in which the subsidiarity principle is called upon to correct the EU's democratic deficit, see Marija Bartl, 'The Way We Do Europe: Subsidiarity and the *Substantive* Democratic Deficit' (2015) 21(1) *European Law Journal* 23.

[40] For more in-depth analyses of the Hungarian situation, *see* G Halmai, 'National(ist) Constitutional Identity? Hungary's Road to Abuse Constitutional Pluralism' (2017) EUI Working Papers 8.

[41] Council Decision (EU), No 2015/1601 [2015] OJ L248 /80.

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> itself that European Christianity is now barely able to keep Europe Christian? There is no alternative, and we have no option but to defend our borders.[42]

Hungary was not the only government opposed to this particular EU decision—it was joined in its opposition by the Czech Republic, Romania, and Slovakia, as well as Poland, though the latter ultimately voted in favor of the relocation plan. After losing the vote in favor of the plan, Hungary first turned to the EU courts for help, initiating an annulment action (alongside Slovakia) before the CJEU.[43] When this strategy also failed, the government turned elsewhere for legal cover.

On the basis of a petition filed by the national Commissioner for Fundamental Rights, the Hungarian Constitutional Court was asked to deliver an interpretation regarding, essentially, whether or not the government was required to implement EU law when that law was in breach of national Constitutional principles. Relying on the *BVerfG*'s arguments regarding the permissibility of fundamental rights review by a national court, the Hungarian Constitutional Court determined that it had the right to 'examine whether [the law] results in the violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State) and the constitutional self-identity of Hungary'.[44] These values, it maintained, are protected within EU law by Article 4(2) TEU, which provides, in relevant part:

> 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. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.[45]

The Constitutional Court's decision qualifies the extent of national constitutional review by asserting that 'the review of competence reserved for the Constitutional Court must be applied with due account to the obligation of cooperation, by paying respect to the enforcement of EU law as far as possible'.[46] Accordingly, 'the protection of constitutional identity should be grounded in the framework of an informal cooperation with the EU Council based on the principles of equality and collegiality, with mutual respect to each other'.[47] This is an explicit reference to the principle of sincere cooperation spelled out in Article 4(3) TEU, which states:

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[42] R Mackey, 'Hungarian Leader Rebuked for Saying Muslim Migrants Must Be Blocked 'to Keep Europe Christian' (*The New York Times*, 3 September 2015), at https://www.nytimes.com/2015/09/04/world/europe/hungarian-leader-rebuked-for-saying-muslim-migrants-must-be-blocked-to-keep-europe-christian.html.

[43] *Slovak Republic and Hungary v Council*, C-643/15 and C-47/15, EU:C:2017:631.

[44] Hungarian Constitutional Court, Decision 22/2016, para 46.

[45] Article 4(2) TEU.

[46] Ibid, para 49.

[47] Ibid, para 63.

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> Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.[48]

Despite the Constitutional Court's couching its decision in the TEU's language of sincere cooperation and the respect for national identity, the ruling was enthusiastically received by Viktor Orbán, who claimed: 'I threw my hat in the air when the Constitutional Court ruled that the government has the right and obligation to stand up for Hungary's constitutional identity. This means that the cabinet cannot support a decision made in Brussels that violates Hungary's sovereignty'.[49] The Hungarian government, interpreting the protection of national sovereignty and identity as including respect for its preferences regarding ethnic and religious homogeneity and migration control, took the decision as permission to reject the EU's asylum *acquis*.

EU actors have in turn rejected Hungary's interpretation of the TEU and the Constitutional Court's decision. In the Council's view, through this and other recent behavior, Hungary had committed a 'serious breach … of the values referred to in Article 2', sufficient to justify the initiation in September 2018 of the procedure under Article 7 TEU that could ultimately result in a suspension of Hungary's Treaty rights, including voting rights in Council.[50]

The Hungarian Constitutional Court's decision is particularly interesting because it was made in explicitly constitutional pluralist terms, paralleling in significant ways the line of jurisprudence developed by the *BVerfG*. The similarities between the judgments are hard to miss. The Hungarian Constitutional Court drew directly on the case law of the *BVerfG* and other Member State courts and noted the tension between the protection of national identity/fundamental rights and the duty of loyal cooperation. Both the Hungarian Constitutional Court and the *BVerfG* claimed the right to a final review of legitimate legal authority within their Member State. Both asserted their right to reject EU law on the grounds of internal constitutional norms. Both emphasized that the ultimate locus of sovereignty remained with the Member State and its people. And both stressed that their constitutional review processes were to be undertaken in the spirit of sincere cooperation coupled with respect for Member State constitutional identity.

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[48] Article 4(3) TEU.

[49] Quoted in Halmai, note 40 above, p 14.

[50] European Parliament Resolution (EU) No 2017/2131(INL).

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The primary differences between the decisions of the *BVerfG* and the Hungarian Constitutional Court boil down to: (1) the scope of the constitutional review that the two courts performed; (2) the substantive content of the fundamental rights claims that they invoked; and (3) the perceived legitimacy of the court making the claims in each case. But are these differences enough to place the Hungarian Court's decision outside the bounds of constitutional pluralism, as defined by its various proponents?

Proponents of the various strains of constitutional pluralism discussed in Part III would almost certainly claim that Hungary's actions are illegitimate, rather than pluralist. For example, Leonardo Pierdominici characterizes the Constitutional Court's decision not as true constitutional pluralism—the 'more or less muscular use of genuine pluralistic instances, which, as exemplified by *Gauweiler*, can eventually find accommodation'—but rather as an 'abuse' of the 'jargon' of constitutional pluralism 'for pure and immediate political purposes' that requires a redefinition of 'the proper rules of this game of mutual accommodation, in *interpretative/participative* terms, so that the uses and abuses of constitutional pluralism can be detected, diversified, and differentially and properly treated'.[51] Matej Avbelj also makes this point explicitly, arguing that Decision 22/2016 would fall outside of most understandings of constitutional pluralism.[52] Indeed, he goes on to specify that the Decision would be rejected by two of the models discussed above: Mattias Kumm's cosmopolitan constitutionalism, because illiberalism does not uphold the universal substantive framework of shared liberal values that undergirds the EU's constitutional pluralist order; and Miguel Poiares Maduro's contrapunctual constitutionalism, as the Hungarian system is unable to justify its claims in such a way as to promote ultimate convergence around a shared outcome.[53] Joseph Weiler, too, might reject this case out of hand as failing to demonstrate the requisite submission and commitment to the project of 'ever closer union' to fall under his notion of constitutional tolerance.

However, this outcome is far from assured. Whether one agrees with the outcome or (more likely) not, the Hungarian Constitutional Court certainly made a cognizable argument for reading its Decision as a constitutional pluralist one. The ability to review EU law with respect to its compatibility with human dignity and fundamental rights is at the very heart of the *BVerfG* cases so lauded by constitutional pluralist literature of times past. Extending the grounds of national review to include sovereignty and constitutional identity goes further—but couched as it is in the language of mutual cooperation and respect, can it be said *in abstracto* to violate the central tenets of EU constitutionalism, particularly when read in the light of Article 4(3) TEU? Do the principles of subsidiarity, respect for difference, and the substantive margin of appreciation not provide sufficient grounds for arguing the pluralist case? Could the Decision not be said to present an alternate version of constitutional pluralism in which the common cause of EU law encompasses a narrower band of

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[51] L Pierdominici, 'The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?' (2017) 9(2) *Perspectives on Federalism* E-119, p E-144.

[52] Avbelj, note 3 above, p 103.

[53] Ibid, pp 103–04.

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substantive and procedural norms; in which the system's tolerance for pluralist heterarchy is much more substantial, encompassing not only the formal pluralism of overlapping constitutional claims, but also the substantive pluralism of diverging understandings of terms such as national identity? Or, even more basically, in a constitutional pluralist order should national courts not sometimes be allowed their victories when they have presented good reasons for their decisions? Indeed, it is for such reasons that commentators like Kelemen do see the Hungarian case as an example of constitutional pluralism—one that reveals what he sees as the dark side and ultimate indefensibility of the concept. As Kelemen put it: 'The Hungarian example may be the first egregious abuse of constitutional pluralism and identity to date, but it will surely not be the last', demonstrating that 'the history of constitutional pluralism in the EU is the tragic tale of a path to legal hell paved with good intentions'.[54]

Whether Decision 22/2016 is a legitimate example of constitutional pluralism or an illegitimate act of national recalcitrance depends on how one defines the minimum amount of shared substantive or procedural content that is fundamental to the EU order, and whether the Hungarian Constitutional Court's decision falls inside or outside of this bounded space. Where there is only one legitimate hierarchy, authority, or value system, there is no room for pluralism. And conversely, the greater the scope of legitimate claims, the greater the tolerance for heterarchy. Comparing the treatment of the German and Hungarian Courts according to the various models of constitutional pluralism is instructive. Those which would deem the *BVerfG*'s decisions to be legitimate instances of constitutional pluralism while seeing the Hungarian Constitutional Court's decision as an illegitimate 'abuse' of the 'jargon' of pluralism for political expediency must delineate the difference between them precisely by naming some of the underlying assumptions that guide their boundary drawing work. This exercise in definition is not marginal, but rather reveals the political heart of constitutional pluralist arguments.

This raises again the question that was asked at the end of Part III: whether the boundaries of constitutional pluralism can in fact so easily be drawn on the basis of the express terms that its theorists outline. The Hungarian case demonstrates that perhaps this is not so easy to do. Instead, determining whether a particular instance of constitutional dissent is pluralism in action or is rather an illegitimate exercise of national power can only be done by reference to background assumptions regarding legitimacy and common 'European' values—in other words, by invoking the implicit political commitments of the constitutional pluralists themselves. To put it another way, the limits of systemic tolerance may be less about the 'descriptive' question of what the members of the order *can* agree to disagree about, and more about the 'normative' question of what they *should*. This 'should' is a big word: it contains within it all of the underlying ideological assumptions and equivalences that make up the implicit content of constitutional pluralist discourse which will be considered in Part V.

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[54] Kelemen, note 5 above, p 393. See also Kelemen and Pech's contributions to the current volume.

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V. THE NORMATIVE CORE OF CONSTITUTIONAL PLURALISM

Which values are 'shared'? Which disagreements are 'legitimate'? What 'should' the limits of systemic tolerance be? The answers to these questions are intimately linked with the forms of political rationality that structure a legal order.[55] Exploring the normative content of EU constitutional pluralist arguments thus reveals the operation of deep ideological currents within the literature.[56]

Take, for example, the version of constitutional pluralism espoused by Matej Avbelj, who so definitively rejected the idea that the Hungarian Constitutional Court's Decision was a constitutional pluralist one. In another piece on a similar topic, Avbelj explains his reasoning in the following way:

> The pluralist nature of the EU leaves no room for pretexts for … recalcitrant Member States. Pluralist insistence on the respect for national constitutional autonomy, for the national pluralist-self, cannot be misused or even abused to legitimate national measures corrosive of the EU fundamental values under the guise of pluralism. In short, pluralism cannot be defined pluralistically. A pluralist European integration assumes that its Member States are well-ordered societies.[57]

Hungary's departure from EU norms, in Avbelj's view, is not constitutional pluralism because it is being 'misused' as a 'guise' to cover 'national measures corrosive of the EU fundamental values'. How do we know that this is the case? Because Hungary, for Avbelj, is not a 'well-ordered society'. Indeed, he goes on to say, Hungary and other Member States dabbling with illiberalism are 'simply not normal countries', but rather 'half-built democracies, destined to swing from the leftist to … rightist semi-authoritarianism and back' and which 'need time before they can develop into well-ordered societies'.[58] Constitutional pluralism, it seems, operates only so long as Member States remain within a narrow band of shared concerns and common commitments.

Such honesty reveals a great deal about the normative core of EU constitutional pluralism. It demonstrates, in effect, that its normative content is far more determinate than it appears: it is not only a commitment to an 'ever closer union' or 'democratic values' or 'respect for diversity' or any other abstract concept that makes behavior an acceptable instance of constitutional pluralism—it is also necessary to be a 'normal', 'well-ordered' (Western) European state that acts within acceptable bounds. These values may be historically, geographically, and politically contingent, may shift over time, and may not be applied with equal fervor to all actors in the system, but they are most certainly present. In other words, the constitutional pluralist question is whether a diverging actor's disagreements are viewed as legitimate by

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[55] On the notion of political rationality, see J Lawrence, *Governmentality in EU Trade and Environment Policy: Between Rights and Market* (Routledge, 2018).

[56] Lawrence, note 16 above

[57] M Avbelj, 'Pluralism and Systemic Defiance in the EU', in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2016), pp 56–57.

[58] Ibid, p 68.

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the other members of the system. It is a question of vertical or horizontal identification, of inclusion and exclusion from the constitutional club.

As it demarcates the boundaries of what 'we' share, constitutional pluralist discourse anoints certain actions, forms of government, and state behaviors as legitimate, while designating others as illegitimate on the basis of whether or not they hew to an implicit set of shared ideological commitments. In doing so, constitutional pluralism's boundary-drawing exercise also subtly takes a further step, serving to justify those allocations of power and authority that conform to this definition of legitimacy.

The legitimating function of constitutional pluralism has been a part of the story from the very beginning. Indeed, one of the primary impacts of Neil MacCormick's original *Maastricht Urteil* piece was to reframe the 'problematic' moves of the German Constitutional Court as in fact not being 'problematic' at all, but rather as evidence of the operation of a different, but equally legitimate, system: a constitutional pluralist one.[59] In this new vision, constitutional authority could be conceived of not only as a single, unified order confined to and articulated within the boundaries of the nation state, but also as a multiparty, multilevel amalgam that could withstand disagreement and a lack of resolution on the question of ultimate authority. The 'problem' of conflict between the EU and Member State courts was thus not really a problem at all. In Neil Walker's words:

> [A]s the constitutional pluralist views the world, it becomes increasingly difficult if not impossible *not* to conceive of the environment of constitutionalism in non-unitary terms—as a place of heterarchically interlocking legal and political systems. The dimension of value lies in viewing this changing landscape not as a threat to the maintenance of the traditional template of constitutionalism but as a welcome opportunity to integrate what in conventional constitutional wisdom tend to be treated as contrasting and even opposing modalities of normative thought. The constitutional pluralist, in short, seeks to make a virtue out of necessity.[60]

Constitutional pluralism marks certain conflicts as legitimate despite their lack of a single source of 'legality'. It does this by shifting the legitimating function to some other norm—whether cosmopolitan values, fundamental rights, shared conflict resolution principles, an alternative constitutional order, or something else. As Halberstam argues, '[c]onstitutionalism supplies the "grammar of legitimacy" that governs the pluralist contest'.[61] The content of this grammar is the basis on which claims to power are deemed legitimate or not.

By making this secondary (and more furtive) move, constitutional pluralism becomes a legitimating discourse. It defines legitimacy in terms of its shared ideological content, and then justifies those forms of political order that conform with this normative core, while rejecting those that do not as 'illegal', 'illegitimate',

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[59] MacCormick, note 1 above.

[60] N Walker, 'Constitutionalism in Global Context' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart, 2012), p 18

[61] D Halberstam, 'It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16(1) *German Law Journal* 105, p 107.

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'incoherent', etc. In so doing, it presumes the legitimacy of those forms of power and authority that match its procedural and substantive preferences.

As a result, constitutional pluralism is far from being a neutral descriptive project that works inductively to build an explanatory theory for situations of jurisdictional heterarchy. Instead, it is a normative discourse that validates and legitimizes certain claims regarding the allocation of power and authority while invalidating or delegitimizes others. This reconceptualization flips the script from the usual understanding of constitutional pluralism as a descriptive/explanatory discourse that takes legal and political facts as its starting point, to one that sees constitutional pluralism as a political tool deployed for political ends.

At its core, constitutional pluralism is more than a way of understanding legal authority in the EU—it is a discursive technique deployed to justify claims to power. On its own, this is not per se either a good thing or a bad thing: but self-reflection and acknowledgement of this constitutive function of the discourse would serve to fill what is currently a gap in the field.

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