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# The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?

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## Abstract

The paper deals with the validity of constitutional pluralism as a constitutional theory for the European Union and a paradigm for the understanding of EU law in the current times of crisis. It reconstructs the way in which constitutional pluralism came to the fore, the different ways in which the theory was presented, and considers historical criticism it has faced. It then looks at the anomalies that, allegedly, cannot be explained today by constitutional pluralism as a paradigm, linked to the current economic and political crises in the Union. The reconstruction of the debate is complemented with reflections on both the descriptive and normative validity of EU constitutional pluralism's claims.

## Key-words

European integration, European constitutionalism, constitutional pluralism, economic crisis, political crisis



## 1. Introduction

This special issue deals with competing paradigms for EU law in times of crisis. The basic idea is to question paradigms of EU integration in the context of current multifaceted critical situations, contribute to a better understanding of their impact on the nature and identity of the Union, and reflect on their applications and implications.

The theory of EU constitutional pluralism is surely one of the most successful paradigms for the explanation of EU law development in the last decades: it was termed by a leading scholar in the field, himself considered a pluralist (Jaklic 2014; Weiler 2012: 13), as a new ‘orthodoxy’, as ‘the only party membership card’ capable today to ‘guarantee a seat at the high tables of the public law professoriate’ (Weiler 2012: 8). Thus, it is obvious to question its soundness, especially because the crisis added to its classic discontents new critical voices pleading for its ‘unsustainability’ (Kelemen 2016).

The connection of the terms *paradigm* and *crisis* cannot but lead to the adoption of certain specific epistemological coordinates in such an endeavour. Thomas Kuhn famously suggested designating as a *paradigm* what the members of a certain scientific community have in common, namely the whole of ideas, techniques and values shared by the members of an epistemic community; and to consider that a scientific revolution occurs when members of an epistemic community encounter *anomalies* that cannot be explained by the accepted paradigm, so to put such a paradigm in *crisis* (Kuhn 1962).

If, as suggested by Weiler, constitutional pluralism has been an orthodoxy for EU legal scholars, at least for a while, and for many such a theory is now put in crisis by the crisis, we will adopt Kuhnian coordinates to shape this essay as follows.

In the first chapter, we will briefly reconstruct the way in which constitutional pluralism came to the fore, the different ways in which the theory was presented, how it became a *paradigm*. We will also consider historical criticism it has faced since the beginning of its journey in the world of ideas. In what follows, we will look at the *anomalies* that, allegedly, cannot be explained today by constitutional pluralism as a widely-accepted paradigm. In the second chapter, in particular, we will look at the debate which arose around recent measures to resolve the Eurozone crisis and some famous judicial cases which are related: this is the first area of law in which doubts about the possible ‘demise of the pluralist



movement' (Sarmiento 2015) organically emerged. In the third chapter, we will examine another sensitive anomaly: the recent instrumental use by certain Central and Eastern European constitutional tribunals of a supposedly pluralistic jargon, for political reasons. The fourth chapter will wrap up the arguments and conclude by discussing the enduring validity of constitutional pluralism as a paradigm for the explanation of EU law and its development.

## 2. A brief reconstruction of the debate: forms of constitutional pluralism and its discontents

Constitutional pluralism emerged as an organic theory in the early 1990s.

As well known, its basic tenets were formulated in Neil MacCormick's 1993 seminal work "Beyond the Sovereign State", in which this leading scholar aimed at prompting a renewed debate on the problem of how to 'locate sovereignty and the theory of sovereign statehood in the setting of legal theory, showing how developments in European Community law raise difficulties for some standard positions in legal theory', in the immediate aftermath of the Maastricht Treaty (MacCormick 1993: 1).

As also well known, the debate was invigorated by the historical *Maastricht-Urteil* case of the German Constitutional Tribunal some months later (Poiars Maduro 2012: 69-70). The judgment gave a new prominence to the risk of constitutional conflicts between EU law and national constitutions, stemming from the specular claims of ultimate authority inherent in the caselaw of the European Court of Justice on the supremacy of EU law, and in national constitutional courts on the limits to such a principle of supremacy. As noted by scholars, 'constitutional pluralism is often presented as a reaction to this judgment' (Poiars Maduro 2012: 69). In fact, MacCormick himself reacted to the judgment with another important article, 'The Maastricht-Urteil: Sovereignty Now' (MacCormick 2015), merging the doctrinal and the judicial 'formants' of the theory together (I am of course paraphrasing the words of Sacco 1991).

Nevertheless, both the judgment and the theory did not come out of the blue.

The *Maastricht-Urteil* was the last episode of a series of well-known cases of the *Bundesverfassungsgericht*, starting the *Solange* cases of 1974<sup>I</sup> and 1986,<sup>II</sup> in which the potential conflict between German constitutional law's and supranational law's possession of



supremacy was accommodated in a significant process of mutual influence.<sup>III</sup> Such a judicial process, concerning the primacy of EU law and competing constitutional claims of ultimate authority, was not only fed by German cases: to name a few examples, important judgments of the Italian Constitutional Court such as *Frontini*,<sup>IV</sup> *Industrie chimiche*,<sup>V</sup> *Granital*,<sup>VI</sup> and *FRAGD*<sup>VII</sup> played an analogous role between the 1970s and the 1980s (Barile 1973; Gaja 1990; Cartabia 1990); controversies such as *Macarthys v Smith*<sup>VIII</sup> and *Factortame*<sup>IX</sup> prompted similar debates in the United Kingdom (Best 1994); the year before, in 1992, the French *Conseil Constitutionnel*,<sup>X</sup> and the Spanish *Tribunal Constitucional*,<sup>XI</sup> issued negative decisions on the compatibility of the Maastricht Treaty with their respective constitutions, requiring constitutional amendments before ratification could proceed (Oppenheimer 1994: 385, 399, 712; Baquero Cruz 2007: 1); the Danish Supreme Court soon followed the German initiative by issuing a judgment on the unconstitutionality of the implementation of the Maastricht Treaty<sup>XII</sup> reminiscent in both ‘conceptual matrix and normative solutions’ (Baquero Cruz 2007: 13).

The theory of pluralism itself was a development, or better a refinement, of the doctrinal works on the constitutional nature of the European Communities (themselves a major *paradigm* for the study of supranationalism competing with others) (Weiler, Haltern 1998; De Witte 2012). In different ways, authors like Stein (Stein 1981), Mancini (Mancini 1989) and Weiler (Weiler 1999) posed fundamental questions, such as if Europe implied a supranational construction of constitutional nature, and if it indeed needed a formal constitution. The answers to these ‘old questions’ (Poiáres Maduro 2012: 67-68) created a narrative, that of European constitutionalism, with profound implication in terms of what conception of, say, fundamental rights protection, separation of powers and judicial review ought to shape EU law.

The same proponents of constitutional pluralism presented it as a refinement of a constitutionalist narrative that ‘developed without a constitutional theory’, as an attempt at theorizing the nature of European constitutionalism (Poiáres Maduro 2012: 67-68). The *Maastricht-Urteil*, with its normative thickness and theoretical robustness,<sup>XIII</sup> was a development and refinement of all the judgments of previous decades on the relationship between national and supranational norms, and the competing of constitutional claims of ultimate authority, involving plain arguments of a political nature, in the sense of a basis in theoretical conceptions of the state. Moreover, with its normative thickness and theoretical



robustness, *Maastricht-Urteil* shaped a new doctrinal agenda, which was equally a development and refinement of the lines of cases cited above. Thus, constitutional pluralism was forged as a development and refinement of constitutionalist readings of the European Communities, then probably a stronger paradigm than now (Chiti, Teixeira 2013; De Witte 2015).

Such a theoretical development was based predominantly on *political* (again, in the sense of based on theoretical conceptions of the state) observations on the nature of judicial competition for ultimate authority, with clear *legal* implications. The caselaw of national courts, based on a fruitful *Solange* narrative<sup>XIV</sup> or in any case developing through the years towards an always more integrated approach with that of the European Court of Justice,<sup>XV</sup> was considered to be part of a general process of development of the law of integration (in the sense defined by Pescatore 1974), ‘in motion and open’ but also ‘running smoothly’ towards the classic aim of an ‘ever closer union’, also in legal terms (Baquero Cruz 2007: 1).

The *Maastricht-Urteil* was probably the first judgment in which, instead, ‘the superiority of the national constitutional model on the integrative process’<sup>XVI</sup> was plainly predicated, in a way in which, in comparison with the classic tenets of the European Court of Justice jurisprudence,<sup>XVII</sup> the idea of a hierarchy between (certain) national constitutions and EU law appeared inherently unstable, or unresolved, and destined to remain so. The idea of a potential *stability in instability* was conceived. According to Wittgenstein’s seventh proposition, ‘whereof one cannot speak, thereof one must be silent’ (Wittgenstein 1922); and for comparative constitutional scholars like Foley, the lesson to be learned from constitutional history is precisely that it is best not to comment on the ultimate questions concerning sovereignty (Foley 1989; Bin 2012: 54 et seq.; Bin 2014: 11). In the wake of what appeared to be a stable coexistence of competing narratives on how to conceptualize the plurality of constitutional sources in Europe and their relationship, constitutional pluralists came to the fore and argued that no one should pretend to be able to give the definitive word on the point of prevalence of one order over another (Bin 2014: 11). After all, ‘the habitual willingness to defer indefinitely consideration of deep constitutional anomalies, for the sake of preserving the constitution from the severe conflict that would arise from attempts to remove them, represents the core of a constitutional culture’ (Foley 1989: 10): and the constitutional culture of Europe could precisely rest, for pluralists, on such an apparently unstable, or unresolved, solution, as a decision not to decide.



In legal terms, the theory was appropriate, since it was able to capture the plurality of constitutional norms at stake after the enactment of the Maastricht Treaty, and the magnitude of the potential constitutional conflicts threatened at the time by judgments such as *Maastricht-Urteil* and the French and Spanish cases of 1992. The latter ultimately proved to be unproblematic: their respective constitutions were easily amended, and the Treaty was soon ratified; when conflicts did come, it was in the form of ‘soft’ constitutional conflicts (Baquero Cruz 2007: 1). The German case was different: it came in the form of a potentially ‘hard’ conflict, threatening disobedience, evoking the possibility of unilateral withdraw (Baquero Cruz 2007: 1), but eventually led to ratification and adherence, even though by placing strong conditionality on the table (never overruled). It left the idea of a potential stability in instability.

In political terms the theory was captivating, since it captured the political zeitgeist of the time, with the first signs of popular disaffection in the French and Danish referenda. This was again the case years later, after the constitutional failure of 2004 (Martinico 2009). Constitutional pluralism helped to reinvigorate the idea that both the European Union and national legal orders could be conceived of as constitutional systems, and could coexist even though it was impossible, in political terms, to answer that ‘old question’ on whether Europe needed a formal constitution, and how to reconcile competing claims of authority in a stable way (Poiars Maduro 2003; Poiars Maduro 2012: 67-68).

The same concrete utility of the theory emerged in other subsequent phases of the European legal system development: to name a few, in recent periods in which it was otherwise difficult to reconcile that way in which the European Court of Justice, in the *Kadi* case of 2008,<sup>xviii</sup> expanded the promise of constitutional autonomy already inherent in *Van Gend en Loos* to reassert that, with a supreme and directly effective EU law, individuals are subjects of the Treaties to be protected, while, in the same years, the *Bundesverfassungsgericht*, with the *Honeywell*<sup>xix</sup> and the Lisbon Treaty cases,<sup>xx</sup> reasserted the national pluralist narrative and therefore the retained power to comply *ultra vires* and identity reviews; to conceptualize the ongoing and unsettled controversy over the scope of protection of EU fundamental rights, with competing interpretation over Art. 51 of the EU Charter of fundamental rights by the Court of Justice<sup>xxi</sup> and, again, national constitutional courts such as the German one,<sup>xxii</sup> to make sense of the continued conflict surrounding



the European Arrest Warrant in the last decades, based on national constitutional limits.<sup>XXIII</sup>

In this way, over the years, constitutional pluralism became a paradigm. According to a recent study, which attempted a taxonomy, several variants were suggested by its proponents (Jaklic 2014). In addition to MacCormick's foundational theorization, there would be a strand of Walker's *epistemic* pluralism, focused on the limitations of classic national constitutionalism in explaining today's social transformation and political challenges, and the incommensurability of authority claims by supranational and national constitutionalism (Walker 2002); a strand of Weiler's *substantive* pluralism, more interested in defining a balance between the two confronting constitutional identities, the nation-state and the European one, and the substantive content of it (Weiler 2003: 10);<sup>XXIV</sup> and *institutional* and *interpretative/participative* strands of pluralism, of Kumm (Kumm 1999; Kumm 2005) and Poiares Maduro (Poiares Maduro 2003; Poiares Maduro 2007; Poiares Maduro 2012), focusing in particular on how the theory, through its contestation of finality and conclusiveness, highlights the role of particular institutions which take decisions of constitutional significance, and on the ways in which those institutions should act and interact.

In sum, Poiares Maduro recently identified three major claims of constitutional pluralism as a constitutional theory of EU: the empirical, the normative and the thickly normative (Poiares Maduro 2012). The analysis of these is vital in understanding how the theory proved decisive, for many, in conceptualizing European legal and political challenges of the last decades as discussed above, and useful to reflect, later, on current suspected anomalies.

The empirical claim is the 'starting point' of the theory. It develops from a consensus over the fact that the EU is governed by a form of constitutional law,<sup>XXV</sup> and identifies the phenomenon of a plurality of constitutional sources and claims of ultimate authority which create a context for potential constitutional conflicts that are not hierarchically regulated. This is particularly obvious in the case of EU law, where the multiplication of competing legal sites and jurisdictional orders is evident, and a discursive practice between the European Court of Justice and national constitutional courts, aimed at reducing the risks of constitutional conflicts and accommodating their respective claims of final authority, is in place in the form of a 'dialogue' (Claes 2006; Poiares Maduro 2007). The first claim is



therefore descriptive in nature: its basic tenet is that ‘constitutional pluralism is what best describes the current legal reality of competing constitutional claims of final authority among different legal orders (belonging to the same legal system) and the judicial attempts at accommodating them’; it is a claim where EU and national legal orders can be construed as normatively autonomous but also institutionally bound by the adherence of their respective actors to both legal orders (Poiares Maduro 2012: 69-74).

The normative claim of the theory is complementary, and it is the following (Poiares Maduro 2012: 75 et seq.): not only does the question of final constitutional authority remain open in the EU, but it ought to be left open, since *heterarchy* (in the sense widely exposed, in comparative terms, by Halberstam 2009) is superior to hierarchy as a normative ideal in circumstances of competing constitutional claims of ultimate authority. This is a different level of discussion, reminiscent of what we referred to before as the lesson to be learned from constitutional history according to comparative constitutional scholars such as Foley (Foley 1989). This claim would fit, here again, particularly for the EU case: for here the fact is that the recognition of the legitimacy of the EU constitutional claim, and the idea that competing constitutional claims such as the supranational and the national ones are of equal legitimacy or, at least, cannot be balanced against each other once and for all. As MacCormick put it, in a system of constitutional pluralism ‘it is possible that each [constitutional order] acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges the constitutional superiority over another’ (MacCormick 1999: 102 et seq.). In this sense, it would be desirable to embed – explicitly or not – pluralist thinking within EU law: and the best way to do it could actually vary, ranging from the idea that national courts should explicitly take account of EU interests in interpreting national law (Poiares Maduro 2007) to the idea that ‘EU law should be self-policing’ (Davies 2012: 269), and it should adopt a more pluralist approach and prevent EU law becoming a threat to national constitutions (Kumm 2005).

The thickly normative claim of the theory is the following: in the current state of affairs, pluralism provides a closer approximation to historical ideals of constitutionalism than either national constitutionalism or a form of EU constitutionalism modeled after national constitutionalism. It would be, in general, the best representation of the ideals of constitutionalism. This broad claim is based on the idea that pluralism is an inherent ingredient of constitutionalism, and that it can be decisive, facing today’s ‘changing nature



of the political authority and the political space', and therefore in the current context of increased pluralism and deterritorialisation of power, to leave open and to periodically reassess questions of inclusion faced by national polities, of democratic exercise of power vis-à-vis limitations of power for the protection of minorities, and of institutional solutions in the organisation of power' (Poiares Maduro 2012: 77 et seq.).

For our purposes, it is important to note that these views were endorsed by many in the context of EU studies,<sup>xxvi</sup> although of course not necessarily in a complete way and therefore wholly supporting the three claims suggested by Poiares Maduro. Theoretically, it is possible to differentiate and divide them, and endorse a descriptive/empirical version of EU constitutional pluralism without backing, on the normative plan, the other arguments on its appropriate nature.

The same can be said for the critical arguments faced by constitutional pluralism.

In the last two decades, constitutional pluralism became a paradigm, an orthodoxy in the study of EU law: still, it attracted, from the beginning, critical remarks by renowned authors.

To name a few, Loughlin termed constitutional pluralism an oxymoron, 'used to make a full-fronted assault on the conceptual edifice of public law' and its basic tenets, including sovereignty intended as ultimate political authority, and as an indivisible concept (Loughlin 2014: 24). He rejected MacCormick's idea of competing constitutional claims of equal value determined by judicial claims, as flawed by 'the fallacy of equivalence in which all species of law (all normative orders) are assumed to possess a similar status and authority' (Loughlin 2014: 17). He basically rejected the idea itself that 'EU is governed by 'a form of constitutional law'' (Loughlin 2014: 24), therefore simply not accepting the constitutional narrative of the EU which is the basis of EU constitutional pluralism, as discussed.

Similarly, Somek contested the novelty of the theory by reducing constitutional pluralism to a form of monism under national law. According to him, constitutional pluralists give up precisely where an answer is most needed: what happens when constitutional conflict cannot be prevented or solved? In this respect, in his view, the normative claim that the answer ought to be left open is flawed: in fact, the question of final authority is never left open, and there must always be a legal answer, at worst in terms of 'legally irrelevant statements'.<sup>xxvii</sup>



Davies contested the idea of constitutional pluralism as a description of an only apparently unstable, or unresolved, balance between competing national and supranational claims. He acknowledged the ‘initial attractiveness’ of the theory, which can seem ‘more convincing than one which concedes to the claims of one side or the other’; yet he deemed the symmetry of the situation ‘illusory’ (Davies 2012: 270). He argued that national courts control the outcome of actual cases, and in most cases still consider that their ultimate allegiance, in the event of conflict, is to national constitutions and national supreme courts; conversely, EU law may assert in principle, but it lacks the means to enforce its assertions. In this sense, practically, national constitutions are the superior authority, on the operational level.

Baquero Cruz, on his side, ironically cherished the ‘noble, consensual and politically correct’ nature of constitutional pluralism (Baquero Cruz 2016: 365) - with a view to protecting the authority of Union law as being ‘more fragile than one might think when reading a handbook on Union law’ (Baquero Cruz 2016: 356). He has consistently argued that the approach of Union law to its relationship with national law is ‘more productive and more ordered’ than national constitutional approaches, which contest the autonomy and primacy of Union law (Baquero Cruz 2016: 357), and which potentially damage the integrity of Union law (Baquero Cruz 2007: 18). He recently openly contended that ‘constitutional pluralism has serious problems both as a description (for things are not always as it claims they are) and as a prescription (because it does not offer an attractive and sustainable model for the relationship between the legal systems involved)’ (Baquero Cruz 2016: 369).

This last is in fact the point to be emphasized and unpacked here. All the classic discontents of constitutional pluralism were radically critical on all its claims, within their respective logics and in their logical order. Authors like Loughlin, Somek, Davies, Baquero Cruz, have always contested the basic tenets of the theory, and therefore the adequacy of the descriptive/empirical claims on pluralism on the nature of the competing claims for final constitutional authority in Europe. As we saw, they either contested the idea of a constitutional narrative for European integration itself, or in any case contested the openness of the debate on the *Kompetenz-Kompetenz*, and the possibility itself of heterarchy as a veritable constitutional principle replacing hierarchy.



This is perfectly legitimate, of course, precisely because we are talking of different paradigms for the understanding of the same phenomena.

But the nature of such critical views must be separated from other more recent critical remarks presented as new anomalies which the paradigm of constitutional pluralism would not be able to explain.

### 3. The first alleged anomaly: the unsustainability of constitutional pluralism in times of crisis

Today constitutional pluralism is facing different kinds of criticism. In paradigmatic terms, these new critical remarks are presented not as radical objections to the adequacy of the theory for the understanding of the relationship between EU law and national constitutional law. On the contrary, they are presented as a discussion on the ‘unsustainability’ of the theory in present times (Kelemen 2016), for we would face anomalies that could not be explained by the accepted paradigm, anomalies that are capable of pushing the paradigm into crisis.

The first source of such a criticism was the observation of the new legal dynamics prompted by the Euro-crisis of the last years.

The argument came in two different but interrelated fashions.

Authors like Kelemen argued that the *Gauweiler* case of 2015, issued by the European Court of Justice,<sup>xxviii</sup> definitely defied any possible constitutional pluralist stance. The case is one of the best known in recent times: the question was whether the European Central Bank had exceeded its mandate in previous years by announcing the Outright Monetary Transactions (OMT) bond-buying program in an effort to resolve the Eurozone crisis.<sup>xxix</sup> The reference for the preliminary ruling - the first ever - came once again from the *Bundesverfassungsgericht*, in early 2014;<sup>xxx</sup> but in Kelemen’s view, more than as a dialogical act of judicial deference between apical courts, it should be read as a ‘poisoned chalice’, a ‘vitriolic’ order where both ultra vires review, and identity review, were explicitly threatened, and a clear set of limitations to the acceptability of the OMT program according to German constitutional law was propounded (Kelemen 2016: 137). The threat was clear enough in the explicit statement that, should the Court of Justice not adhere to the restrictive interpretation suggested in the reference, an identity review assessed



‘exclusively according to German constitutional law’, and not ‘according to EU law’, could be performed, leading to disobedience towards the supranational judicial dicta and a declaration of inapplicability of the OMT program in Germany.<sup>xxxI</sup> As we know, the European Court of Justice did not acquiesce, and sent back a preliminary ruling explaining how the OMT program was sufficiently connected to the ECB’s monetary policy mandate as to fall within its proper competences, and, in general terms, reasserted its own claim of constitutional rule, its *Kompetenz-Kompetenz*.<sup>xxxII</sup> As a result, in June 2016 the *Bundesverfassungsgericht* finally held that if the conditions formulated by the Court of Justice of the European Union, in its judgment intended to limit the scope of the OMT program, were met, neither the complainants’ rights under German Basic Law nor the *Bundestag*’s overall budgetary responsibility were violated by the launch of the OMT program.<sup>xxxIII</sup> This holding was complemented, nonetheless, with deep concerns on both the theoretical arguments put forward by the Court of Justice and the factual assumption thereby implied.<sup>xxxIV</sup>

According to Kelemen, the OMT judicial saga is an example of how ‘the Court of Justice’s approach to the question of supremacy is straightforward and compelling’ (Kelemen 2016: 141), while the German approach is ‘fundamentally unsound’, based on casuistry, and ultimately unsustainable, since it could lead to ‘no uniform application of EU law and no coherent EU legal order’ (Kelemen 2016: 143). This criticism was also formulated by Fabbrini in terms of a necessary guarantee of the equality of Member States vis-à-vis EU law: ‘[i]n the end, in the compound order of the EU, the supremacy of EU law is the only guarantee that states will abide by the same rules, mutually depriving themselves of the power to discretionally pick and choose the rules of EU law they like or not’ (Fabbrini 2015: 1016). From these premises, Kelemen continued by saying that the ‘unsettled state of affairs’ left open by constitutional pluralism was fundamentally ‘unsustainable’. He acknowledged that Constitutional pluralists have embraced this unsettled state of affairs as the product of the prudent exercise of ‘constitutional tolerance’ by both levels of courts (the concept is obviously borrowed from Weiler 2003), since promoting judicial dialogue between the high courts of Europe is surely a good thing, as is avoiding destructive judicial conflicts where possible through tolerance and accommodation. He also acknowledged that, in fact, in the EU legal space apical courts have avoided conflicts, if not through mutual accommodation and fertilization (in the sense



predicated by Poiares Maduro 2007), at least by talking past one another and ignoring the points on which their jurisprudence actually conflicted (Kelemen 2016: 146; Sarmiento 2012). But in his opinion such stability of instability could not be a proper solution: ‘while direct conflict between EU and national constitutional orders has been avoided for a long time indeed, it was inevitable that such conflict would emerge eventually’ (Kelemen 2016: 146). With *Gauweiler*, the psychological ‘parallel play’ inherent in constitutional pluralism came to a close, especially given the magnitude of the interests at stake: the continued existence of the whole architecture built for the ‘survival of the Eurozone’ was at risk ((Kelemen 2016: 146, 147).

This last point links Kelemen’s arguments with the general remarks of another leading scholar, Daniel Sarmiento. In a recent essay - framed in the conversational style of a blog post but with his usual brilliance - he suggested that ‘academics that seemed quite comfortable with the pluralist narrative now seem quite uncomfortable with it’, including himself: the ‘pluralist movement’, in his view, might be ‘in retreat’, since it ‘dramatically crashed against the wall of reality’ (Sarmiento 2015).

What was the anomaly found by Sarmiento to challenge, in such a harsh way, the validity of the paradigm to which he himself adhered? In his view, pluralism provided ‘a nice theoretical backdrop’ to developments taking place, for example, during the EAW saga, when, as said, a large number of constitutional and supreme courts engaged in a lively debate about the constitutional limits of EU Law (Pollicino 2008): but the niceness of the theory was in its ‘harmless’ nature, since, ‘in the nineties and 2000’s’, when ‘pluralism was nice’, the questions at stake were of no existential importance. After all, questioning the European arrest warrant could neither destroy the EU, nor would it undermine the authority of the Court of Justice; the same could be said, in his view, to those very principled decisions from constitutional courts deciding on the constitutionality of reform Treaties, imposing strict conditions but, ultimately, green-lighting their ratification by Parliaments, as in cases such as *Maastrich-Urteil* and *Lissabon-Urteil* discussed above (Sarmiento 2015). Today, the situation would be different: supranational agreements ‘entered by Member States in the European Council, in the Eurogroup, the actions of the troika, etc., seemed untouchable for national courts that had been much more concerned in the past about much more irrelevant EU acts’, so that pluralism could no longer explain the way in which constitutional and supreme courts actually deal, in today’s context of fear,



with the authority of EU Law (Sarmiento 2015). Moreover, when pluralism came back to the game, in cases such as the challenge of the *Bundesverfassungsgericht* to the OMT program, it did so ‘with a force and consequences much more destructive than ever seen in the past’, and therefore in a tremendously dangerous way that makes it undesirable: ‘in the midst of the worse economic and political crisis the EU has gone through, it might seem too dangerous to play’ with pluralist stances, and therefore wise to go back to an unconditional version of supremacy (Sarmiento 2015).

All in all, considering both Kelemen’s and Sarmiento’s points, it seems to me that these new arguments against constitutional pluralism are flawed, but interesting and worthy of consideration. They embody the current zeitgeist in which constitutional pluralism as a paradigm is surely under scrutiny. They must be scrupulously analyzed to understand their differences compared to the classic criticism faced by constitutional pluralism that we already summarized.

In this sense, one can start by highlighting that Kelemen’s argument is strictly normative. In his manifesto, he actually acknowledges the descriptive validity of pluralism, or, in Póitares Maduro’s words, the validity of its empirical claim. In his words, ‘(c)onstitutional pluralism may describe the situation in the EU at least since the FCC’s *Maastricht* judgment’ (Kelemen 2016: 146), and ‘constitutional pluralists like Miguel Póitares Maduro are surely right in their empirical claim that today, given the unresolved impasse between the Court of Justice and national constitutional courts, constitutional pluralism ‘best describes the current legal reality of competing constitutional claims of final authority among different legal orders (belonging to the same legal system) and the judicial attempts at accommodating them’ (Kelemen 2016: 145). He also acknowledges that mutual accommodation is sometimes reached openly, by judicial cross-fertilization, and sometimes merely through selective silences (Kelemen 2016: 146): and this is, again, part of classic teachings from comparative constitutional history on how ‘latest questions concerning sovereignty’ are treated (Foley 1989; Bin 2012; Bin 2014), and therefore the basis of constitutional pluralist thinking. Kelemen’s preoccupation is on another plane, and its criticism is therefore very different from Loughlin’s, Somek’s or Baquero Cruz’s: his idea is that pluralism is today, with cases such as *Gauweiler*, an unsustainable position, dangerous for the correct unfolding of European integration.



Having clarified his points in this way, it seems less odd that another author published, on the same issue as Kelemen, an article in which he reads the *Gauweiler* saga precisely in constitutional pluralist terms (Goldmann 2016). Matthias Goldmann convincingly argued that the OMT controversy is in fact constitutional pluralism in action: it allowed two repeat-players, such as the *Bundesverfassungsgericht* and the European Court of Justice, to unfold their traditional ultimate claims of authority; it allowed them, at the same time, to interact, through the first preliminary ruling ever issued by the German tribunal to the court, which is a detail not to be underestimated; it allowed - albeit in harsh terms - the dialogic research of a solution through the typical pluralist approach of ‘mutually assured discretion’ between institutions (Goldmann 2016: 128). In Goldmann’s view, this is desirable on the normative plane, but first of all it is true from a descriptive point of view, confirmed by a collective reading of the preliminary reference from Karlsruhe, the preliminary ruling from Luxembourg, and the final German decision. Without doubt, the style of the reference was questionable, and some grievances which were left untouched in the final decision are relevant: but the question was substantially positively solved at the time, and one must remember that mutual accommodation through judicial dialogue is a diachronic exercise, in which judgments talk for both present and future purposes (Faraguna 2016a). Now we know that, as of the summer of 2017, a new preliminary reference by the *Bundesverfassungsgericht* concerning the quantitative easing program has reached Luxembourg,<sup>xxxv</sup> it is easy to predict that those grievances left in *Gauweiler* will be part of a new judicial conversation and duly taken into account by the European Court of Justice.

In sum, the whole saga was constructed, or at least can be read, through the lexis of constitutional pluralism: a theory that predicts, after all, mutual institutional accommodation and the switch to the idea of pure legality to the basic principle of legitimacy (Halberstam 2010), which is visible in the case in the ‘mutually assured discretion’ between courts described by Goldmann and also in the Court of Justice’s deference to the expertise of the European Central Bank.<sup>xxxvi</sup>

Coming to Sarmiento’s thesis, it can be split in two parts. In his view, the new supranational legal construction addressing the Euro-crisis, of hybrid European and international nature (De Witte 2013; Kilpatrick 2014), stiffened the dynamics of the European constitutional legal space. ‘Agreements entered by Member States in the



European Council, in the Eurogroup, the actions of the troika, etc., seemed untouchable for national courts that had been much more concerned in the past about much more irrelevant EU acts' (Sarmiento 2015): in the era of the European Financial Stability Facility, the European Financial Stability Mechanism, the European Stability Mechanism, the Fiscal Compact, the various Memoranda of Understanding signed by Member States with the *Troika*, there would be no more room for pluralistic instances. National apical courts are worried by the potential economic consequences of their decisions – a classic problem in the theory of adjudication (Posner 1996; Dyevre 2008; Alviar García, Klare, Williams 2014) - and this would inhibit them from claims of constitutional authority. There would simply be no more pluralism: a descriptive claim. Moreover, when back in action, in cases such as *Gauweiler*, pluralism proved indeed dangerous and undesirable, with its ability to lead to 'consequences much more destructive than ever seen in the past' (Sarmiento 2015). Pluralism, according to Sarmiento as well, could be dangerous: in this sense, he adds a classic normative claim, similar to Kelemen's.

I have my own objections to the first descriptive claim made by Sarmiento. I do not think that the European constitutional space is today less pluralistic than before. Recent comparative research on the impact of Euro-crisis legal measures on national legal orders, as discussed above, has shown that, on the contrary, several national constitutional or supreme courts indeed exercised strong judicial review on austerity measures prompted by Euro-crisis law. Sarmiento claims that 'playing pluralism suddenly became a high-risk game and many national jurisdictions decided that it was time for obedience', and in particular this was the case of debtor countries involved in financial assistance programs. Sarmiento wrote that '(W)ith the exception of a few decisions of the Portuguese Constitutional Court, the other courts decided to put pluralism to rest' (Sarmiento 2015): the Portuguese case was surely the most remarkable in terms of the quantity of judicial decisions, and was the most debated,<sup>xxxvii</sup> but, as I have also argued elsewhere (Pierdominici 2016; Poiaras Maduro, Frada, Pierdominici 2017), it is possible to detect similar exercises of constitutional claims of authority against austerity measures and their supranational sources in Greece,<sup>xxxviii</sup> Latvia,<sup>xxxix</sup> Romania,<sup>xl</sup> and Cyprus.<sup>xli</sup> In each of these countries, we have had in recent years one or more examples of judicial adjudication on austerity measure involving a review based on national constitutional principles of objectives set by supranational Euro-crisis law. The Portuguese example is well known, and quoted by



Sarmiento himself, as the *Tribunal Constitucional*, at least in some cases,<sup>XLII</sup> was explicit in elaborating such an interpretative move: in its view, supranational obligations set by Euro-crisis law are purely obligations of result, therefore leaving the State free to determine how that result is achieved, and in this sense the Tribunal is therefore free to conduct its review based only on national constitutional provisions, with neither tentative harmonization with EU law and its principles, nor the perceived need to raise a preliminary reference procedure (Poiares Maduro, Frada, Pierdominici 2017: 8 et seq.). This was a highly contestable interpretative move, already criticized by scholars (Kilpatrick 2014; Poiares Maduro, Frada, Pierdominici 2017); but is indeed a claim of ultimate constitutional authority vis-à-vis supranational norms, even of a radical nature. The aforementioned cases of other debtor countries such as Greece, Latvia, Romania, Cyprus replicated, albeit in a more implicit fashion, the same dynamics: national courts performed judicial reviews on austerity measures involving an interpretation of supranational norms according to national principles, and a ‘removal’ of those based on national constitutional arguments (Pierdominici 2016: 366 et seq.; Poiares Maduro, Frada, Pierdominici 2017: 29 et seq.). In this sense, pluralism is still alive and kicking, although in a new – maybe subtle – form, and in areas of law in which EU law is complemented by international law measures of a hybrid nature, and where the application of basic canons such as primacy is debatable.

The same can be said for the case of creditor countries, ‘on the other side of the economic spectrum’ as Sarmiento put it: he wrote that in those countries we had ‘hardly any major challenging rulings coming from the courts’ (Sarmiento 2015), but we all know of the important German cases on the constitutionality of the participation in Euro-crisis assistance programmes, much discussed in recent times,<sup>XLIII</sup> and we also recently learned of a new preliminary reference issued by the *Bundesverfassungsgericht* to Luxembourg, concerning the constitutionality of the participation in the quantitative easing programme.<sup>XLIV</sup> The German Tribunal, in this respect, has always been a repeat-player in the game of pluralism, and confirmed its role in this respect. But this was not an isolated example: the Estonian Supreme Court was also asked in 2012 to rule on the constitutionality of the European Stability Mechanism ratification by the country, given various concerns on the possible violation of principles of parliamentary democracy, and the budgetary powers of the *Riigikogu*.<sup>XLV</sup> It actually gave the green light to the programme, but did so only by posing conditions on the subscription of capital stock of anti-crisis stability mechanisms: in this



sense, in its exercise of the application of ‘proportionality to sovereignty’, the decision proposed a solution which was potentially transient in nature (Ginter 2013). Here doubts might be raised on the compatibility of logic; where debtor countries case law established on a case-by-case conditionality the constitutionality of austerity measures, and creditor countries caselaw established on a case-by-case conditionality finding participation to financial assistance constitutionally feasible (Poiaras Maduro, Frada, Pierdominici 2017: 29 et seq.). Therefore, I also continue to see from this side of the economic spectrum constitutional pluralist instances in action.

After all, it would be difficult to argue today that constitutional pluralist instances are disappearing, when, in the last twelve months or so, we had cases such as *Gauweiler*,<sup>XLVI</sup> the new German reference raised on the quantitative easing procedure,<sup>XLVII</sup> the new Danish Supreme Court’s decision of December 2016 rejecting the horizontal direct effect of EU law general principles by interpreting strictly the Danish Accession Act<sup>XLVIII</sup> (and running contrary to the Court of Justice preliminary ruling in the case and to its established caselaw ranging from *Mangold*<sup>XLIX</sup> to *Kücükdeveci*),<sup>L</sup> and the preliminary reference of the Italian Corte costituzionale in the Taricco saga, where the application of the counterlimits doctrine is suggested.<sup>LI</sup>

Given this factual background, I think that the core of Sarmiento’s general claim is therefore more normative than descriptive in nature; although in this sense, it is a perfectly legitimate claim, and well argued. Like Kelemen, he is now ultimately afraid of the inherent risks of constitutional pluralism, the magnitude of the questions that can be at stake in such cases where there is a judicialization of mega-politics (Hirschl 2008), such as in constitutional complaints over Euro-crisis measures (and many other areas which intersect EU nowadays’ expanded competences), and ultimately the possibility of an explosion of antagonistic constitutional claims.

In my view, this again leaves untouched the validity of the empirical claim of constitutional pluralism as a paradigm that can explain the coexistence of competing constitutional claims of authority in the Union, which are not fading at all. Sarmiento himself, in another more recent essay, suggested a more dialogical approach to mutual judicial accommodation in the European space in his comments on *Dansk Industri* and *Taricco*, by reutilizing jargon reminiscent of pluralism (Sarmiento 2017).



This makes me think that his major concern is with a specific normative aspect of constitutional pluralism, of a particular typology: is constitutional pluralism desirable, in the sense that it can really lead to a fruitful mutual accommodation of competing constitutional claims through a genuine inter-institutional dialogue? In the past, this probably happened. But today: are there any limits to it? Should we define exceptions vis-à-vis the potential danger inherent in the theory?

To reflect on these points, we firstly analyze the second current anomaly of the constitutional pluralist paradigm, in the next chapter.

#### **4. The second alleged anomaly: on the uses and abuses of constitutional pluralism**

Constitutional pluralism was successful and attractive - some critics say - as for a long time it put a measure of theoretical indirect pressure on the European Court of Justice and on other European institutions, but remained without direct practical consequences (Davies 2012: 270 et seq; Baquero Cruz 2016: 367). As said, some recent critics now propose a rethinking of the paradigm, for the potential dangerousness that it has increasingly acquired in times of judicialization of mega-politics such as the Euro-crisis treatment. We discussed the traits and the pitfalls of these new critical remarks. As also said, arguments like Kelemen's and Sarmiento's boil down to a question of a strongly normative nature: is constitutional pluralism desirable? Does it really promote mutual accommodation between competing constitutional claims, in one way or another, or does it conceal existential risks for the fruitful development of the law of integration? I tried to discuss the examples, put forward by the new critics, drawn from Euro-crisis law.

Nonetheless, I do not undervalue their normative question. I consider it profound, especially if we now turn our attention to another phenomenon recently suggested as a second anomaly for the pluralist paradigm: one is tempted to label it as a sort of Eastern abuse of constitutional pluralist jargon.

A brief contextualization is in order. Some constitutional pluralists, Walker in particular, focused their reflections on how the notions of constitutionality and constitutionalism are in transition vis-à-vis new social and political challenges of post-modernity, but, at the same time, in today's *Weltstunde des Verfassungsstaates*, in the global



hour of the constitutional state (Walker 2002: 1; Häberle 1992). Such a special political *zeitgeist* was explicitly exemplified by Walker, in 2002, with the example of Eastern and Central Europe countries, where ‘the post-Communist establishment of liberal democratic regimes has been accompanied by the gradual emergence of new constitutional settlements, and by vigorous debate over the precise model of constitutionalism the final form of these settlements should represent’ (Walker 2002: 1; Howard 1993; Elster 1993).

Fifteen years later, we have probably left *der Weltstunde des Verfassungsstaates* behind. We live in a period of crisis: as it has been argued, a multifaceted crisis, which is capable of highlighting our ‘economic, financial, fiscal, macroeconomic, and political structure weaknesses’ (Menendez 2013: 454). Eastern and Central Europe countries are today, in many instances, not examples of the unfolding of the global hour of constitutionalism, but major examples of the political crisis which is gripping Europe.<sup>LII</sup>

This is not the place in which to go in depth into these topics. Nonetheless, it is relevant to emphasize that some recriminations of Eastern and Central Europe Member States have been recently framed, in judicial controversies, in a jargon reminiscent of constitutional pluralism. We will discuss in here a couple of momentous episodes.

The first can be traced back to 2012, when the Czech Constitutional Court declared an EU act, namely a ruling of the Court of Justice, as *ultra vires*.<sup>LIII</sup> In the *Landtová* case concerning an alleged discriminatory pension scheme in the Czech republic, that resulted from the dissolution of Czechoslovakia, the Czech Court wrongly argued that a European regulation, which governs co-ordination of pension systems among the Member States, may not be applied to an entirely specific situation of a dissolution of the Czechoslovak federation, and to consequences stemming thereof (Komárek 2012; Bobek 2013: 226). The consequence was the performance of an *ultra vires* review of the Court of Justice preliminary ruling issued in the same case<sup>LIV</sup> on the basis of national constitutional norms, and its disapplication. The saga started a veritable exercise of mutual inter-institutional accommodation: a preliminary reference was sent to Luxembourg by the Czech Supreme Administrative Court, in light of a previous judgment of the local constitutional court issued without having asked preliminary reference to the Court of Justice, although its ruling necessarily involved the interpretation of the relevant Regulation no. 1408/71; the Czech Government submitted observations which openly admitted that the CCC’s case law was contrary to EU law; the CJEU even tried to ‘soften’ the consequences of its ruling by



stating that the special increment which was deemed discriminatory could be maintained, but should be paid to Slovak nationals as well as Czech, and to all EU citizens in general.<sup>LV</sup>

Against this mundane backdrop, the situation inconceivably deteriorated. The Czech Constitutional Court - whose previous interpretation was marred by Czech Government observations – and the Court of Justice, ultimately the Supreme Administrative Court in a final judgment, tried to have a final say on the topic. Having not submitted a preliminary reference when this was possible, the Czech Constitutional Court then asked to submit a letter to the European Court of Justice, in which they provided an explanation of their caselaw, as it had not been properly defended by its Government before the Court. The Luxembourg Registry, however, sent the letter back, stating that ‘according to what is established practice, the members of the CJEU do not exchange correspondence with third parties concerning the cases submitted to the CJEU’ (Komárek 2012). This somewhat predictable response led the Czech Court, incredibly, to lament the breach of its own guarantees of a fair trial (!); and, on the substance, to consider the Court of Justice’s initiative to apply free movement rules to legal arrangements following from the dissolution of Czechoslovakia as unconstitutional, and therefore to consider the *Landtová* preliminary ruling as an act exceeding the competences transferred to the EU by virtue of Article 10a of the Czech Constitution, and thus an ultra vires act.

All in all, the Czech Constitutional Court was an exercise of ‘national pride and prejudice’ (Baquero Cruz 2016: 367), fed by the national sensitivity of the case at hand concerning the post Czechoslovak dissolution agreements, and plain ignorance of EU law, at least in procedural terms on how preliminary references work before the Court of Justice. It is important to note that such an exercise was undertaken by ‘closely following the steps and terminology’ of the German *Bundesverfassungsgericht* (Baquero Cruz 2016: 367), in deeming an act of the Union ultra vires as allegedly exceeding the scope of transferred powers as per the original paradigm, even elaborately referring to its rulings such as *Solange* and *Maastricht-Urteil*. It did so, in any case, by selectively overlooking the *Bundesverfassungsgericht* when more relevant for the case at hand, for instance, by forgetting that its much discussed *Honeywell* jurisprudence<sup>LVI</sup> not only preached *Europafreundlichkeit*, but limited the proclamation of ultra vires act to ‘drastic’, ‘manifest, consistent and grievous’ cases, with a ‘right to a tolerance of error’ by the Court of Justice and the condition of a previous opportunity for Luxembourg to interpret the issue in question



(Zbiřal 2012: 12 et seq.). This was not the case in *Landtová*, where the German jargon was merely instrumentally employed. The Czech Court, therefore, instrumentally used the German pluralist approach in a case in which its own interpretation of EU law was plainly wrong, and by wrongly translating the German insights in its jurisprudence.

The second relevant episode is more recent. It concerns an even more problematic case, that of contemporary Hungary. It is the last step of the building up of the country to the infringement of values enshrined in Art. 2 TEU. After the anti-migrant referendum of October 2016, and the failed attempt to reform the Constitution of November 2016, last December Decision no. 22/2016 of the Hungarian Constitutional Court was published.<sup>LVII</sup> The case concerned European Council Decision 2015/1601, of 22 September 2015, which established provisional measures in the area of international protection for the benefit of Italy and Greece. As well known, the Council decision introduced a quota system for the relocation of migrants: the supranational order was for the transfer of 1294 asylum seekers to Hungary. This was contested by the national government, which has a political platform of strong opposition to migration, very much focused on national sovereignty. The case was initiated by the Hungarian Commissioner for Fundamental Rights (a sort of ombudsman), sympathetic with the government, and brought before the Constitutional Court: the court itself, as known, is composed of members all appointed by the same parliamentary majority, supportive of the government, as made possible by the recent reform of the appointment procedure in 2011 (Kelemen 2017).

The questions brought to the Court asked whether the collective transfer of migrants implied in Council decision 2015/1601 would violate the prohibition on the collective expulsion of foreigners provided by the new Hungarian Constitution of 2011; whether state bodies and institutions are entitled or obliged to implement EU measures which can be in conflict with fundamental rights protected by the constitution; whether there are constitutional limitations, based on the kind of act, to the duty to fulfill the obligations stemming from the European Treaties through the 'joint exercise of competences' with other EU member states and EU institutions; whether there are constitutional limitations under new local constitutional law for national bodies, agencies, and institutions, within the legal framework of the EU, to facilitate the relocation of a large group of foreigners legally staying in one of the Members States without their expressed or implied consent and without personalized and objective criteria applied during their selection.



The case was therefore framed in the double form of a test of the respect of fundamental rights of relocated migrants and asylum seekers, and a fine tuning of the relationship between EU law obligations on national bodies, agencies, and institutions and alleged national constitutional limits. The concrete questions linked to the rights of the migrants (on the interpretation of Article XIV of the Fundamental Law) were separated from the others (on the interpretation of its Article E), and the Court decided not to examine them:<sup>LVIII</sup> after all, as emphasized by Halmai, the only rights which needed defense in the case were ‘those of the migrants and refugees, but their rights will be ignored if Hungary exempts from the quota decision, and any other solution of the refugee and migrant crisis’ (Halmai 2017a; his arguments were then developed in Halmai 2017b).

Thus, unsurprisingly, the substance of the case was reduced to an abstract review of the unwelcome ‘joint exercise of competences’ of Hungary with EU. And in light of the provisions of the new Fundamental Law of 2011, the Court developed a whole theory of limits to such a joint exercise, and to the primacy of EU law and obligations stemming thereof in the Hungarian legal order. Compared to the Czech *Landtová* case, the attempt here was similar, but even more refined. The Court made, in Decision n. 22/2016, substantial reference to comparative constitutional law<sup>LIX</sup> and even to the European Court of Human Rights’ jurisprudence;<sup>LX</sup> here again, it focused in particular on the German teachings coming from the *Bundesverfassungsgericht* caselaw, widely quoted in specific details (a dissenting opinion even criticises the Court for the rubber-stamp copy of a sentence from a German judgment!).<sup>LXI</sup>

Therefore, in this way, and by ‘relying on the German Federal Constitutional Court’s methods of constitutional review of EU law’ (Halmai 2017a), a whole theory of limitations to the primacy of EU law once again developed, ranging from the possibility of a fundamental rights review to an ultra vires review, composed in turn of a sovereignty review and an identity review, based on a unilateral appropriation of Art. 4(2) TEU interpretation. Each of the components of such a theoretical construction had been criticized by the original commentators: as said, the idea of an ‘ultima ratio defense’ of fundamental rights review was in the case at hand completely absurd, and in fact, contrary to the German original model, for the reference was meant ‘to lower the standards of fundamental rights protection’ and not to promote higher standards (Halmai 2017a). The idea of a veritable identity review was no less detached from reality, because although what



should belong to such a concept is debated by scholars (Besselink 2010; von Bogdandy, Schill 2011; Guastaferrò 2012; Saiz Arnaiz, Alcobarro Llivina 2013; Faraguna 2016b) it was difficult to see what core interests (e.g. the form of the state,<sup>LXII</sup> its secular nature,<sup>LXIII</sup> the protection of national language,<sup>LXIV</sup> or fundamental budgetary decisions)<sup>LXV</sup> would be at stake in the case of a few hundred migrants relocated for their own interest. Finally, the idea of a sovereignty review, although in line with other constitutional courts' jurisprudence, is perilously similar to the Hungarian Government's political portfolio.

And in fact, Decision no. 22/2016 of the Hungarian Constitutional Court has been denounced as a plain political decision (Halmai 2017a; Halmai 2017b), in which a petition reduced to abstract questions was answered in an abstract way<sup>LXVI</sup> with the essential aim of putting in place the possibility of a future *ultra vires* review of EU law. Claiming that transposing the quota system into national law conflicted with legitimate interests and principles, entrenched in the Hungarian national constitutional identity, was a very different way of framing a constitutional claim of authority from that of the past, that of the fruitful mutual accommodation of the 1970s and 1980s. It was phrased by using, in a refined way, constitutional pluralist jargon specially adapted from the German example. But it did so to promote a purely political constitutional claim of authority, not linked to the theory of the state vis-à-vis supranational organization, but simply to the *form* of the state, given the terrible transformation Hungary is undertaking. Ultimately, the practical aim was simply to derogate to Hungary's obligation under EU law. It was, in this sense, a plain 'abuse of constitutional pluralism' (Halmai 2017b).

It is here that we see the real danger of constitutional pluralism from a normative point of view. As with many other 'constitutional ideas', it can circulate, 'migrate' (Choudhry 2006), and be transplanted (Watson 1974; Tushnet 1999; Graziadei 2009; Shaffer 2012), especially today in an era of globalization of law. But any migration of constitutional ideas can be genuine and fruitful, or rather forced and instrumental in nature; and comparative transplants, as well known, can be successful or not depending on the recipient environment. When the first organic discussions on the theory started, critics suggested that constitutional pluralism could become, and remain, one of those nice theories confined to certain academic communities, often in Anglophone circles.<sup>LXVII</sup> Our analysis proves that this was not the case: and that in the current globalized legal space, and given



the influence of German public law in continental Europe, constitutional pluralist concepts percolated.

As already noted (Baquero Cruz 2016: 366), in its recent order in the *Gauweiler* saga, the *Bundesverfassungsgericht* referred to the judgments of at least ten constitutional courts of European Member States which have in the last years followed, with some variations, its pluralist approach to the relationship between Union law and State constitutional law.<sup>LXVIII</sup> From our analysis, one can notice that today's abusive uses of the pluralist jargon, such as in the Czech Republic in *Landtová*, or in Hungary with Decision no. 22/2016, can be nicely (and always better) packaged in the form of civilized judgments, for the accommodation of mutual claims, with the use or misuse of extra-systemic hermeneutic parameters and lip service to comparative judicial precedents. But from our analysis it is also clear that, notwithstanding, the Czech and Hungarian cases analyzed are cases of abuse of constitutional pluralism and its jargon for pure and immediate political purposes: as said, *Landtová* was rejected by commentators as an exercise of 'national pride and prejudice' (Baquero Cruz 2016: 367), and the Constitutional Court's judges taunted as if 'giving *Solange* into their hands' was like letting 'children play with matches' (Komárek 2012); Decision no. 22/2016 in this respect was even more worrying because it was an episode of voluntary abuse (Halmai 2017b), and even better crafted in formal and theoretical terms.

There was no dialogue there, not even a *hidden* dialogue, in search of some consistency (Martinico, Fontanelli 2008; Fontanelli, Martinico 2010), but a plain and abusive disobedience to the canons of EU law, for purely instrumental purposes. This shows that the problem for the paradigmatic value of constitutional pluralism today is not therefore the more or less muscular use of genuine pluralistic instances, which, as exemplified by *Gauweiler*, can eventually find accommodation,<sup>LXIX</sup> but a fully distorted use of constitutional pluralism and its jargon, the heterogenesis of its intents, and the unintended distorted consequences that such an abuse can create.

Albeit paradoxically, this still reinforces the descriptive/empirical claim of constitutional pluralism; however, this poses a renewed challenge for constitutional pluralism theorists, to define the proper rules of this game of mutual accommodation, in *interpretative/participative* terms, so that uses and abuses of constitutional pluralism can be detected, diversified, and differentially and properly treated.



## 5. Some concluding remarks

In the paper, we have tried to discuss the current value of EU constitutional pluralism as a paradigm, in times of crisis. We briefly sketched the origins of the theory and its development, its basic tenets, and also historical criticism it has met. We then passed to examine the current criticism constitutional pluralism is facing, precisely in these times of crisis: and we discussed the essentially different strands of such criticism which are indeed linked to the Euro-crisis and to Central and Eastern Europe political scenarios.

All in all, the argument proposed is that, fortunately or unfortunately, constitutional pluralism is the theory that is best able to describe the current state of affairs of EU constitutionalism. It retains, therefore, its strong empirical claim. It depicts the European phenomenon of a plurality of constitutional sources and claims of ultimate authority, and the inherent potential constitutional conflicts that are not hierarchically regulated; it also represents the discursive practice between supranational and national judicial authorities, aimed, when pluralism is properly used, at reducing the risks of constitutional conflicts, and accommodating their respective claims.

In this sense, constitutional pluralism can be considered as a paradigm because it is a valid *theory*: it is the formulation and definition of the general traits and principles of a certain area of practice, as well as all the activities logically deduced from those traits and principles. It is therefore a valid set of cognitive statements aimed at information and knowledge on what it is; and useful for predictions - in hypothetical terms - on what can be in the future.

The current debate that I tried to trace is instead on the normative plane, which is different. Is constitutional pluralism desirable in the EU? Is it useful? Is it dangerous? Should the question of ultimate authority really be left open in the EU constitutional space? The normative claim of pluralism has been strongly questioned in the recent times of crisis.

In this sense, it is indeed questionable if constitutional pluralism is a *doctrine* - in a different sense compared to the concept of *theory* (Modugno 2014: 2; Posner 1997). Is pluralism articulated enough to be prescriptive, and not merely descriptive? Does it clearly prescribe, to operate or interpret in a certain way rather than another? Does it really



encapsulate a *sollen*, and not merely a *sein*? Does it do it in practical terms for the legal operators of the EU constitutional space?

One is tempted to answer, drawing from the wise words of Weiler,<sup>LXX</sup> that constitutional pluralism can be considered to do so provided that it shapes a reality in which there is a commonality of shared values in place, ordered in a hierarchical sense, and where the fruitful heterarchy is in the institutions and the voices which are called to interpret those values.<sup>LXXI</sup> Hierarchy of shared values, heterarchy of voices and institutions: these were the rules of the game when constitutional pluralism was proved to work, this is the way to distinguish uses and abuses of constitutional pluralism.

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<sup>I</sup> BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß.

<sup>II</sup> BVerfGE 73, 339 2 BvR 197/83 Solange II- Beschluß.

<sup>III</sup> In the words of the German scholar Georg Ress '(Q)uesta giurisprudenza ha contribuito in maniera essenziale alla formazione degli standards democratici e dello Stato di diritto della potestà normativa della UE ed è un esempio di come i singoli Stati membri possono prendere parte all'interpretazione del diritto comunitario in un processo significativo di reciproca influenza': see Ress 1999: 146.

<sup>IV</sup> Corte costituzionale no. 183/1973.

<sup>V</sup> Corte costituzionale no. 232/1975.

<sup>VI</sup> Corte costituzionale no. 170/1984.

<sup>VII</sup> Corte costituzionale no. 232/1989.

<sup>VIII</sup> England and Wales Court of Appeal (Civil Division) Decision *Macarthy's Ltd v Smith (No.2)* [1980] EWCA Civ 7 (17 April 1980).

<sup>IX</sup> United Kingdom House of Lords Decision *R v Secretary of State for Transport ex p Factortame Ltd (Interim Relief Order)* [1990] UKHL 7 (26 July 1990).

<sup>X</sup> Conseil constitutionnel Décision 92-308 DC, 9 April 1992 (I), *Traité sur l'Union européenne (I)*, JORF, 11 April 1992, 5354.

<sup>XI</sup> Spanish Tribunal Constitucional, *Declaración 1/1992*, 1 July 1992 (Treaty of Maastricht).

<sup>XII</sup> Danish Supreme Court (Højesteret), judgment of 6 April 1998, *Carlsen v. Rasmussen*.

<sup>XIII</sup> See the words of J. Baquero Cruz in *Avbelj and Komárek* 2008, 9: '(I)t was paradigmatic, it was a piece of dogmatics with a well developed reasoning linked to a theory of the state'.

<sup>XIV</sup> In the specific German case: BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß, BVerfGE 73, 339 2 BvR 197/83 Solange II- Beschluß.

<sup>XV</sup> In the specific Italian case: Corte costituzionale no. 183/1973, 170/1984, 232/1989, 509/1995.

<sup>XVI</sup> 'La superiorità del modello costituzionale statale sul processo integrativo', in the words of Martinico 2012: 41.

<sup>XVII</sup> Arrêt du 5 février 1963, *Van Gend en Loos / Administratie der Belastingen* (26/62, Rec. 1963 p. 3); Arrêt du 15 juillet 1964, *Costa / E.N.E.L.* (6-64, Rec. 1964 p. 1141); Arrêt du 9 mars 1978, *Amministrazione delle finanze dello Stato / Simmenthal* (106/77, Rec. 1978 p. 629).

<sup>XVIII</sup> Arrêt du 3 septembre 2008, *Kadi et Al Barakaat International Foundation / Conseil et Commission* (C-402/05 P et C-415/05 P, Rec. 2008 p. I-6351) ECLI:EU:C:2008:461.

<sup>XIX</sup> BVerfG, Order of the Second Senate of 06 July 2010 - 2 BvR 2661/06.

<sup>XX</sup> BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08.

<sup>XXI</sup> Arrêt du 26 février 2013, *Åkerberg Fransson* (C-617/10) ECLI:EU:C:2013:105; Arrêt du 6 mars 2014, *Siragusa* (C-206/13) ECLI:EU:C:2014:126.

<sup>XXII</sup> BVerfG, Urt. 24.4.2013 – 1 BvR 1215/07: see in particular paragraphs 90-91, which read 'It follows



directly from the wording of Art. 51 sec. 2 EUCFR and from Art. 6 sec. 1 of the Treaty on European Union that the Charter does not extend the field of application of Union law beyond the competences of the Union, and that it neither establishes new powers or tasks for the Union, nor modifies the powers and tasks defined in the Treaties (cf. also ECJ, judgment of 15 November 2011, C-256/11, Dereci et al., para. 71; ECJ, judgment of 8 November 2012, C-40/11, Iida, para. 78; ECJ, judgment of 27 November 2012, C-370/12, Pringle, paras. 179 and 180). Accordingly, for the questions that were raised, and which only concern German fundamental rights, the European Court of Justice is not the lawful judge according to Art. 101 sec. 1 GG. The ECJ's decision in the case Åkerberg Fransson (ECJ, judgment of 26 February 2013, C-617/10) does not change this conclusion. As part of a cooperative relationship between the Federal Constitutional Court and the European Court of Justice (cf. BVerfGE 126, 286 <307>), this decision must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in the Member States (Art. 23 sec. 1 sentence 1 GG) in a way that questioned the identity of the Basic Law's constitutional order (cf. BVerfGE 89, 155 <188>; 123, 267 <353 and 354>; 125, 260 <324>; 126, 286 <302 et seq.>; 129, 78 <100>). The decision must thus not be understood and applied in such a way that absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union's fundamental rights set forth in the EUCFR. Rather, the European Court of Justice itself expressly states in this decision that the European fundamental rights under the Charter are "applicable in all situations governed by European Union law, but not outside such situations" (ECJ, judgment of 26 February 2013, C-617/10, para. 19).

<sup>xxiii</sup> See for instance the Polish case Trybunał Konstytucyjny (Polish Constitutional Court), ruling 27 April 2005 (P 1/05), the German case BVerfG 2 BvR 2236/04 (Zweiter Senat) - Beschluss vom 24. November 2004, the Cypriot case Cyprus Supreme Court, ruling 7 November 2005 (294/2005), all discussed by Pollicino 2008.

<sup>xxiv</sup> And see Weiler 2012: 13, where he admits that his theories 'can easily fit with the vernacular of constitutional pluralism'.

<sup>xxv</sup> And, in paradigmatic terms, this is contested by those who do not agree on such a theoretical premise: see Loughlin 2014: 24-25.

<sup>xxvi</sup> Recently even by the President of the Court of Justice of the European Union: see Lenaerts 2015.

<sup>xxvii</sup> Somek 2012: 346 et seq.: 'If national courts were to let Union law trump constitutional law, they would clearly act as agents of the supranational system and thereby sever their ties with the national system. Viewed from the national perspective, again, they would not act as courts and produce legally irrelevant statements'; these remarks are coupled with strong critical arguments against the normative claims of constitutional pluralism in subsequent Somek 2014.

<sup>xxviii</sup> Arrêt du 16 juin 2015, Gauweiler e.a. (C-62/14) ECLI:EU:C:2015:400.

<sup>xxix</sup> European Central Bank Press Release, Technical Features of Outright Monetary Transaction, 6 September 2012.

<sup>xxx</sup> BVerfG, Case No. 2 BvR 2728/13, section B.II.4, on the 'Possibility of an Interpretation in Conformity With Union Law': see on this Schneider 2014.

<sup>xxxi</sup> BVerfG, Case No. 2 BvR 2728/13, section D, paragraphs 102-103.

<sup>xxxii</sup> Arrêt du 16 juin 2015, Gauweiler e.a. (C-62/14) ECLI:EU:C:2015:400.

<sup>xxxiii</sup> BVerfG, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13.

<sup>xxxiv</sup> Ivi, para. 181 et seq.: 'Nevertheless, the manner in which the law was interpreted and applied in the Judgment of 16 June 2015 meets with serious objections on the part of the Senate in respect of the establishment of the facts of the case (aa), the principle of conferral (bb), and the judicial review of acts of the European Central Bank that relate to the definition of its mandate (cc)'.

<sup>xxxv</sup> C-493/17 en cours, Weiss e.a. (C-493/17).

<sup>xxxvi</sup> Arrêt du 16 juin 2015, Gauweiler e.a. (C-62/14) ECLI:EU:C:2015:400, especially at para. 55 et seq. and 79 et seq.

<sup>xxxvii</sup> See, in English, the recent special issue published by *E-pública Revista Eletrônica de Direito Público*, vol. 4 no. 1 Maio 2017, devoted to 'A jurisprudência da crise do Tribunal Constitucional Português'; and in Portuguese Almeida Ribeiro and Pereira Coutinho 2014.

<sup>xxxviii</sup> Decision no. 668/2012 of the Plenum of the Council of State, 20 February 2012, available at the website <http://www.dsnet.gr/Epikairothta/Nomologia/668.htm>. See the report by Marketou Afroditi I., Dekastros Michail, 2014, *Greece*, available at the website <http://eurocrisislaw.eu.eu/greece>, especially sub V.4.



XXXIX Judgment of the Constitutional Court of Latvia in the case no. 2009-43-01, 21 December 2009, available at the website <http://socialprotection-humanrights.org/wp-content/uploads/2015/06/Latvia-2009-Constitutional-Court-Elders-Rights-Judgment.pdf>.

XI. See the report by Vita Viorica, 2014, *Romania*, available at the website <http://eurocrisisaw.eu/romania/>, and the list of the Romanian Constitutional Court thereby provided, including cases no. 1414/2009, 1415/2009, 872/2010 e 873/2010 e 874/2010, 1655/2010, 1658/2010, 383/2011, 574/2011, 575/2011, 765/2011, 1533/2011; see also Zegrean and Toader 2013.

XLI Maria Koutselini-Ioannidou et al. v. the Republic, 7 October 2014, available at the website <http://www.cylaw.org/cgibin/open.pl?file=apofaseis/aad/mero>; Law on pensions of state officials (General Principles) of 2011, N. 88(I)/2011, available at the website [http://www.cylaw.org/nomoi/arith/2011\\_1\\_88.pdf](http://www.cylaw.org/nomoi/arith/2011_1_88.pdf).

XLII For instance in the well known *Acoș rda* o no 574/2014, 14 August 2014, available at the website <http://www.tribunalconstitucional.pt/tc/acordaos/20140574.html>.

XLIII BVerfG, Order of the Second Senate of 14 January 2014 - 2 BvR 2728/13 on the ratification of the European Stability Mechanism; BVerfG, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13 on the OMT program.

XLIV C-493/17 en cours, Weiss e.a. (C-493/17).

XLV Case 3-4-1-6-12 of 12 July 2012, on which see Ginter 2013, and Evas 2016, chapter eight.

XLVI BVerfG, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13.

XLVII C-493/17 en cours, Weiss e.a. (C-493/17).

XLVIII Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S v The estate left by A.

XLIX Arrêt du 22 novembre 2005, Mangold (C-144/04, Rec. 2005 p. I-9981) ECLI:EU:C:2005:709.

L Arrêt du 19 janvier 2010, Küçükdeveci (C-555/07, Rec. 2010 p. I-365) ECLI:EU:C:2010:21.

LI Corte costituzionale, ordinanza no. 24/2017; C-42/17 en cours, M.A.S. et M.B. (C-42/17).

LII See the systemic threats to the rule of law detected by EU institutions in the scope of the so called new EU Framework to strengthen the Rule of Law: [http://ec.europa.eu/justice/effective-justice/rule-of-law/index\\_en.htm](http://ec.europa.eu/justice/effective-justice/rule-of-law/index_en.htm), and Pech and Scheppele 2017.

LIII Czech Constitutional Court, judgment of 31 January 2012, Pl. U S 5/12: see on this Zbiřal 2012.

LIV Arrêt du 22 juin 2011, Landtová (C-399/09, Rec. 2011 p. I-5573) ECLI:EU:C:2011:415.

LV Ivi, para. 43 and 47: 'the documents before the Court show[ed] incontrovertibly that the judgment discriminate[d], on the ground of nationality, between Czech nationals and the nationals of other Member States'; 'no evidence capable of justifying such discrimination has been adduced before the Court'.

LVI BVerfG, Order of the Second Senate of 06 July 2010 - 2 BvR 2661/06.

LVII Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law of 30 November 2016, available in the official English translation at the website [http://hunconcourt.hu/letoltesek/en\\_22\\_2016.pdf](http://hunconcourt.hu/letoltesek/en_22_2016.pdf) (last access 29th August 2017).

LVIII Decision 22/2016. (XII. 5.) AB, para. 27-29.

LIX Decision 22/2016. (XII. 5.) AB, para. 34-46.

LX Ibidem, par 47: 'The Constitutional Court underlines that according to Article I (1) of the Fundamental Law, it is the primary obligation of the State to protect the inviolable and inalienable fundamental rights of MAN. As the protection of fundamental rights is a primary obligation of the State, it shall precede the enforcement of everything else. Accordingly, the Member State's liability cannot be exempted at the European Court of Human Rights either, by making a reference to implementing the law of the EU (Cp. *Matthews v. United Kingdom*, 18 February 1999)'.

LXI Ibidem, par. 106: 'This is why I consider the following statement made in the second next paragraph of the majority decision to be unacceptable: "The protection of constitutional selfidentity may be raised in the cases having an influence on the living conditions of the individuals, in particular their privacy protected by fundamental rights, on their personal and social security, and on their decision-making responsibility". This statement has been taken without examination from the decision of the German Federal Constitutional Court quoted earlier in the reasoning (BverfG, 2 BvE 2/08, 30 June 2009), in the absence of any argument based on the Fundamental Law of Hungary'.

LXII Arrêt du 22 décembre 2010, Sayn-Wittgenstein (C-208/09, Rec. 2010 p. I-13693) ECLI:EU:C:2010:806.

LXIII Conseil Constitutionnel, décision n° 2008-564 DC -19 juin 2008.

LXIV Arrêt du 24 mai 2011, Commission / Luxembourg (C-51/08, Rec. 2011 p. I-4231) ECLI:EU:C:2011:336; Arrêt du 16 avril 2013, Las (C-202/11) ECLI:EU:C:2013:239.



LXV BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08: see in particular its para. 252-260, where a list is elaborated: 'decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, inter alia, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5)'.

LXVI Decision 22/2016. (XII. 5.) AB, para. 68-69: 'The petitioner's question related to the transferring of third country nationals in the context of the European Union can be answered by the Constitutional Court in the framework of this procedure aimed at the interpretation of the Fundamental Law as follows. If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated due to the exercising of competences based on Article E) (2) of the Fundamental Law, the Constitutional Court may examine, on the basis of a relevant petition, in the course of exercising its competences, the existence of the alleged violation'.

LXVII See J. Baquero Cruz in Avbelj and Komárek 2008: 13-14: 'I wonder whether constitutional pluralism is really dominant in the academia. Maybe not. Many Community lawyers do not even know that these issues are being discussed. They do not care. And others do not dare to criticise them. There are two discourses talking past each other. In French journals, for example, you never see articles about this. In German journals, *Europarecht*, sometimes, but it is not mainstream. In the College of Europe in Bruges, I do not think students are taught about these things. There is a disconnection'.

LXVIII BVerfG, Case No. 2 BvR 2728/13, par. 30.

LXIX This was also the idea propounded by M. Cartabia in her lecture *Europe Today: Bridges and Walls* at the European Law Institute - 2016 Annual Conference and General Assembly in Ferrara, 7th September 2016, available at the website [https://boa.unimib.it/retrieve/handle/10281/145747/207020/Cartabia%20ELI%20Lecture%20v.1.0\\_final.pdf](https://boa.unimib.it/retrieve/handle/10281/145747/207020/Cartabia%20ELI%20Lecture%20v.1.0_final.pdf), 10: 'everything considered, Gauweiler was a remarkable and constructive example of judicial cooperation, concerning a very sensitive and crucial issue which is at the core of the present European agenda. It was the practical implementation of the idea of *Verfassungsgerichtsverbund*, elaborated years ago by Andreas Vosskuhle, the current chief justice of the BVerfG. Indeed, it was an example of successful judicial dialogue; although – as it has been noticed - surely not a gentlemen's conversation'.

LXX Weiler 2012, 17: 'I think words simply lose their meaning if one tries to describe a legal political order as constitutional when it does not have both the pluralist and hierarchical combined- though one can have endless debates on the appropriate dosages of each'.

LXXI In the various ways, in constant definition, sketched by Poireres Maduro 2007; Kumm 2005; Halberstam 2010.

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