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Introduction

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Human creativity knows no limits, but nor do the challenges that people face; they constantly fight hermeneutical battles with the surrounding world. New concepts are frequently born to provide tools for grasping and at the same time potentially changing the social reality. However, it is not known how the new concepts would fare in practice at the time of their inception. Some are more successful than others. What all bring along, however, is a claim that something about the 'old' is wrong and needs to be redone.

Constitutional pluralism, the concept that this book explores, has emerged from hermeneutical clashes of this kind and seems to have gained a remarkable success. Since the mid 1990s, it has grown from a concept that was only unconsciously used to an idea that has drawn remarkable attention and even resulted, according to some, in a 'movement'.[1] The concept of such a rapid ascendancy merits attention for that reason alone, but it does so even more when it manages to capture the attention and mobilise some of the leading academics in a given legal field – be it in constitutional theory, European integration, or international and global relations.

As an edited volume, this book's purpose is not to provide a single valid exegesis of the evolution and the present state of the idea of constitutional pluralism. Its objective rather lies in demonstrating how different authors have understood and used constitutional pluralism in different contexts. For that purpose we invited a group of scholars who are engaging in this debate to a conference, which took place in Oxford in March 2009.[2]

What some of those invited present as 'constitutional pluralism' can eventually seem not be 'pluralist' or 'constitutional' at all. The book therefore offers a critical perspective on the current state of the idea of constitutional pluralism. In order to help the reader through the maze of different theories and to allow a better understanding and critical engagement with the contents of this book, this introduction provides a short sketch of what can be considered the essentials of constitutional pluralism.

[1] J Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14 *European Law Journal* 389.

[2] Constitutional Pluralism in the European Union and Beyond, Oxford, 20–21 March 2009.

I. The Birth of an Idea

The idea of constitutional pluralism first emerged in the context of European integration. Neil MacCormick can be named as its 'founding father'. In a very short article[3] published in the aftermath of the German Federal Constitutional Court's *Maastricht* decision,[4] MacCormick broke apart from the then conventional wisdom. According to a then common view, Community law was supposed to have absolute supremacy over the Member States' legal orders and the pronunciations of the European Court of Justice were to be respected unconditionally. Any reservations on the side of the national courts were deemed, almost a priori, unfounded and short-lived.[5] However, as the German Federal Constitutional Court's *Maastricht* decision – and the reaction which this decision provoked on the part of other actors, including other national highest courts – showed, a reversal of the national courts' attitude was nowhere in sight. To the contrary, the courts even reinforced their stance. MacCormick thus sincerely engaged with their concerns and concluded that despite all criticism, the *Maastricht* decision had a 'sound basis in legal theory'.[6] The basis consisted in a pluralistic legal theory,[7] following which

> the most appropriate analysis of the relations of legal systems is pluralistic rather than monistic, and interactive rather than hierarchical. The legal system of Member States and their common legal system of EC law are distinct but interacting systems of law, and hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another.[8]

MacCormick's article effectively marked the beginning of a theory of constitutional pluralism, save for calling it by this name. However, even before the notion of 'constitutional pluralism' was first employed, other authors too had started unveiling a more intricate internal legal structure of European integration[9] and were trying to devise a set of principles that could enable the national courts to legitimately deviate from the supremacy of European Community law.[10]

[3] Neil MacCormick, 'The Maastricht Urteil: Sovereignty Now' (1995) 1 *European Law Journal* 259.

[4] Case 2 BvR 2134, 2159/92 *Maastricht* [1993] BVerfGE 89, 155, published in English as [1994] 1 CMLR 57.

[5] For a classical voice in this respect see Eric Stein, 'Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the *Costa* Case' (1965) 63 *Michigan Law Review* 491. Baquero Cruz, n 1, provides perhaps the most forceful current expression of these ideas.

[6] MacCormick, above n 3, at 265.

[7] Formulated in the spirit of legal institutionalism developed earlier by MacCormick, first in a book written together with Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Kluwer Academic Publishers, Dordrecht, 1986). See also N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, Oxford University Press, 1999) 1–15 (Chapter 'The Legal Framework: The Normative Institutional Order').

[8] MacCormick, above n 3, at 265.

[9] See particularly JHH Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European integration* (Cambridge, Cambridge University Press, 1999).

[10] Mattias Kumm, 'Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 *Common Market Law Review* 351.

A theory of constitutional pluralism was first explicitly addressed by its name, again by Neil MacCormick, in his book entitled *Questioning Sovereignty*.[11] The language used there, however, was still slightly ambiguous, as constitutional pluralism was at times assimilated with other notions such as normative, legal or juridical pluralism.[12] Nevertheless, this work already provided for a vague definition of constitutional pluralism that was portrayed as a situation of plurality of institutional normative orders, each with a functioning Constitution, whereby each acknowledges the legitimacy of every other within its own sphere, while none asserts or recognises constitutional superiority over another.[13] Constitutional pluralism as applied to European integration, MacCormick later averred, entails a strongly decentralised conception of the Union whose constitutional architecture is much closer to confederation than to federation.[14]

The theory of constitutional pluralism was therefore initially limited to European integration. However, in 2002 Neil Walker suggested that constitutional pluralism is a wider phenomenon, which extends beyond it.[15] Walker contended that we are facing a transition away from the old one-dimensional Westphalian world. The state is no longer an exclusive unit of legal and political organisation. The link between the autonomy and territorial sovereignty has been severed and the exclusivity of the territorially limited claims towards ultimate legal authority have given way to the competition of various functionally underpinned but equally plausible claims towards ultimate legal authority. Alongside the state, new sectorally and functionally oriented polities have been emerging. The European Union was one of them, perhaps the most developed, but certainly not the only one. New forms of legal and political community can be found on the sub-state, trans-state, supra-state and on other non-state levels.[16]

The theory of constitutional pluralism has an important role to play in this post-Westphalian world. It carries a promise of a better explanation of the new world order: 'We can only begin to account adequately for what is going on . . . if we posit a framework which identifies multiple sides of constitutional discourse and authority'.[17] It contains a normative vision of the new world order, which could be a better place than the old Westphalian configuration, built on mutual recognition and respect between the many emerging authorities. However, for that purpose these newly emerging authorities have to be taken for what they are: different epistemic sites that have in common no neutral perspective from which different representational claims to authority could be reconciled.[18]

[11] MacCormick, above n 7, at 104.
[12] *Ibid* 102.
[13] *Ibid* 104.
[14] Neil MacCormick, 'A Comment on the Governance Paper', *Jean Monnet Working Paper* No 6/01, 'Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance', http://centers.law.nyu.edu/jeanmonnet/papers/01/012501.html.
[15] Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317.
[16] *Ibid* 320.
[17] *Ibid* 337.
[18] *Ibid* 338.

With Walker constitutional pluralism is thus no more limited to European integration only. It can also account for, explain and normatively guide other socio-political phenomena, trends and developments characteristic of the post-Westphalian world. However, beside the change of the scope of the theory of constitutional pluralism, which is hereinafter converted from the European-integration specific to a general theory, its original objective is altered too.

If MacCormick largely saw constitutional pluralism as a device that can provide a sound(er) basis for thinking of, practising, and therefore functioning of the European integration, Walker primarily conceives of constitutional pluralism as a means of rehabilitation of the constitutional language.[19] The diagnosis is that the changing world of non-exclusivity, fragmentation, heterarchy and of increasingly permeable boundaries between different sites and authorities has debased the traditional statist foundations of constitutionalism and therefore subjected it to an unprecedented strain. Constitutionalism has come under the risk of marginalisation, of losing its relevance, precisely at the stage when its values and social-engineering capacities are needed perhaps more than ever before. The world pervaded by plurality also requires a minimum degree of coherence and, more importantly, it calls for a meta-language through which the actors situated at different (epistemic) sites could reflexively engage with each other by recognising their differences with a simultaneous commitment to a certain shared framework of co-existence. Constitutionalism has proved successful as such a language in the statist environment and absent other alternatives, which are still nowhere emerging on the horizon, it should also continue to play the same role in the new pluralist world order beyond the state, provided it undergoes some pluralist transformation.[20]

II. The Spread and Diversification of the Idea

However, as a result of the launch of the process of adopting a formal Constitution of the EU ('documentary constitutionalism'), the focus of constitutional pluralism again reverted to Europe, whereas its broader, potentially more general theoretical implications have for now remained far less developed. Inside the European Union's debate constitutional pluralism has, however, drawn new supporters, but in so doing it has also become a more diversified and heterogeneous idea.

Different authors are still referring to the nominally identical concept, but effectively they often harbour a different, sometimes also very different, understanding of what the latter concretely entails. Consequently, several different conceptions of European constitutional pluralism have gradually emerged. Six of them have been more prominent, developed and therefore influential.[21]

[19] *Ibid* 317.

[20] See, eg, N Walker, 'Beyond the Holistic Constitution?' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford, Oxford University Press, 2010) 291–308.

[21] This classification follows M Avbelj, 'Questioning EU Constitutionalisms' (2008) 9 *German Law Journal* 1.

The first is *socio-teleological constitutionalism* developed by Joseph Weiler. His special brand of European constitutionalism has three dimensions. Following the first, formal dimension, the European Union already has a Constitution, developed in the interaction between the national judicial as well as political branches, and therefore does not need a special, documented one, resembling the statist Constitution. Pursuant to the second, normative dimension, which is also the key pluralist component in this conception, the Union is founded on the principle of constitutional tolerance, which sends a deeply normative message of necessity and desirability of mutual recognition between the self-reflexive individuals and the Member States in their eternal pursuit of a decent life. Third, there is a sociological dimension, whereby constitutional tolerance is being exercised on a daily basis between all the actors of the integration: from the lowest-ranked official, to the highest judicial authority.[22]

The epistemic meta-constitutionalism, suggested by Neil Walker, offers constitutionalism, redefined in a pluralist way, as a meta-framework above and beyond the constituent entities of European integration. It similarly insists on the need of fostering dialogue, mutual-learning and cross-fertilisation between them,[23] but it admits that due to a distinct epistemic status of each of the entities involved the bridging-mechanisms between them cannot be unlimited.[24] Also, in contrast to Weiler's conception, the epistemic meta-constitutionalism distances itself more from the classical hierarchical constitutional structure, while at the same time, largely because of the potentially positive effects a Constitution-making process could engender for the integration, remains in favour of the European Union's own 'documented' Constitution.[25]

This is something that *the best fit universal constitutionalism*, recently dubbed cosmopolitan constitutionalism,[26] would be also willing to concede to. This brand of constitutional pluralism also recognises the pluralist structure of European integration, but it considers its plurality, different as the epistemic meta-constitutionalism, to be situated in a universal framework of substantively homogeneous shared

[22] JHH Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*' in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge, Cambridge University Press, 2003) 23. The idea of constitutional tolerance has won broad support among scholars; see, eg, S Oeter, 'Federalism and Democracy' in A von Bogdandy, J Bas (eds), *Principles of European Constitutional Law* (Oxford, Hart Publishing, 2006) 95; P Eleftheriadis, 'The Idea of a European Constitution' (2007) 1 *Oxford Journal of Legal Studies* 1, 16; C Offe and UK Preuss, 'The Problem of Legitimacy in the European Union: Is Democratization the Answer?' in C Crouch and W Streech (eds), *The Diversity of Democracy: Corporatism, Social Order and Political Conflict* (Cheltenham, Edward Elgar, 2006).

[23] Neil Walker, 'Flexibility within a Meta-Constitutional 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?* (Oxford, Hart, 2000).

[24] Walker, n 15, 338.

[25] N Walker, 'Europe's Constitutional Engagement' (2005) 18 *Ratio Juris* 387, 398.

[26] M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in J Dunoff and J Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (Cambridge, Cambridge University Press, 2009).

principles and values of political liberalism, which lie at the base of the modern constitutionalism. The latter provides a universal language against which the competing claims of the entities constituting European integration can be measured and balanced so as to find the best fit solution for the integration as a whole.[27]

Another version of European constitutional pluralism, *harmonious discursive constitutionalism*, closely resembles the best fit universal constitutionalism in welcoming and preserving plurality in the European Union, but only if this stays within certain manageable bonds that still ensure harmony of a system.[28] The two differ, however, on the one hand as to the intensity of the plurality and its recognised implications, as well as, on the other hand, to the degree of universalism. The harmonious discursive constitutionalism is slightly more disposed in favour of plurality. It refrains from making (strong) claims about the actual substantive universality of principles and values, and insists only on the procedural dimension of universalisability of arguments through which actors across different entities of the integration justify their claims to authority.[29] Constitutional pluralism in this sense therefore provides for a shared discursive, for example procedural framework, rather than for universally shared substantive foundations.

Another branch of constitutional pluralism, defended mainly by German scholars and in particular by Ingolf Pernice, has been the so-called *multilevel constitutionalism*.[30] It also proceeds from the presumption of a considerable degree of substantive unity and homogeneity of values between the constituent entities of the integration, which can therefore function as a composite of two independent constitutional lawyers, national and supranational, that are nonetheless forming part of a single European Constitution. Multi-level constitutionalism presupposes one European sovereign as well as a single answer in any constitutional conflict that might arise.[31] In so doing, it most closely approaches the classical, for example non-pluralist, constitutional account.

Exactly the opposite is attempted by the last of the six forms of EU constitutional pluralism: *the pragmatic constitutionalism*. This argues that the classical constitutional paradigm should be abandoned in its entirety, along with its sovereignty conundrum, pursuit of universality, coherence and integrity. The constitutional language should switch from the whole to the particular, from the constitutionally holistic to the constitutionally atomistic approach. The European integration should be, accordingly, completely reconstructed and established as a directly deliberative polyarchy,[32] characterised by a pragmatic, experimentalist

[27] M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262, 292.

[28] M Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed), *Sovereignty in Transition* (Oxford, Hart, 2003) 502.

[29] *Ibid* 525.

[30] I Pernice, 'Multilevel Constitutionalism in the European Union' (2002) 27 *European Law Review* 511, 514.

[31] *Ibid* 518–19.

[32] O Gerstenberg and CF Sabel, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?' in C Joerges, R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford, Oxford University Press, 2002) 292.

approach to governance involving a range of private and public actors entangled into a whole array of policy networks.[33]

The idea of constitutional pluralism has not remained tied to the ambit of scholarship only; its presence can also be increasingly traced in judicial practice, both national and supranational. Two examples should serve to illustrate this point. The German Constitutional Court in its much criticised *Lisbon* decision recognised the legal autonomy of EU law,[34] but it also reserved for itself the right to exceptionally disapply EU law, albeit under special and narrow conditions.[35] The Court, inter alia, argued that this is justified in the contexts of political order which are not structured according to a strict hierarchy.[36] The same approach was adopted by the Court of Justice in relation to international law. In *Kadi* the Court, contrary to the conspicuously monist approach to international law followed by the Court of First Instance (renamed by the Lisbon Treaty as 'General Court'),[37] asserted the autonomy of the Union legal system and declined the possibility of hierarchical supremacy of international law over it. It treated Union law and international law as two distinct legal orders. In their relationship international law in principle enjoys primacy, but it must satisfy certain basic requirements of the Union legal order, such as protection of fundamental human rights, in order to be granted that effect.[38] These and other examples of national and supranational judicial practice[39] further illustrate that courts also to a certain extent subscribe to constitutional pluralism.

III. The Theoretical Issues and Dilemmas

In the last 10 years or so the idea of constitutional pluralism has therefore apparently made substantial progress: from a reaction to what was deemed a problematic practice in the mid 1990s it was transformed into a theory which has subsequently grown more sophisticated as well as diversified and is now influencing the practice. Constitutional pluralism has thus emerged in the form of a virtuous hermeneutical circle, which is inspired by practice and via theoretical refinement influences it back. Yet, this hermeneutical circle has never been

[33] G Marks, L Hooghe and K Blank, 'European Integration from the 1980s: State-Centric v Multi-Level Governance' (1996) 34 *Journal of Common Market Studies* 341; G Marks (ed), *Governance in the European Union* (London, Sage, 1996).

[34] Case 2 BvE 2/08 *et al Lisbon* [2009], paragraph 333.

[35] *Ibid*, paragraph 340.

[36] *Ibid.*

[37] Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649.

[38] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, in particular paragraphs 282, 307–9, 317, 326, 327.

[39] See, in particular, Spanish Constitutional Court, Declaration of 13 December 2004, 1/2004, [2005] 3 BOE 5. See also See F Castillo de la Torre, 'Tribunal Constitucional (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty Establishing a Constitution for Europe' (2005) 42 *Common Market Law Review* 1169.

without problems, let alone criticism. It has raised strong theoretical and philosophical dilemmas even among its proponents. Many of them continue to await, if not a resolution, than at least a better understanding of the challenges they spur.

Constitutional pluralism is widely regarded as presenting a paradigm shift; however, absent agreement on whether this shift is for better or for worse. The sceptics have blamed constitutional pluralists for justifying national constitutional courts' diversions from the clear and precise requirements of European Union law, assisting them in turning the 'real world into a fable'.[40] The opposite side reacted that the so-called 'real world' has, perhaps, never been what it was thought to be and that it is only now with the help of constitutional pluralism that we are pulling our heads out of the sand,[41] being faithful to ourselves in recognising that the classical story does not fit the actual practice and that it even fails to be convincing on its own terms.[42]

However, this paradigm shift has also been seen as going beyond the context of European integration. Constitutional pluralism is said to be introducing post-modernity into the sphere of law, which has been one of the last strongholds of modernity. This could be self-defeating for law and for lawyers.[43] Fluidity, fragmentation, and law in a constant flux could come with too high a price in terms of clarity, certainty and effectiveness.[44] Recognising this, however, the proponents of constitutional pluralism do not necessarily conceive of it as a post-modern enterprise. It is in fact the constitutional pluralism's constitutional side that preserves the modernist virtues and tries to make them fit our changing world in which, unlike in the past, the overlap between different sites, authorities, jurisdictions and peoples has become endemic.[45] Constitutional pluralism in that way serves as a balanced approach, as a via medium between the chaos and fragmentation of post-modernity, which is feared coming, and the slowly fading watertight certainty, coherence, uniformity and effectiveness of modernity.[46]

Constitutional pluralism is furthermore torn between a number of methodological and philosophical binary choices. Is it a descriptive or a normative theory? Do we merely describe the world and discover plurality, or do we also justify it as something that is good and ought to be preserved?[47] This relates to a distinction, recognised by some and disregarded by others, between plurality, as a social fact of existence of a multitude of sites and authorities, and pluralism, as a normative fabric which recognises and accepts this plurality and tries to galvanise it into an operational whole.[48] To the extent that constitutional pluralism lays emphasis

[40] Baquero Cruz, n 1, 389.

[41] N Walker in M Avbelj, J Komárek (eds), 'Four Visions of Constitutional Pluralism' (2008) 2 *European Journal of Legal Studies* 325, 334.

[42] M Kumm in Avbelj and Komárek, above n 40, at 355.

[43] J Baquero Cruz, in Avbelj and Komárek, above n 40, at 332.

[44] *Ibid* 333.

[45] N Walker in Avbelj and Komárek, above n 40, at 334; M Poiares Maduro in Avbelj and Komárek, above n 40, at 337.

[46] *Ibid* 345.

[47] For these queries and attempted answers, see Avbelj and Komárek, above n 40, at 328.

[48] N Walker in Avbelj and Komárek, above n 40, at 336.

on the plurality or on the common whole, that is, to what is different and what is shared, scholars have tried to assimilate it both in the universalist-particular and in the communitarian-cosmopolitan dichotomy. In so doing, they would occupy a different position on the pluralist-monist continuum, which ranges from radical pluralism on the one end, via moderate pluralism, to monism on the other end, with a number of pluralist or monist variants in between. As will be apparent, contributions to this book are no different in this respect.

IV. What this Book Offers

There is perhaps no better person to open the discussion on constitutional pluralism than Neil Walker. His Chapter presents three challenges that constitutional pluralism faces today and discusses how these challenges materialise in the European and global context. The first concerns the question of whether the normative assumptions of constitutionalism, its emphasis on hierarchically ordered authority, uniformity and finality, do not deny pluralism. In Walker's words, 'constitutional *pluralism* may, on closer inspection, simply mutate and settle into a new form of constitutional *monism* or singularity'.[49] The second challenge contends that there is just a *plurality* of distinct and unconnected, bounded and hierarchically ordered constitutional entities while 'we lack a constitutional code that operates independently of [them]'.[50] Constitutional pluralism, according to this challenge, brings nothing but a series of reductions. The third challenge suggests that, in order to develop a meaningful framework that would enable us to grasp the pluralist reality, we must 'dispense with the constraining and increasingly anachronistic language of constitutionalism as an appropriate characterization of such entities'.[51] We should therefore speak of pluralism without the adjective 'constitutional'. In the rest of the Chapter Walker discusses these three challenges in the European and global context. While he suggests that the former offers 'a kind of regional comfort zone for the ideas of constitutional pluralism', the latter context poses the challenges 'more sharply and insistently'.[52] In the end, Walker hesitates whether constitutional pluralism provides a useful framework to grasp relationships existing in the global world:

> Constitutional pluralism, conceived of as idea of a constitutionally relevant connection between self-authorizing constitutional sites, silently assumes something like the statist template of constituent power as the legitimate basis for the self-authorization of the post-national constitutional sites. If self-authorization increasingly lacks that legitimation, however, the focus of our concern shifts to the broader question of what form

[49] N Walker's Chapter in this volume, 18.
[50] *Ibid* 19.
[51] *Ibid* 20.
[52] *Ibid* 25.

> of legitimation is possible in place of or in supplementation of site-specific self-authorization.[53]

At the same time, however, Walker admits that

> if we think of constitutional pluralism . . . as referring to the continuing relevance of constitutionalism in addressing the mix of empirical and normative factors which contribute to the deep pluralism of the emerging global order, then it certainly remains a relevant conceptual point of departure.[54]

Mattias Kumm examines various conceptual frameworks within which one can think of the question of '[u]nder what circumstances [it is] appropriate to conceive of the relationship between different legal orders in pluralist terms, rather than thinking about them in terms of hierarchical integration?'[55] Kumm suggests that there are three such frameworks: 'legal (or legalist) monism', 'democratic statism' and finally, 'cosmopolitan constitutionalism'. The first 'is sceptical about any kind of legal pluralism and can analyse it only as a case of law in crisis'.[56] According to Kumm, judgments of the Court of Justice in *Costa* and *Kadi* can be read in this way.[57] The second is epitomised by the German Constitutional Court's judgments concerning European integration, but as Kumm shows, its traces can also be found in the Court of Justice's decision in *Costa*. However, Kumm argues that all these decisions can be read through the lenses of cosmopolitan constitutionalism too. Within this framework,

> the refusal of a legal order to recognize itself as hierarchically integrated into a more comprehensive legal order is justified if that more comprehensive order suffers from structural legitimacy deficits – relating to human rights protection of democratic legitimacy – that the less comprehensive legal order does not suffer from. The concrete norms governing the management of the interface between legal orders are justified, if they are designed to ensure that the legitimacy conditions for liberal-democratic governance are secured.[58]

According to Kumm, cosmopolitan pluralism thus provides normative criteria to decide the question he sets at the beginning of his Chapter.

Miguel Poiares Maduro is also strongly related to the development of the idea of constitutional pluralism. His Chapter is a continuation of his works: constitutional pluralism can be conceived 'not only as remedy for constitutional conflicts of authority, but as the theory that can best embrace and regulate the nature of the European Union polity'.[59] In that relation Maduro presents three claims that constitutional pluralism makes and defends them against recent criticisms. The first,

[53] *Ibid* 37.
[54] *Ibid* 54.
[55] M Kumm's Chapter in this volume, 41.
[56] *Ibid* 42.
[57] Case 6/64 *Costa* [1964] ECR 585 and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.
[58] M Kumm's Chapter in this volume, 43.
[59] M Poiares Maduro's Chapter in this volume, 68.

empirical claim, asserts that 'constitutional pluralism is what best describes the current legal reality'.[60] Maduro directly responds to Alexander Somek's doubts raised as regards this claim in his contribution to this very volume[61] and also to arguments based on either explicit national constitutional amendments, which would provide evidence 'of national constitutional supremacy that would, otherwise, prevent the entry into force of the new Treaty'[62] or on those who claim that in fact supremacy of EU law is now the rule.

The second and third claims are normative, either in a weaker form, related closely to the EU, or a thick one, according to which constitutional pluralism is 'the best representation of the ideals of constitutionalism for the current context of increased pluralism and deterritorialization of power'.[63] According to Maduro:

> To understand this we need to start by recognising that pluralism is inherent in constitutionalism. In fact, constitutionalism aims to simultaneously guarantee and regulate such pluralism: a pluralism of interests, ideas and visions of the common good that is reflected in the paradoxes of constitutionalism and the balance between democratic deliberation and constitutional rights that its modern liberal form embraced.[64]

Daniel Halberstam responds in the following Chapter to some of the challenges identified by Walker by reinterpreting 'the traditional view of constitutional law as the complete consolidation and hierarchical ordering of legal authority' in pluralist terms. This 'may produce a constitutional practice that is more true to the ideals of constitutionalism than the traditional model of consolidation and hierarchy itself'.[65] Halberstam distinguishes between *systems* pluralism and *institutional* pluralism. The former entails a simultaneous conflict of final legal authority between two overlapping legal systems, which however 'contains an inherent openness to the claim of authority of the other'.[66] Contrary to what some people think, including probably Neil Walker, Halberstam suggests that this 'mutual embedded openness' exists not only in the European Union, but also on the international level, in the form of some universalisable principles. According to Halberstam:

> Claims of authority from beyond the system must give voice to a legitimate political will, respect or advance the rights of individuals and groups, and promote the effectiveness of governance. Unless the claim from the outside can be made in these terms, it will fall on deaf ears.[67]

Institutional pluralism, contrary to the Montesquieuian conception of separation of powers, whereby legislative, executive and adjudicative functions are separated, protects liberty through granting the same actors the same kind of legal authority

[60] *Ibid* 70.
[61] See 73.
[62] M Poiares Maduro's Chapter in this volume, 73.
[63] *Ibid* 78.
[64] *Ibid* (references omitted).
[65] D Halberstam's Chapter in this volume, 86.
[66] *Ibid* 95.
[67] *Ibid* 109.

to interpret the foundational framework – the Constitution. This kind of pluralism is best illustrated by the example of the United States Constitution, but Halberstam shows that it can be found in other systems too. According to Halberstam, the openness and lack of settlement brought about by both forms of pluralism promotes and does not contradict the constitutional idea of limited collective self-governance through law – be it on the national, supranational or global level.

Franz Mayer and Mattias Wendel present in Chapter 6 the concept of multilevel constitutionalism developed by Ingolf Pernice in response to the German Federal Constitutional Court's *Maastricht* decision.[68] They suggest that multilevel constitutionalism is largely compatible with constitutional pluralism, since according to them, 'the core assumption of [both] is the existence of *multiple, independent and incommensurable claims of constitutional autonomy*'.[69] They argue that quarrels raised in Germany against the concept are not limited to that country – they are not just *querelles allemandes*. At the same time, they are still meaningful – they are not quarrels about nothing, or, as the French expression goes, they are not *querelles d'Allemand*.

René Barents, however, argues in the following Chapter that the theory of multilevel constitutionalism is a fallacy. In his opinion, it is based on dubious assumptions and suffers from serious contradictions. Although it was developed in response to theories that tie the Constitution together with the state, which informed the *Maastricht* decision, they are both based on democratic constitutional ideology. Where the latter is based on the will of the democratic states as the supreme source of politics and law, in the [multilevel constitutionalism] theory this foundation is exchanged for the hypothetical common will of the citizens'.[70] However, in Barents' opinion, '[n]either the will of the democratic Member States nor the democratic will of the citizens can provide for a sound theoretical explanation of what the Union is'.[71]

Robert Schütze moves the debate on constitutional pluralism from the European context to the other side of the Atlantic. In Chapter 8 Schütze goes into the history of the United States Constitution in order to show 'that constitutional pluralism is an inherent characteristic of American federalism'[72] based, contrary to Europe, on an idea of divided sovereignty. Schütze discusses four episodes concerning identity of the final arbiter in conflicts concerning the scope and interpretation of the federal Constitution and claims that '[t]he theory of constitutional pluralism speaks federal prose, without – as Molière's Monsieur Jourdain – being aware of it'.[73]

[68] German Federal Constitutional Court, Case 2 BvR 2134, 2159/92 *Maastricht* [1993] BVerfGE 89, 155, published in English as [1994] 1 CMLR 57.
[69] F Mayer and M Wendel's Chapter in this volume, 135.
[70] Barents' Chapter in this volume, 182.
[71] *Ibid.*
[72] R Schütze's Chapter in this volume, 187.
[73] *Ibid*, footnote omitted.

In Chapter 9 Ola Zetterquist argues that the foundations of the Union, as expressed in the case law of the Court of Justice, have moved from a *pacta sunt servanda* principle, centred on the state, to a *res publica* approach, centred on the individual and her rights, echoing 'Cicero's definition of the republic as a community based on legal agreement and community of interest'.[74] Understanding the Union in republican terms has several advantages according to Zetterquist:

> Firstly, it places the emphasis on individuals rather than on states . . . Secondly, it focuses on substance rather than form and leads to value hierarchies rather than norm-hierarchies . . . Thirdly, it broadens the concept of voice to include the legal domain in addition to the political . . . Finally, a republican lens provides a way out of the sovereignty trap where sovereignty is essentially a zero-sum game: either the Member States or the EU has it. These three elements combined form building stones for a pluralistic European republican constitution.[75]

Jan Komárek's Chapter discusses a particular feature of constitutional pluralism – its capability of making institutional choice inherent in the constitutional form of government, visible. Constitutional pluralism, through its contestation of finality and conclusiveness, highlights the role of particular institutions which take decisions of constitutional significance. Komárek argues that this institutional dimension is one of constitutional pluralism's principal virtues. Most theories of European constitutionalism do not recognise this and leave important questions unexplored. Those that do so focus too much on conflict and choice. Komárek proposes the reorientation of institutional analysis towards communication and involvement among the institutions.

Julio Baquero Cruz's Chapter shares with the previous one the emphasis on institutions. Baquero Cruz, who is marked out by many contributors to this volume as a representative of the 'hard-line approach' to the European Union's constitutional authority, seeks to interpret occasional instances of national constitutional courts' reservations to European Union law as 'as exceptional instances of institutional disobedience rather than as examples or a more or less virtuous general practice of legal or constitutional pluralism'.[76] Baquero Cruz first explores various conceptions of the relationship between Union and national law: 'state-centred', 'constitutionalism beyond the state', and legal or constitutional pluralism. As regards the last of them, Baquero Cruz observes that the clashes concerning the final authority, which are supposedly at the heart of pluralist approaches, are quite rare. Thus, to Baquero Cruz, they are expressions of disobedience, not from the citizens, but from institutions, which under certain – exceptional – circumstances can be legitimate.

Gareth Davies in Chapter 12 also proposes a framework through which constitutional conflicts in the European Union could be resolved in a pluralist fashion, through balancing and the proportionality principle:

[74] O Zetterquist's Chapter in this volume, 227.
[75] *Ibid* 229.
[76] J Baquero Cruz's Chapter in this volume, 249.

> States often have to adapt their policies and institutions to comply with EU law. That is an unavoidable consequence of membership. However, if the application of EU rules makes achievement of important and legitimate national policy preferences effectively impossible, or unreasonably difficult, then, depending upon the degree of EU or other interest in full application of that rule, it may be disproportionate to apply the rule in the particular context in question. States must provide evidence that amending their systems or policies to achieve their goals in a way compatible with EU law would either be unreasonably difficult or disproportionately harmful to other interests.[77]

Daniel Sarmiento in Chapter 13 offers a fresh look at one of the bridging mechanisms[78] in the pluralist settings of the European Union – the preliminary ruling procedure and a particular strategy which European courts employ to preserve pluralism: 'silent judgments' by the Court of Justice and responses by national courts that can be 'deaf' to these silent judgments to various degrees. Sarmiento assesses the virtues but also the vices of such strategies and proposes to interpret Union law 'silently, but not in silence'. It means adopting the famous *CILFIT* criteria on last instance courts' duty to refer to the Court of Justice in order to give more freedom to national courts while at the same time taking this duty more seriously.

Xavier Groussot's Chapter 14 also explores constitutional dialogues in the European Union – the communication between national constitutional courts (or national highest courts with jurisdiction over constitutional matters) and the Court of Justice. It identifies several ways of communication beyond the preliminary ruling procedure and also its substantive boundaries lying primarily in national constitutional identities. Groussot submits that a 'doctrine of deference' relating to the deep national interests has emerged in the Court's jurisprudence, which should provide the Court with legal tools to respect these identities. At the same time Groussot identifies several ways in which the Court's functioning could be improved to enhance constitutional dialogue, especially through its greater openness.

In some Chapters of this volume monism is seen as an outdated concept, while constitutional pluralism should provide a more accurate theoretical position, both descriptively and normatively. Alexander Somek does not think so and in Chapter 15 explains why. Somek argues that pluralism and cosmopolitanism, which in his opinion accompanies it, do not offer new alternatives to presumably outdated concepts of dualism and monism. According to Somek:

> If defensible, pluralism, either in simple or cosmopolitan form, formulates a new version of monism; if not, it amounts to a travesty of constitutional ideas, which assimilates legality to the mindset of administrative action . . . [C]hoosing one construction over the other is a question of political philosophy. Monism commends itself not least owing to its superb constitutionalist sensibilities.[79]

[77] G Davies' Chapter in this volume, 281.
[78] N Walker's Chapter in this volume, 22.
[79] A Somek's Chapter in this volume, 343–44.

Chapter 16 by Matej Avbelj closes the circle opened by Neil Walker's contribution. Instead of reinterpreting the notion of constitutionalism in pluralist terms, as Daniel Halberstam suggests, Avbelj concludes that constitutionalism and pluralism are incompatible to such an extent that using the term 'constitutional pluralism' is not very helpful for understanding European integration. After defining the two concepts Avbelj critically assesses whether constitutionalism can be 'translated' into the context of the pluralist European integration. Despite a number of arguments raised in favour of such translation, Avbelj suggest 'innovation instead of translation: thou shalt not be called constitutionalism'.

However, we are quite sure that while Avbelj's Chapter concludes this volume, it does not conclude the debate on constitutional pluralism – either in a European or in a global context. We hope that this volume will be an invitation to further exploration of questions which constitutional pluralism seeks to address.